

De Los Santos v Butkovich

2013 NY Slip Op 33883(U)

November 4, 2013

Supreme Court, Westchester County

Docket Number: 29328/2010

Judge: Linda S. Jamieson

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This opinion is uncorrected and not selected for official publication.

[* 1]

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp ____ Dec ____ Seq. Nos. 2-3 Type reargue

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED

NOV - 6 2013

TIMOTHY C. IDON
COUNTY CLERK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON
-----X

ALAN DE LOS SANTOS,

Plaintiff,

-against-

Index No. 29328/2010

NIKOLA BUTKOVICH and N.B. PAINTING
AND DECORATING CORP.,

DECISION AND ORDER

Defendants.

-----X

The following papers numbered 1 to 3 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Notice of Cross-Motion, Affirmation and Exhibit	2
Reply Affirmation and Exhibit	3

Both parties bring their respective motions pursuant to CPLR § 2221 seeking to reargue the Decision and Order of this Court dated June 27, 2013 (the "Decision"). In the Decision, the Court dismissed Mr. Butkovich from the action, finding that there was no real evidence that plaintiff worked for him, rather than the corporate defendant.

However, the Court denied the aspect of defendants' motion to dismiss based on Workers Compensation, finding that there is "no dispute that plaintiff worked for the Company, and, accordingly, is limited to the remedy provided by Workers

Compensation - if, indeed, there is such a remedy available at this juncture." The reason that the Court held this way is because, as the Decision stated, "The problem here is that the parties fail to inform the Court . . . whether Workers Compensation has disclaimed coverage for any reason. If, for example, Workers Compensation denied coverage because of untimely notice, then plaintiff may be entitled to sue the Company." The footnote to the Decision stated that "The parties do not address the issue of whether a company may be sued if Workers Compensation declines coverage."

It is well-settled that "A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.' A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented." *Haque v. Daddazio*, 84 A.D.3d 940, 922 N.Y.S.2d 548 (2d Dept. 2011) (citations omitted).

The problem with these motions is that the Court cannot possibly reconsider what it did on the original motion when it does not have those papers in front of it. *Biscione v. JetBlue Airways Corp.*, 103 A.D.3d 158, 957 N.Y.S.2d 361 (2d Dept. 2012)

("There is no authority for compelling [a court] to consider" papers which were not submitted in connection with the motion on which it is ruling; indeed, under CPLR 2214(c), the court may refuse to consider improperly submitted papers.") (citations omitted). See also *Sheedy v. Pataki*, 236 A.D.2d 92, 663 N.Y.S.2d 934 (3d Dept. 1997) ("Because a Supreme Court Justice does not retain the papers following his or her disposition of a motion and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions, Supreme Court properly required plaintiffs to submit to it all papers that were to be considered on the instant motion."). Because the Court cannot rule on a motion to reargue without the underlying papers, the Court's Part Rules expressly provide that "On motions pursuant to CPLR § 2221, movant must submit copies of all papers on the prior motion. Failure to comply with this provision shall result in the automatic denial of the motion unless another party submits the papers to the Court." For this reason alone, the Court must deny the motions.

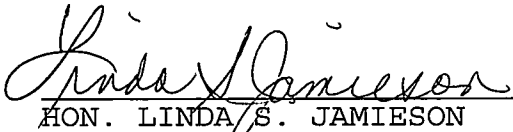
Even if the Court were not to deny the motions on procedural grounds, the Court would have to deny defendants' motion because the cases cited by defendants all presume that Workers Compensation coverage is available to the injured party. See, e.g., *O'Rourke v. Long*, 41 N.Y.2d 219, 391 N.Y.S.2d 553 (1976) ("It is axiomatic that, as to an employer, where workmen's

compensation **provides a remedy**, the remedy that it provides, save for the rare case, is exclusive. Where liability is imposed upon an employer to provide workmen's compensation **and compensation is provided**, that liability is exclusive and in the stead of any other employer liability whatsoever." (emphasis added). Here, the Court does not know whether the insurance company has disclaimed coverage or not. If it has not, and coverage were available to plaintiff, then defendants would be correct, and the action should be dismissed - regardless of whether plaintiff chose to take advantage of the coverage. But if coverage is not available, because of the company's actions or otherwise, then this action might be appropriate.

Accordingly, both motions are denied. The parties are directed to appear for a Settlement Conference in the Settlement Conference Part, Courtroom 1600, on January 9, 2014 at 9:30 a.m. Defendants shall send a copy of this Decision and Order to plaintiff within three business days of receipt.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
NOVEMBER 4, 2013


 HON. LINDA S. JAMIESON
 Justice of the Supreme Court

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