Finney v Morton
2014 NY Slip Op 34032(U)
June 25, 2014
Supreme Court, New York County
Docket Number: 4654/13
Judge: Peter M. Forman

[* 1]

Court/County: _____

Case Title: _____

Docket Number: 4654/2013

Judge: Peter M. Forman

EXPERT(s): _____

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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AMY FINNEY, as Administratix of the Estate of ROBERT C. FINNEY, JR., deceased

Plaintiff,

-against-

CHRISTOPHER A. MORTON, JR.,

Defendant.

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DECISION AND ORDER

Index No. 4654/13

FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents upon this application:

	PAPERS NUMBERED
NOTICE OF MOTION	1
AFFIRMATION	2
EXHIBITS	3-6
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REPLY AFFIRMATION	8

This action arises out of a fatal motor vehicle accident that occurred when Defendant's pickup truck struck a motorcycle and killed its operator, Robert C. Finney, Jr. After joinder of issue, but before the commencement of discovery, Plaintiff moved for partial summary judgment as to the issue of liability. This Court denied that motion by Decision and Order dated January 30, 2014.

Plaintiff has moved for leave to reargue that Decision and Order. That motion is denied for the reasons stated herein.

DISCUSSION

A motion for leave to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind." [*Siegel*, ***New York Practice***, §254 ("Motion to reargue or renew"). It must be based on a showing that the court overlooked or misapprehended the facts or law, or for some other reason mistakenly arrived at its earlier decision. [***Long v. Long***, 251 AD2d 631 (2d Dept. 1998)]. 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. [***McGill v. Goldman***, 261 A.D.2d 593, 594 (2d Dept. 1999). *See also* ***Anthony J. Carter, DDS, P.C. v. Carter***, 81 A.D.3d 819, 820 (2d Dept.2011); ***Mazino v. Rella***, 79 A.D.3d 979, 980 (2d Dept. 2010); ***Woody's Lumber Co., Inc. v. Jayram Realty Corp.***, 30 A.D.3d 590, 593 (2d Dept. 2006)].

Plaintiff has failed to demonstrate that the January 30, 2014 Decision and Order overlooked or misapprehended the facts or law, or for some other reason was mistakenly decided. Plaintiff argues that the Court misapprehended the law when it concluded that Plaintiff's motion failed to make the requisite *prima facie* demonstration that it was entitled to partial summary judgment as a matter of law because it relied on an unsworn MV-104A police accident report that was inadmissible hearsay. In support of this argument, Plaintiff asserts that the police report qualifies as

admissible non-hearsay evidence because it was certified in compliance with CPLR §4518(c).

The Court's January 30, 2014 Decision and Order expressly acknowledged that the police report contains a certification verifying that it is a true and complete copy of a record on file with the Department of Motor Vehicles. That certification states "This is to certify that this document is a true and complete copy of a record on file in the New York State Department of Motor Vehicles, Albany, New York."

However, under CPLR §4518(c), while the certification of an accident report serves to authenticate that document, the certification must do more than establish that a document is genuine in order to qualify as a business record. [*Alexander*, McKinney's Practice Commentaries, CPLR 4518:10]. As cogently explained by Professor Alexander in his Practice Commentaries:

> In order to take advantage of CPLR 4518(c), *the proponent must ensure that the certification of the record is properly made...*
>
> The certificate will serve to authenticate the record, i.e., establish its genuineness. *But the certificate must do more than this.* The contents of the certification must demonstrate that the requirements of subdivision (a) of CPLR 4518 have been met, i.e., that the record was made in the regular course of business, that it was the regular course of business to make a record of this type and that the record was made at or about the time of the occurrence of the event recorded. *The certificate must contain the same information that would be provided by a witness if the record were being sponsored through live testimony.* [emphasis supplied].

The certification that appears on the face of the unsworn MV-104A police accident report does not contain any information demonstrating that the requirements of CPLR §4518(a) have been satisfied. Therefore, it constitutes inadmissible hearsay because the certification does not provide the foundation necessary to render it admissible as a business record pursuant to CPLR §4518(c).

Plaintiff also argues that its motion was also supported by the sworn testimony of both police officers, and that the Court mistakenly concluded that Plaintiff's motion papers were only supported by the unsworn police report [Bagen, ¶4]. However, as confirmed by Plaintiff's Notice of Motion, the only exhibits to that motion were the Verified Complaint, the Answer, the Verified Bill of Particulars, the unsworn police report, and a police photograph.

The police testimony was only produced as an exhibit to Plaintiff's reply papers. It is well-settled that a plaintiff cannot rely on evidence submitted for the first time as an exhibit to its reply papers in order to demonstrate its *prima facie* entitlement to summary judgment as a matter of law. [***Daguerre, S.A.R.I., v. Rabizadeh***, 112 A.D.3d 876 (2d Dept. 2013); ***Matell Contracting Co., Inc., v. Fleetwood Park Development, LLC***, 111 A.D.3d 681 (2d Dept. 2013); ***L'Aquila Realty, LLC v. Jalyng Food Corp.***, 103 A.D.3d 692 (2d Dept. 2013)].

Plaintiff's motion for leave to reargue is also denied because Plaintiff has failed to make the requisite *prima facie* showing that Finney was free from comparative fault, and that Defendant's alleged negligence was the sole proximate cause of the accident as a matter of law. [***Thoma v. Ronai***, 82 N.Y.2d 736, 737 (1993); ***Cohn v. Khan***, 89 A.D.3d 1052, 1053 (2d Dept. 2011); ***Melchiorre v. Dreisch***, 95 A.D.3d 845, 845-46 (2d Dept. 2012)]. In any event, even if Plaintiff had satisfied her *prima facie* burden, Defendant has submitted evidentiary proof in admissible form sufficient to establish the existence of material issues of fact as to whether his alleged negligence was the sole proximate cause of the accident, and as to whether there was any comparative negligence on Finney's part. Based on the foregoing, it is hereby

ORDERED, that Plaintiff's motion for leave to reargue is denied.

Dated: June 25, 2014
Poughkeepsie, New York

Hon. Peter M. Forman
Acting Supreme Court Justice

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