

<b>Proctor v AICOA, Inc.</b>
2015 NY Slip Op 30023(U)
January 5, 2015
Supreme Court, New York County
Docket Number: 190040/13
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 30

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 JAMES AUGUSTUS PROCTOR and JOY C. PROCTOR,

Index No. 190040/13  
 Motion Seq. 012

Plaintiffs,

-against-

**DECISION & ORDER**

ALCOA, INC., *et al.*,

Defendants.  
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Defendant Andal Corporation (“Andal”) moves pursuant to CPLR 2221(d) for leave to reargue the court’s June 26, 2014 decision in this case (“Decision”)<sup>1</sup>, and upon reargument, for an order granting it summary judgment dismissing the complaint and all cross-claims asserted against it. In support of reargument, Andal argues, *inter alia*, that the court should have rejected plaintiffs’ unauthorized sur-reply and that plaintiffs’ assertions therein are not supported by the record.

CPLR 2221(d) provides 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 ...” While the determination to grant leave to reargue lies within the sound discretion of the court, reargument is not designed to afford an unsuccessful party successive opportunities to relitigate previously decided issues or to present arguments different from those originally asserted. *William P. Pahl Equip, Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992).

As set forth in the Decision, plaintiff James Proctor alleges that he was exposed to asbestos as a sheet metal worker during the 1960’s and 1970’s. Mr. Proctor testified that he worked at the World Trade Center construction site (“WTC”) in 1970 for approximately four months where he

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<sup>1</sup> The Decision, a copy of which is submitted as defendant’s exhibit C, is incorporated herein by reference and made a part hereof.

sustained bystander asbestos exposure from other trades which sanded joint compound and cut floor tiles in his presence.

On the underlying motion Andal argued that Mr. Proctor's inability to identify the contractors who were responsible for such work entitled it to summary judgment. Plaintiffs' opposition sought to demonstrate that Andal was the successor-in-interest to Star Circle and Circle Floors through a series of corporate transactions, and that they were engaged as the WTC's exclusive carpentry and flooring contractors. In reply Andal asserted that plaintiffs' proofs did not show that these entities performed any work in Mr. Proctor's vicinity. Plaintiffs submitted a sur-reply which proffered further documentation regarding Andal's connection to Star Circle and Circle Floors and their connection to the WTC.

In denying Andal's motion, the court explained that there were "material triable issues of fact whether Andal, as successor-in-interest to the Circle corporate entities, is responsible for Mr. Proctor's asbestos exposure at the WTC site by reason of Circle Floors and Star Circle."<sup>2</sup>

On this motion Andal asserts that the court acted in contravention of CPLR 2214<sup>3</sup> by

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<sup>2</sup> Decision, p. 6.

<sup>3</sup> CPLR 2214(b) provides that "[a] notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least ... sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time."

CPLR 2214(c) provides that "[e]ach party shall furnish to the court all papers served by ... that party. The moving party shall furnish ... all other papers not already in the possession of the court necessary to the consideration of the questions involved. Except when the rules of the court provide otherwise, in an c-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system. Where such papers are in the possession of an adverse party, they shall be produced by ... that party at the hearing on notice served with the motion papers. Only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, *unless the court for good cause shall otherwise direct.*" (emphasis added).

considering plaintiffs sur-reply even though they did not seek the court's permission or demonstrate good cause before filing same (citing *Flores v Stankiewicz*, 35 AD3d 804, 805 [2d Dept 2006]; *Traders Co. v AST Sportswear, Inc.*, 31 AD3d 276, 277 [1st Dept 2006]; *Picone v Mineola Union Free Sch. Dist.*, 2014 NY Misc. LEXIS 3127 [Sup. Ct. Nassau Co. July 17, 2014, Marber, J.]. However, it is well-settled that, notwithstanding CPLR 2214, trial courts have broad discretion to accept or reject supplemental briefings as part of their inherent authority to regulate motion practice before them. *See Pena-Vazquez v Beharry*, 82 AD3d 649, 649 (1st Dept 2011) (court's discretion providently exercised in granting permission for the filing of sur-reply which included documentation); *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624 (2d Dept 2003) (court providently exercised its discretion to consider the supplemental affirmation which was belatedly served by the plaintiff in sur-reply on the appellants' original motion"); *269 Fulton Corp. v H.A.B. Realty Assoc.*, 179 AD2d 752 (2d Dept 1992) ("court did not improvidently exercise its discretion in considering the plaintiff's sur-reply papers submitted after the return date of the defendant's motion"); *see also Liotti v Peace*, 36 Misc. 3d 1218(A), 2003 NY Misc. LEXIS 2064, at \*36 (Sup. Ct. Nassau Co. Sept. 23, 2003, DiBlasi, J.) (quoting *Gabrelian v Gabrelian*, 108 AD2d 445, 448 [2d Dept 1985], *appeal dismissed* 66 NY2d 741 [1985], *overruled in part* by *A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1 [1985]) ("every court of record is 'vested with inherent powers, which are neither derived from nor dependent upon express statutory authority, and which permit such courts to do all things reasonably necessary for the administration of justice within the scope of their jurisdiction. . . ." [and] "a court has the discretion to determine whether to accept late papers, sur-reply papers or papers otherwise not in conformance with controlling statutes or rules, and the authority to generally regulate the motion practice before it. . . .") *Liotti, supra*, at \*27. This court

believed the additional information proffered by plaintiffs to be reasonably necessary for the proper determination of Andal's motion.

Andal's concern that it was not given an opportunity to respond is not correct. As the record shows, Andal raised its concerns with the court prior to the motion's argument date.<sup>4</sup> The court then gave Andal every opportunity at oral argument to express its objections (both procedural and substantive) to the evidence presented by plaintiffs' in their sur-reply. As illustrated in the Decision, this court explicitly considered those objections before reaching its conclusions.<sup>5</sup> A motion to reargue is not the proper vehicle by which Andal might seek to rehash those same objections. *Pahl Equip, Corp., supra*.

Andal also takes issue with the court's factual conclusions, arguing that Star Circle and Circle Floor were not the WTC's only carpentry and flooring contractors. In this respect Andal points to testimony that "National Acoustics" was also a carpentry contractor at the WTC. It does not however demonstrate the specific work National Acoustics may have performed, whether it be sheetrocking, taping, or something else entirely. Andal also makes vague reference to testimony concerning a contractor named "Nager Electric" and suggests that it was connected with a ceiling tile project on the 43<sup>rd</sup> Floor of WTC Tower A despite the fact that Mr. Proctor never worked in that location.

The possible presence of other WTC contractors does not render plaintiffs' claims speculative on the evidence now before the court. A trier of fact considering the entire record, including testimonial references to these non-Circle contractors, could still reasonably determine

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<sup>4</sup> See letter to the court dated February 18, 2014, submitted herein as defendant's exhibit C.

<sup>5</sup> Decision, n. 1.

that Star Circle and Circle Floor performed the specific work that allegedly exposed Mr. Proctor to asbestos. It is for this reason that summary judgment was denied. *See Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 (2014); *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

There is also an issue of fact whether Andal is the successor-in-interest to the Circle entities. The evidence presented by plaintiffs on the underlying motion indicates that several "Circle" owned construction service companies, including Star Circle and Circle Floors, were sold to National Kinney Construction in 1971. Additional evidence was submitted to show that these Circle entities merged into National Kinney Construction in 1974, and that National Kinney Construction, which changed its name to Circle Industries Corporation in late 1974 and again to Old Salem in 1983, merged into Andal in 1984. Without providing any factual basis therefor, Andal asks this court to speculate that some of these Circle entities' liabilities may have been sold between 1971 and 1974 and/or that Circle Industries Corporation's holdings changed during the nine year period prior to the Old Salem/Andal merger. If anything, Andal's speculation in this regard further added to this court's reluctance to award summary judgment.

Accordingly, it is hereby

ORDERED that Andal Corporation's motion to reargue is denied.

This constitutes the decision and order of the court.

DATED: 1.5.15



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SHERRY KLEIN HEITLER, J.S.C.