

Patriarca v Oreckinto
2015 NY Slip Op 32735(U)
August 4, 2015
Supreme Court, Richmond County
Docket Number: 101482/09
Judge: Desmond A. Green
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
ALMERINDO PATRIARCA,

DCM Part 3
Present:
Hon. Desmond A. Green

Plaintiff,

-against-

DECISION AND ORDER

KEVIN ORECKINTO,

Index No. 101482/09
Motion No. 1879-002

Defendant.
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In addition to oral argument heard on, June 17, 2015, the following papers were fully submitted on the 17th day of June, 2015:

	Pages Numbered
Defendant's Notice of Motion for Reargument and Renewal with Supporting Papers and Exhibits (dated May 13, 2015).....	1
Plaintiff's Affirmation in Opposition with Supporting Papers and Exhibits (dated June 10, 2015).....	2
Defendant's Affirmation in Reply with Exhibits (dated June 16, 2015).....	3

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 RICHMOND COUNTY CLERK
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Upon the foregoing papers, and oral argument had hereto, that portion of defendant's motion to reargue and renew motion 001 is granted. However, defendant's request that the court overturn its prior decision is denied.

This court adheres to its original decision on motion 001 whereby it was rendered that plaintiff's motion for partial summary judgment is granted.

In a motion to reargue and renew, pursuant to CPLR 2221(d)(2) the movant must base his submission on "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion".

Here, defendant has failed to meet his burden in showing that the court overlooked any matters of fact or misapprehended the law.

In support of his current motion, seeking to overturn this court's prior decision, defendant now brings an affidavit of Chris Comitini¹ purporting to show that the accident never occurred at the site, that no work was performed before the permit was issued and that the plaintiff was never an employee. The affidavit, which is self serving at best, was not tendered in opposition to the prior motion evidencing a failure to show that defendant exercised due diligence.

Here, as plaintiff points out, there is no reasonable justification for defendant's delay in bringing forth the affidavit as Mr. Comitini was personally known to defendant. Furthermore, defendant relies on *Gonzalez v Vigo Construction Corp.*, 69 AD 3d 565 (2nd Dept 2010) which is not dispositive here.

Mr. Comitini's own affidavit suggests that he thought the matter had been resolved and that he is cooperating now because he was alerted that the case is continuing.

Apparently, as defendant informs the court, there was some nebulous financial disagreement between Mr. Comitini and the defendant, however this matter was filed in 2009, over six years ago, and the blanket reason is at best specious as defendant does not specifically state time frames or provide any reasonable excuse for the delay in presenting this "evidence" on the original motion.

A motion to reargue and renew is not an opportunity merely for the movant to get a second bite of the apple. *In Re Catherine V.D.*, 100 AD3d 992 (2nd Dept 2012); *Coccia v Liotti*, 70 AD3d 747 (2nd Dept 2010) Furthermore, as Mr. Comitini was known to the

¹ Attached as Exhibit H to defendant's motion 002 papers.

defendant and he knew of this litigation as he states in his affidavit, Mr. Comitini's affidavit is not "new evidence". As such, a motion for leave to renew must be based on new facts not offered on the prior motion that would change the outcome and it must contain reasonable excuse for the failure to present such facts previously. CPLR 2221 (e)(2); *Ramirez v Khan*, 60 AD3d 748 (App Div 2nd Dept 2009)

In opposition to this motion, plaintiff further points out that defendant stated at his deposition that locating Mr. Comitini was plaintiff's "problem" and he "plainly stated that he was not going to look for him." ² Clearly, the information could have been obtained by defendant in time for the prior motion. *Singh v Avis Rent A Car System* 2013 NY Slip Op 31777(U) (Queens Sup Ct 2013) Similar to the situation here, the court in *Singh* stated that "defendant's failure to inform the court on [its] original motion, of their attempts to get an affidavit indicates that they are merely attempting to get a second bite of the apple after their original motion was denied."

Furthermore the flexibility accorded for a motion to renew lies with the discretion of the court as long as the moving party provides reasonable justification for not presenting the facts in the prior motion. Here, defendant fails to do so. As such, there is no recourse but to deny the relief sought. *Heaven v McGowan* 40 AD3d 583 (2007)

As this court stated in its prior decision, in brief, defendant has failed to offer any non-speculative evidence sufficient to refute plaintiff's prima facie case or to raise a bona fide issue as to how and where the accident occurred (*see Carrion v. City of New York*, 111 AD3d 872, 873 [2nd Dept 2013]).

Accordingly, it is

² Plaintiff's Affirmation in Opposition to defendant's motion 002 to Reargue and Renew, P 4, paragraph 11, citing defendant's EBT testimony.

ORDERED that defendant's motion 002 to renew and reargue is granted; and it is further

ORDERED that the court adheres to its original decision on motion 001; and it is further

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law §240(1) is granted; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,



J.S.C.

DATED: August 4, 2015

GRANTED
AUG 13 2015
STEPHEN J. FIALA