

**Arrascue v Metropolitan Club, Inc.**

2015 NY Slip Op 32860(U)

May 26, 2015

Supreme Court, New York County

Docket Number: 111673/11

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

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MARTHA ARRASCUE,

Plaintiff,

-against-

**DECISION AND ORDER**

Index No. 111673/11

Mot. Seq. No. 004

METROPOLITAN CLUB, INC.,

Defendant.

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**KATHRYN E. FREED, J.S.C.**

**FILED**  
JUN 03 2015  
COUNTY CLERKS OFFICE  
NEW YORK

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2 (Exs. A-E)
ANSWERING AFFIDAVIT.....	3
MOVANT'S MEMORANDUM OF LAW.....	4

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action, plaintiff Martha Arrascue alleges personal injuries as a result of a trip and fall which took place while she was working as a waitress at premises owned and occupied by defendant Metropolitan Club, Inc. Plaintiff moves, pursuant to CPLR 2221(d), to reargue an order of this Court (Freed, J.) dated December 1, 2014 and entered December 12, 2014, which granted a motion for summary judgment made by defendant, dismissing the complaint. Upon a review of the papers submitted and the relevant statutes and case law, the motion is **denied**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

This action arises from personal injuries allegedly sustained by plaintiff on October 26, 2009 when she tripped and fell on an empty cardboard box while walking in the kitchen area of

defendant's premises located at 60<sup>th</sup> Street and Fifth Avenue, in the County, City and State of New York.

This action was commenced by plaintiff's filing of a summons and verified complaint against defendant in or about October 2011, in which she alleged that she suffered personal injuries as a result of defendant's negligence, carelessness, and recklessness in creating the condition on which she tripped. Ex. A to Ex. A.<sup>1</sup> Issue was joined by defendants by service of their answer on or about January 9, 2012. Ex. B to Ex. A. Following the commencement of the discovery process, several depositions were conducted, including those of plaintiff and employees who worked for defendant. The employees of defendant produced for depositions were Deirdre Curran, the catering manager; Vedran Strkalj, the maitre d'; Leonardo Santos, a banquet captain; and Cecilio Robles, a banquet captain. Exs. F-I to Ex. A. Each witness produced by defendant discussed his or her work at the premises, as well as the work of the wait staff. *Id.*

Plaintiff testified that, in 2007, she began working for Gotham Personnel, LLC ("Gotham"), an employment staffing agency, and that she was trained and paid to work as a waitress. Ex. D to Ex. A. Gotham would supply wait staff upon the request of a facility, such as defendant, and Gotham would send the requested number of waiters and waitresses to the specified location. *Id.* Plaintiff alleged that, due to her fall at defendant's premises, she injured her head, ribs, right knee, and left finger. *Id.* Following her accident, plaintiff received \$22,000 in workers' compensation benefits for lost wages. *Id.*

On or about May 7, 2014, defendant moved for summary judgment. Ex. A. Plaintiff

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<sup>1</sup> Unless otherwise noted, all references are to the exhibits annexed to the affidavit of plaintiff's attorney submitted in support of her motion.

opposed defendant's motion. Ex. B.

By decision and order dated December 1, 2014 and entered December 12, 2014, this Court (Freed, J.) granted summary judgment to defendant and dismissed the complaint, holding, *inter alia*, that:

The record thus establishes that, as a matter of law, plaintiff was defendant's special employee at the time of her injury. Plaintiff admitted that defendant directed, instructed, assigned, supervised and controlled her work. Furthermore, although Gotham paid plaintiff's salary, plaintiff failed to present any evidence that Gotham had control over the manner, details, and result of her work at the defendant's premises. Since plaintiff was defendant's special employee, plaintiff's receipt of workers' compensation benefits is her exclusive remedy. Thus, plaintiff is barred from bringing this negligence action against defendant.

Ex. D. On or about January 21, 2015, plaintiff moved for reargument of said order. By decision and order dated April 21, 2015 and entered April 24, 2015, this Court (Freed, J.) denied plaintiff's motion to reargue with leave to renew the motion upon proper papers in accordance with CPLR 2221 and 2214(c), and in accordance with IAS Part 2's Court Rules, which were annexed to the said decision and order. Ex. E.

#### **POSITIONS OF THE PARTIES:**

Plaintiff now moves, pursuant to CPLR 2221(d), for reargument of the December 12, 2014 order on the ground that this Court erred in dismissing her complaint. Plaintiff argues that this Court overlooked and misapprehended the facts she testified to at her deposition (Exs. D-E to Ex. A), which should have created an issue of fact regarding her special employment for a jury to decide. Specifically, plaintiff asserts that her testimony proved that defendant did not have control over the manners, details, and ultimate result of her work. Instead, she asserts that she was under the control

of Mark Cruz, her supervisor from her general employer, Gotham, and that, since she had the requisite work experience as a waitress, she did not require orders by the maitre d' or captains employed by defendant.

Defendant opposes plaintiff's motion on the ground that plaintiff has proffered the same arguments in its motion to reargue as in its opposition to the underlying summary judgment motion. Further, plaintiff fails to address the findings of this Court in its December 12, 2014 order such that the Court overlooked or misapprehended any issue of law or fact which would warrant granting the motion.

#### **LEGAL CONCLUSIONS:**

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1<sup>st</sup> Dept 1992), *lv dismissed*, 80 NY2d 1005 (1992), *rearg denied*, 81 NY2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1<sup>st</sup> Dept 1984]), or to present arguments different from those originally asserted. *See William P. Pahl Equip. Corp.*, 182 AD2d at 27; *Foley v Roche*, 68 AD2d 558 (1<sup>st</sup> Dept 1979); *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 (2d Dept 2004). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v Browning School*, 80 AD2d 790 (1<sup>st</sup> Dept 1981). Professor David Siegel succinctly instructed that a motion 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, NY Prac § 254, at 449 (5<sup>th</sup> ed 2011).

Initially, although plaintiff’s failure to include a complete set of the underlying motion papers warranted the denial of her application on procedural grounds (*see* CPLR 2214[c]; *Biscone v JetBlue Airways Corp.*, 103 AD3d 158 [2d Dept 2012], *appeal dismissed*, 20 NY3d 1084 [2013]), this Court granted her leave to renew the motion to reargue. Upon her filing of corrected papers, this Court notes that plaintiff still failed to follow IAS Part 2’s Court Rule II.F(vii), requiring copies of motion papers to have protruding exhibit tabs for internal exhibits,<sup>2</sup> as well as Part 2’s Court Rule II.F(i), which requires that “[t]he first page of all motion papers, including notice of motion, opposition, reply, exhibits, affirmations, memorandum of law, etc., must reflect the respective motion sequence number and index number in the upper right hand corner.” Although neither party has fully complied with Part 2’s Court Rules, this Court, in its discretion, will nevertheless consider plaintiff’s motion on the merits.

Upon addressing the merits, however, this Court sees no reason to grant reargument of defendant’s motion for summary judgment, since plaintiff fails to explain how this Court overlooked or misapprehended any issues of law or fact. Plaintiff argues that this Court allegedly overlooked her deposition testimony regarding her special employment relationship, which created an issue of fact as to who controlled the means of plaintiff’s work. Plaintiff specifically contends that defendant did not have control over the manners, details, and ultimate result of her work; instead, plaintiff was

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<sup>2</sup> The April 24, 2015 decision of this Court included the text of rule II.F(vii), and stated: Further, pursuant to rule IIF(vii) of the Part 2 Court Rules, copies of motion papers must have protruding exhibit tabs identifying the exhibits. **Absent extraordinary circumstances, papers submitted in violation of this rule will be disregarded by the court.** This rule also applies to internal exhibits provided with underlying motions.

Ex. E.

under the control of Mark Cruz, her supervisor from her general employer, Gotham. Plaintiff also contends that she had the requisite work experience as a waitress and therefore she was not given orders by defendant's maitre d' or captains. However, this Court considered plaintiff's allegedly overlooked or misapprehended testimony when deciding the issue of special employment in its December 12, 2014 order granting defendant's motion for summary judgment. The Court stated:

Although plaintiff testified that, generally, Mark Cruz, her supervisor from Gotham, would be at defendant's premises and would tell her where to work, plaintiff admitted that the maitre d' could give her orders, ran the entire event on the day of her accident, could tell her when to clean up, when to bring or pick up food, could tell her to work faster, and could say anything related to the event which was taking place. Plaintiff further admitted that "if I'm working with a maitre d', if he tells me, then I have to do it, I must do it." Plaintiff's EBT, at 42 [Ex. D to Ex. A].

Ex. D, at 3-4.

In that order, this Court, relying on *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 (1991), stated that:

The Court of Appeals has held that "[a] special employee is . . . one who is transferred for a limited time of whatever duration to the service of another." *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 (1991). "Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive. . . . While not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work." *Id.*, at 558 (citations omitted).

Ex. D, at 3.

Based upon the standard articulated in *Thompson* and in consideration of plaintiff's deposition testimony, this Court determined that plaintiff was a special employee of defendant and, having already filed a workers' compensation claim and, having received said benefits, this was

plaintiff's exclusive remedy and thus she was barred from bringing this negligence action against defendant.

Further, in support of her motion, plaintiff submits the same evidence which she submitted in support of her argument that defendant's motion for summary judgment should not be granted because plaintiff was not a special employee of defendant. However, the purpose of reargument "is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 971 (1<sup>st</sup> Dept 1984) (internal quotation marks and citation omitted).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Martha Arrascue's motion for reargument is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

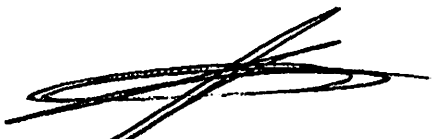
Dated: May 26, 2015

**FILED**

JUN 03 2015

COUNTY CLERKS OFFICE  
NEW YORK

ENTER:


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 KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**