

Sikorjak v City of New York

2016 NY Slip Op 30544(U)

April 4, 2016

Supreme Court, Richmond County

Docket Number: 100582/12

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X Part C2
GABRIEL SIKORJAK,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, CONTI
OF NEW YORK, LLC, and HAKS GROUP, INC.

Defendants.

-----X

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.100582/12

Motion Nos. 4508-005
146-006
174-007
281-008

The following papers numbered 1 to 12 were fully submitted on
26th day of February, 2016:

	Papers Numbered
Notice of Motion to Reargue by Defendant Haks Group, Inc. (Affirmation in Support) (Dated: December 14, 2015).....	1
Notice of Motion to Dismiss Amended Complaint by Defendant Haks Group, Inc. (Affirmation in Support) (Dated: January 5, 2016).....	2
Notice of Motion to Reargue by Defendants City of New York New York City Department of Transportation and Conti of New York, LLC (hereinafter "City") (Affirmation in Support) (Dated: January 8, 2016).....	3
Plaintiff's Notice of Cross Motion to Reargue (Affirmation in Opposition and in Support of Cross Motion) (Dated: January 13, 2016).....	4
Plaintiff's Affirmation in Opposition to Defendant Haks Group, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint (Dated: January 21, 2016).....	5
Plaintiff's Affirmation in Opposition to Defendants City's Motion to Reargue (Dated: January 27, 2016).....	6
Affirmation in Opposition of City to Motions to Reargue by Haks Group, Inc. and Plaintiff (Dated: February 4, 2016).....	7
Affirmation in Reply and in Opposition by Defendant Haks Group, Inc.	

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(Dated: February 5, 2016).....	8
Reply Affirmation by Defendant Haks Group, Inc. to City's Opposition (Dated: February 10, 2016).....	9
Plaintiff's Reply Affirmation to Defendants the City of New York, New York City Department of Transportation and Conti of New York's LLC's Opposition (Dated: February 11, 2016).....	10
Plaintiff's Reply Memorandum of Law to Defendants the City of New York, New York city Department of Transportation and Conti of New York's LLC's Opposition (Dated: February 11, 2016).....	11
Affirmation in Opposition of City (Dated: February 17, 2016).....	12

Upon the foregoing papers, the motion of defendant Haks Group, Inc. (No. 4508-005) and the cross motions of defendants the City of New York, New York City Department of Transportation and Conti of New York (hereinafter, collectively the "City") (No. 174-007) and plaintiff, Gabriel Sikorjak, (No. 281-008) for leave to reargue this Court's Decision and Order dated November 25, 2015 (and entered with the Richmond County Clerk December 4, 2015) are denied. The motion of defendant Haks Group, Inc. (No. 146-006) for an order pursuant to CPLR 3211(a)(5) dismissing the Amended Complaint against it on the grounds of res judicata and collateral estoppel is granted.

This matter arises out of a construction site accident occurring on May 5, 2011, at the "Ramp A" job site of the St. George Ferry Terminal Ramp Project, located on Staten Island. Plaintiff, a laborer for non-party NASDI, Inc., claims to have suffered extensive personal injuries when his left pants leg caught

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fire while he was using a gas powered demolition saw. Plaintiff instituted this action against each defendant alleging, *inter alia*, common-law negligence and violations of Labor Law §§ 200, 240(1) and 241(6).

In his August 9, 2012, Verified Bill of Particulars, plaintiff sets forth that he was "operating a Stihl Concrete Demolition Saw and cutting steel rebar that protruded up and out of an approximately five feet high concrete wall [when] gasoline and highly flammable and explosive gasoline fumes leaked from the saw." According to plaintiff and his expert, Stanley Fein, P.E. (see the July 1, 2015 affidavit of Stanley H. Fein, P.E.; Plaintiff's Exhibit 10), the "gasoline and its highly flammable and explosive fumes were permitted to escape from the saw's gasoline tank due to a badly worn, jagged and chipped gasoline cap, [a] worn, damaged and deteriorated (O) ring, and/or [a] damaged and deteriorated tank" (see also Plaintiff's Verified Bill of Particulars, para 18; Haks Exhibit A). At his June 19, 2013 deposition, plaintiff testified, in relevant part, that immediately prior to the accident "the entire area [of his left leg, from ankle to thigh] was soaked with gasoline" (see Haks Exhibit B, p. 95, ll 19-23). As a result, "the sparks generated by the saw cutting the rebar caused [a] fireball" to form, engulfing plaintiff's leg in the fire. Plaintiff's co-worker, who witnessed the incident, testified similarly in a sworn statement (see Stein affidavit, para 10; see also June 25, 2015 affidavit of plaintiff's co-worker, Trevor

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Burns; Plaintiffs Exhibits 10 and 8, respectively). In his testimony at both his General Municipal Law §50-h hearing and June 19, 2013 deposition, plaintiff was emphatic that: (1) no entity other than NASDI ever supervised him or supplied him with instructions or equipment, *i.e.*, the subject saw (see Haks Exhibit B, pp 45-46); (2) no fire extinguishing equipment was present in the area where plaintiff was working (*id.* at p 108, ll 21-25), and (3) no protective, *i.e.*, fire retardant apparel, had been supplied for plaintiff to wear at the site (see Verified Bill of Particulars, para 25, 26; Haks Exhibit A).

Inssofar as it appears, non-party NASDI was a subcontractor hired by the general contractor, defendant Conti of New York, LLC (hereinafter "Conti"), while the City of New York's Department of Transportation (hereinafter the "City") had separately contracted with an entity calling itself "Haks Engineers and Land Surveyors, P.C." to provide "Resident Engineering Inspection Services" at the construction site (see July 10, 2008 Contract between City and Haks; Haks Exhibit C)¹.

¹The first argument made by Haks for dismissal of the action is that plaintiff misidentified the Haks Group, Inc. as a party defendant. According to Haks, the foregoing entity never undertook to perform any work on the project, while the real party in interest, "Haks Engineers, Architects and Land Surveyors, P.C." was never named as a defendant or served with process, and that the statute of limitations has now expired. According to plaintiff and this defendant, when Haks Group, LLC answered the complaint, it did not indicate that it was answering as "Haks Engineers, Architects and Land Surveyors, P.C. s/h/a Haks Group, LLC" nor was it so described in the summons and complaint. Nevertheless, it should be noted that "Haks" website only lists "HAKS" as the entity involved in the St. George Ferry Terminal Ramps Rehabilitation Project, a representation which is, at best, misleading.

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A court has the discretion to grant a motion for leave to reargue upon a showing that "the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (see CPLR 221[d][2]; SantaMaria v. Schwartz, 238 AD2d 674; Schneider v. Solowey, 141 AD2d 813). If such a showing is made, the motion may be granted (Loland v. City of New York, 212 AD2d at 674). Reargument, however, is not to be used as a means by which an unsuccessful party may (1) reargue again the questions that have already been decided (see ProBrokerage v. Home Ins. Co., 99 AD2d 971), or (2) present arguments different from those originally tendered (see Rubinstein v. Goldman, 225 AD2d 328; Mayer v. National Arts Club, 192 AD2d 863).

On these papers, the respective parties have failed to demonstrate that this Court overlooked any relevant fact, misapprehended the law, or for any other reason mistakenly arrived at its determination (see Schneider v. Solowey, 141 AD2d at 813). Accordingly, the motion and cross motions for reargument are denied.

Haks Group, Inc.'s motion to dismiss the Amended Complaint on the grounds of CPLR 3211(a)(5) (No. 146-006) is granted. The amended complaint asserts essentially the same claims against "Haks Group, Inc." as were asserted against that identical party in the March 8, 2012 complaint. Thus, the issue of Haks' Group, Inc.'s liability has been fully litigated and decided adversely to plaintiff, who is thus, *inter alia*, collaterally estopped from re-

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asserting these claims against Haks Group, Inc., as a defendant (see Kaufman v. Eli Lilly & Co., 65 NY2d 449, 455).

Accordingly, it is

ORDERED, that the motion and cross motions for reargument of this Court's November 25, 2015 Decision and Order are denied; and it is further

ORDERED, that the motion of defendants Haks Group, Inc., for dismissal of plaintiff's amended complaint is granted; and it is further

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ORDERED, that the Clerk enter judgment accordingly.

Dated: April 4, 2016

E N T E R,

Hon. Thomas P. Aliotta,

J. S. C.