

<b>PNY III, LLC v Axis Design Group Intl., LLC</b>
2016 NY Slip Op 31424(U)
July 13, 2016
Supreme Court, New York County
Docket Number: 159743/14
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
Justice

**PART 7**

**PNY III, LLC f/k/a PNY III, LP and AMERICAN  
GUARANTEE AND LIABILITY INSURANCE COMPANY  
a/s/o PNY, III, LLC f/k/a PNY III, LP,**

**Plaintiffs,**

**- against-**

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MOTION SEQ. NO. 003

**AXIS DESIGN GROUP INTERNATIONAL, LLC, JOSEPH  
V. LIEBER, P.E. personally and as MANAGING MEMBER  
OF AXIS DEISGN GROUP INTERNATIONAL LLC, and  
ULM II HOLDING CORP.,**

**Defendants.**

**The following papers were read on this motion by defendant for leave to reargue.**

**Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...**

**Answering Affidavits — Exhibits (Memo) \_\_\_\_\_**

**Replying Affidavits (Reply Memo) \_\_\_\_\_**

**PAPERS NUMBERED**

**Cross-Motion:  Yes  No**

This is a subrogee action brought by plaintiffs PNY III LLC f/k/a PNY III LP (PNY) and its subrogee, plaintiff American Guarantee and Liability Insurance Company (American), regarding alleged negligence resulting from an inspection of property located at 310 East 42<sup>nd</sup> Street, New York, New York and owned by ULM. Before the Court is a motion by defendant ULM II Holding Corp. (ULM) pursuant to CPLR 2221 for leave to reargue the prior motion by defendants Axis Design International LLC (Axis) and Joseph V. Lieber, P.E. personally and as managing member of Axis (Lieber) to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), and upon reargument ULM requests that this Court deny the motion to dismiss in its entirety. Specifically, in a previous Order and Decision of this Court, dated November 13, 2015 (November Order), this Court granted Axis and Lieber's motion to dismiss the complaint.

## BACKGROUND

The facts of this case were set forth in great detail in the November Order of this Court, familiarity with which is presumed. As such, the Court shall only briefly discuss the facts as are relevant to the resolution of the herein application. In motion sequence 002, Axis and Lieber moved to dismiss the complaint against them on the basis that they had no duty of care towards PNY based on contract or privity or a third-party beneficiary relationship. ULM and plaintiffs were in opposition to the motion and argued that Axis and Lieber had an extra-contractual duty towards PNY based on the principle of public safety and on the nature of the inspection, which was a requirement imposed by Local Law 11 of the City Administrative Code.

The Court granted the motion to dismiss finding that these defendants did not have a contractual relationship with plaintiffs. The Court acknowledged that under *Espinal v Melville Snow Contrs.*, (98 NY2d 136 [2002]), the liability of non-contracting parties to plaintiffs could be extended under three exceptions: (1) the contracting party, in failing to exercise reasonable care in the performance of its duty, launches a force or instrumentality of harm; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) the contracting party has entirely displaced the other party's duty to maintain a safe premises. *Espinal* at 98 NY2d at 140. However, the Court found that none of these exceptions were applicable in this case. Moreover, the Court dismissed the public safety exception as it was not recognized in this jurisdiction.

Now, ULM moves for reargument suggesting that the Court reconsider its decision to dismiss Axis and Lieber. In effect, ULM requests that the Court reconsider the *Espinal* exceptions as well as the public safety exception. Axis and Lieber oppose the motion and contend that the Court should uphold its previous determination in the November Order.

## DISCUSSION

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, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; see *Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law"]; see also *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). "A motion for reargument . . . is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided [or] . . . to provide a party an opportunity to advance arguments different from those tendered on the original application" (*id.* at 567-568; see also *Mariani v Dyer*, 193 AD2d 456 [1st Dept 1993]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

Based upon the papers before the Court, ULM's motion for leave to reargue must be denied as it has not demonstrated that this Court in its November Order overlooked or misapprehended any matters of fact or law which would have changed the determination of the prior motion (see CPLR 2221[d][2]), which granted Axis and Lieber's motion to dismiss the complaint. Specifically, the Court notes that in support of this motion, ULM essentially repeats the exact same arguments, to wit, that Axis owed PNY an extra-contractual obligation in tort as a function of Axis's contractual obligation to inspect the facades of the premises and that Axis' conduct displaced its duty to maintain a safe premises, which were already considered and rejected by this Court in the prior motion (see *William P. Pahl Equip. Corp.*, 182 AD2d at 28).

CONCLUSION

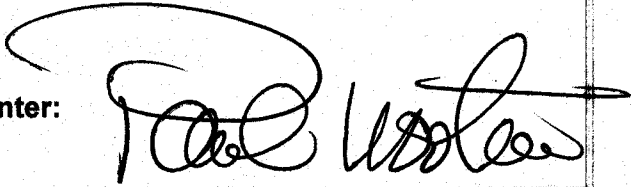
Accordingly, it is

ORDERED that defendant ULM II Holding Corp.'s motion for leave to reargue is denied;  
and it is further,

ORDERED that counsel for defendants Axis Design Group International LLC and  
Joseph V. Lieber is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 7/13/16

Enter: 

PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: :  DO NOT POST  REFERENCE