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| <b>Suarez v Harrison &amp; Burrowes Bridge Constructors, Inc.</b>                                                                                                                                                                                        |
| 2016 NY Slip Op 32682(U)                                                                                                                                                                                                                                 |
| December 21, 2016                                                                                                                                                                                                                                        |
| Supreme Court, Westchester County                                                                                                                                                                                                                        |
| Docket Number: 51041/2012                                                                                                                                                                                                                                |
| Judge: William J. Giacomo                                                                                                                                                                                                                                |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                                                   |

To commence the statutory  
time for appeals as of right  
(CPLR 5513[a]), you are  
advised to serve a copy  
of this order, with notice  
of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----X  
PAULO SUAREZ, a Person Under a Disability, by  
ROBERTO SUAREZ, His Court Appointed Guardian,  
Plaintiff,

Index No. 51041/2012  
**DECISION & ORDER**

-against-

HARRISON & BURROWES BRIDGE CONSTRUCTORS,  
INC., and PCI INDUSTRIES CORPORATION, .  
Defendants.

-----X  
HARRISON & BURROWES BRIDGE CONSTRUCTORS, INC.,  
Third-Party Plaintiff,

-against-

PERSICO CONTRACTING & TRUCKING, INC., and  
MANGONE SAFETY LLC,  
Third Party Defendants.

-----X  
PCI INDUSTRIES CORPORATION,  
Second Third-Party Plaintiff,

-against-

HUSKIE TOOLS, INC., and HOOK INTERNATIONAL, INC.,  
Second Third Party Defendants.

-----X  
PERSICO CONTRACTING & TRUCKING INC.,  
Fourth-Party Plaintiff,

-against-

HUSKIE TOOLS, INC., and HOOK INTERNATIONAL, INC.,  
Fourth-Party Defendants.

-----X

The following papers numbered 1 to 10 were read on Harrison & Burrowes Bridge Constructors, Inc.'s ("H&B") motion to reargue this Court's August 8, 2016 decision and order and Persico Contracting and Trucking's ("Persico") motion to reargue the August 8, 2016.

|                                             | <u>Papers Numbered</u> |
|---------------------------------------------|------------------------|
| Notice of Motion/Affidavit/Exhibits         | 1-3                    |
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| Affidavits in Opposition to Motion/Exhibits | 7-8                    |
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## **Factual and Procedural Background**

On July 13, 2011, plaintiff, a 19 year-old newly hired laborer, was working for third party defendant Persico Contracting and Trucking ("Persico") on a large State/Department of Transportation 31 bridge renovation project. At the time of plaintiff's accident he was working on a bridge on land owned by the State of New York ("the State"). The State had hired defendant Harrison & Burrowes Bridge Constructors, Inc. ("H&B") as the general contractor on the project. Defendant PCI Industries Corporation was a subcontractor on the job. PCI entered into an agreement with third party defendant Persico whereby Persico agreed to provide all labor required of PCI. Richard Persico signed that agreement on behalf of both PCI and Persico.

On the day of the accident, plaintiff was part of a team who's job was to hoist about 37 feet some new steel bearing plates, each weighing 200-250 pounds, up a 37-39 degree sloped embankment to the underside of an overpass of Route 287 in Rye, New York.

Mr. Ragusa, a Persico and PCI employee, was the superintendent on the bridge project. He was not at the job on the day of the accident, but was there the day before and observed the hoisting operation. The hoisting was originally to be performed by a boom truck lowering the plates from the roadway above, but the truck was not available. The alternate plan was to use a 'come-along," a ratcheting pulling device with a hook on both ends. The alternate plan was the idea of Al Rial, a carpenter working for Persico.

One hook was attached to a bolt anchored in the concrete abutment at the top of the slope. A nylon rope was then threaded through the other hook, a cart containing a plate was attached to one end and a flatbed truck attached to the other end of the rope. The truck was driven on a path about 40 feet below where the come-along was anchored and was to pull the cart up the slope. However, since there were train tracks preventing the truck from driving in a straight line from where the hoist system was set up, in order to pull up the plate the rope was also put around a concrete pillar at the bottom of the slope and tied to the back of the truck which then drove parallel to the train tracks. The accident happened on the first hoist of the day, although the hoist was used the previous day without incident.

Three men were involved in the hoisting procedure. Gabriel Gentile drove the truck, foreman Jorge Rodriguez loaded the plate on to the cart at the bottom of the slope and plaintiff would unload the plate at the top of the slope and send the cart back down. During the first hoist of the day, Rodriguez loaded a plate on to the cart and then signaled to Gentile to start driving the truck. Gentile started driving the truck pulling the rope. Based upon his experience from the previous day, Gentile knew that he was not at the end of the truck's "run" (meaning that the cart had arrived at the top of the slope) along the path when suddenly he felt the rope go slack. He looked in his rear view mirror and saw Rodriguez grab his head and run towards the wooden stairs up the slope. Gentile also saw plaintiff rolling down the hill. Based upon his experience driving the prior day, Gentile estimated that the rope became slack close to the top of the slope. Afterwards, Gentile noticed that the come-along had broken away from the anchor bolt at the top of the slope.

Apparently when the come-along broke away from the bolt the plate on the cart rolled backwards striking plaintiff in the head and face rendering him unconscious and in respiratory distress. As a result of this accident, plaintiff suffered severe head and bodily injuries.

In 2011, Roberto Suarez was named plaintiff Paulo Suarez's guardian.

On January 4, 2012, a citation was issued against Persico by OSHA stating that at the time of the accident "The employer did not furnish employee with a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to being struck by components of the hoist and/or load should a manually operated cable hoist fail because of improper use . . . A Hook International Inc. Industrial Cable Hoist, Model H24-20 was used for a purpose for which it was not intended or designed and the hoist was used in a manner where it was restricted from forming a straight line with the direction of the loading creating a side pull."

On January 25, 2012, plaintiff commenced a personal injury action against H&B and PCI. In his complaint plaintiff alleges violations of Labor Law §§ 240(1), 200, and 241(6).

Plaintiff also commenced an action against the State in the Court of Claims. By decision and order dated July 8, 2015, the Court of Claims (Mignano, J.) granted plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim and granted the State's motion for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241(6) claims.

Defendant H&B commenced a third party action against Persico and Mangone Safety LLC ("Mangone"). In 2015, the action against Mangone was discontinued.

In 2015, PCI commenced a second third party action against Hook International, Inc. ("Hook") the manufacturer of the Ratchet Cable Hoist or "come-along" and Huskie Tools, Inc. ("Huskie") the alleged seller of the come-along. Persico then commenced a fourth-

party action against Hook and Huskie. In their complaints PCI and Persico assert products liabilities claims and design defects in regard to the come along. In May 2015, PCI discontinued its action against Huskie.

By decision and order dated August 8, 2016, this Court, granted Seq #6 - H&B's motion join the Suarez Action and the State Action for discovery and trial; granted Seq #7 - H&B's motion to sever the third and fourth party product liability actions; granted Seq #8 - Huskie's motion to dismiss the third and fourth party actions against it; denied Seq #9 - Huskie's motion for costs and fees; granted Seq #10 - Huskie's motion for admission of counsel pro hac vice; granted Seq #11 - Hook's motion to sever the third and fourth party product liability actions; denied Seq #12 - PCI's motion for summary judgment dismissing the complaint; granted in part and denied in part Seq #13- Plaintiff's motion for summary judgment on liability; granted Seq #14 - H&B's motion for summary judgment dismissing the complaint solely to the extent of finding that plaintiff suffered a "grave injury" pursuant to the Workers Compensation Law and denied the motion in all other respects; granted Seq #15 - H&B's motion to amend its answer and upon amendment granted dismissal of plaintiff's Labor Law 241(6); granted Seq #16 - Plaintiff's motion to strike Persico's affirmative defense of Workers Compensation Law.

H&B now moves to reargue and Perscio moves to renew and reargue this Court's August 8, 2016 decision and order.

### Discussion

CPLR §2221 governs motions affecting prior orders. A motion to reargue is designed to give a party a chance to convince the court that relevant facts were overlooked or misapprehended or a controlling principle of law was misapplied and is addressed to the court's reasonable discretion. Its purpose is not to permit a party to reargue once again the very questions the court has already decided. (*See Foley v. Roche*, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588, 593 [1<sup>st</sup> Dept 1979], *citing Fosdick v. Town of Hempstead*, 126 N.Y. 651, 27 N.E. 382 [1891]; *American Trading v. Fish*, 87 Misc.2d 193, 383 N.Y.S.2d 943 [N.Y. Sup., 1975]).

Contrary to moving H&B's arguments this Court does not find it overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. The within motion is nothing but an attempt to get a second bite of the apple.

"A motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered, but to point out controlling principles of law or fact that the court may have overlooked." (*Simon v. Mehryari*, 16 A.D.3d 664, 665, 792 N.Y.S.2d 543, 545 [2<sup>nd</sup> Dept 2005]).

Based on the foregoing, H&Bs' motion for leave to reargue is DENIED.

On a motion for renewal, a party must present material facts which existed at the time the prior motion was made which were not then known. (See *Foley v Roche*, 68 A.D.2d 558 [1<sup>st</sup> Dept 1979]). A motion for re-argument, is addressed to this 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. Its purpose is *not* to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Foley v. Roche*, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588, 593 [1<sup>st</sup> Dept., 1979] , citing *Fosdick v. Town of Hempstead*, 126 N.Y. 651, 27 N.E. 382 [1891]). "A motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered, but to point out controlling principles of law or fact that the court may have overlooked." (*Simon v. Mehryari*, 16 A.D.3d 664, 665, [2<sup>nd</sup> Dept 2005]).

Persico has not offered any specific new evidence to support it's application to renew, nor has it advanced an new arguments no previously argued in the prior motions.

Accordingly, Persico's motion for leave to renew and reargue is DENIED.

**The parties are directed to appear in the Compliance Part on December 23, 2016 as previously scheduled.**

Dated: White Plains, New York  
December 21, 2016

  
HON. WILLIAM J. GIACOMO, J.S.C.

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