

Bilyk v Empire State Realty Trust. Inc.

2017 NY Slip Op 32377(U)

November 9, 2017

Supreme Court, New York County

Docket Number: 154152/2014

Judge: Kelly A. O'Neill Levy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KELLY O'NEILL LEVY
Justice

PART 19

ANATOLE BILYK,

Plaintiff,

- V -

EMPIRE STATE REALTY TRUST, INC., COTY INC.,
BENCHMARK BUILDERS, INC. and ESRT EMPIRE
STATE BUILDING, LLC, as successor in interest to
EMPIRE STATE BUILDING COMPANY, LLC,

Defendants.

INDEX NO. 154152/2014

MOTION DATE _____

MOTION SEQ. NO. 004 and 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 157, 158, 159, 160, 161, 162, 165, 166, 167

were read on this application to/for leave to reargue

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

This is an action to recover damages for injuries sustained by a carpenter on April 2, 2013, when, while working at a construction site located on the 17th floor of the Empire State Building (the Premises), the top of the cabinet that he was moving fell and struck him.

In motion sequence number 004, defendants Coty, Inc. (Coty) and Benchmark Builders, Inc. (Benchmark) (together, the Coty defendants) move, pursuant to CPLR 2221, for an order granting them leave to reargue that part of the decision and order of the court, dated April 12, 2017 (the Prior Order), which granted plaintiff Anatole Bilyk summary judgment in his favor as to liability on the Labor Law § 240 (1) claim (motion sequence number 002) as against them,

and, upon granting reargument, for an order vacating the Prior Order and denying plaintiff's motion.

In motion sequence number 005, defendants Empire State Realty Trust, Inc. (Empire State Realty) and Esrt Empire State Building, LLC, as successor in interest to Empire State Building Company, LLC (the Empire State Building) (together, the Empire defendants) move, pursuant to CPLR 2221, for the same relief.

It should be noted that, in the Prior Order, this court dismissed the complaint in its entirety as against Empire State Realty. Therefore, in the remainder of this decision, discussions involving the Empire defendants will refer to the Empire State Building only.

BACKGROUND

On the day of the accident, the Empire State Building owned the Premises where the accident occurred. The Empire State Building leased the Premises to Coty, a manufacturer of cosmetics and fragrances. Pursuant to a construction contract, Coty hired Benchmark to serve as the general contractor on a renovation project underway at the Premises, which entailed the construction of new offices for Coty. Pursuant to a purchase order, Benchmark hired plaintiff's employer, nonparty Island Architectural Woodwork (Island), to install wooden doors, wall panels and display cabinets at the Premises.

The Motions To Reargue

In separate motions, the Coty defendants and the Empire State Building (together, defendants) move for an order granting them leave to reargue the Prior Order, which granted plaintiff summary judgment in his favor as to liability on the Labor Law § 240 (1) claims against them, and, upon granting reargument, for an order vacating the Prior Order and denying plaintiff's motion.

CPLR 2221 (d) states, in pertinent part:

“(d) A motion for leave to reargue:

* * *

2. 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.”

“Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision.” *Marini v Lombardo*, 17 A.D.3d 545, 546 (2d Dep’t 2005) (citation omitted); *Carrillo v PM Realty Group*, 16 A.D.3d 611, 611 (2d Dep’t 2005).

Here, a review of the Prior Order reveals that the court did not overlook or misapprehend any facts or law when it determined that plaintiff was entitled to summary judgment in his favor as to liability on the 240 (1) claim as against defendants. In support of their motions to reargue, defendants put forth that the court’s decision makes no mention of the affidavits of Thomas Lott, an architectural millwork drafting engineer, and James Higgins, plaintiff’s coworker. Defendants argue that the statements in these affidavits establish that they did not violate Labor Law § 240 (1), by failing to provide adequate safety devices to prevent the top of the cabinet from falling onto plaintiff, because the hardware and equipment provided to plaintiff were the only items necessary to carry out the installation and assembly of the subject cabinet.

However, the court did, in fact, consider said affidavits in making its determination to grant plaintiff’s summary judgment in his favor. In fact, while it is true that the court accidentally referred to the sworn statements of Higgins as those contained in a deposition, rather

than in an affidavit, nevertheless, the court summarized those statements of Higgins which were most relevant to the rendering of its decision.

In any event, as noted in the Prior Order, plaintiff established prima facie that defendants failed to provide appropriate safety devices to properly secure the top of the cabinet, so as to keep it from falling while it was being moved into place, and that this breach was a proximate cause of his injuries. *See Zuluaga v P.P.C. Constr., LLC*, 45 A.D.3d 479, 479-480 (1st Dep't 2007). As the top of the cabinet ultimately collapsed onto plaintiff, clearly, the hardware and equipment provided to plaintiff were not the only items necessary to safely carry out the installation and assembly of the cabinet. Moreover, the evidence in the record established that, as the cabinet's assembly was inherently weak, proper bracing was also necessary to safely secure the top of the cabinet to the sides of the cabinet during the subject work.

The court has considered defendants' remaining arguments and finds them to be either unavailing or improperly raised for the first time in their motions to reargue. A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented. *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 A.D.3d 434, 436 (2d Dep't 2005); *Amato v Lord & Taylor, Inc.*, 10 A.D.3d 374, 375 (2d Dep't 2004).

Thus, defendants' motions to reargue are denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motions of defendants Coty, Inc. and Benchmark Builders, Inc. (motion sequence number 004) and defendants Empire State Realty Trust, Inc., Esrt Empire State Building, LLC, as successor in interest to Empire State Building Company, LLC (motion

sequence number 005), pursuant to CPLR 2221, for an order granting them leave to reargue that part of the decision and order of the court, dated April 12, 2017, which granted plaintiff Anatole Bilyk summary judgment in his favor as to liability on the Labor Law §§ 240 (1) claim against them, are denied.

11-9-17
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: