

Koyl v Gaudio

2019 NY Slip Op 33939(U)

March 27, 2019

Supreme Court, Nassau County

Docket Number: 604505/17

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARY E. KOYL,

Plaintiff,

- against -

JOHN GAUDIUSO, GOGREENSTEAM.COM, INC. and
JONATHAN W. NELSON,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 604505/17
Motion Seq. No.: 04
Motion Date: 01/07/19

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 2221(d)(2), for leave to re-argue her prior motion (Seq. No. 03), for an order granting partial summary judgment against defendant Gaudiuso on the issue of liability, upon which the Court rendered its Decision and Order on October 17, 2018, and, upon re-argument, for the Court to grant her motion (Seq. No. 03). Defendant Gaudiuso opposes the motion.

It is settled that “[m]otions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon showing that the court overlooked or misapprehended the facts or law for some [other] reason mistakenly arrived at earlier.” See *Carrillo v. PM Realty Group*, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept. 2005). See also CPLR § 2221(d)(2); *Barnett v. Smith*, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept. 2009); *Frisenda v. X Large Enterprises Inc.*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept. 2001); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dept. 1992); *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept. 1979), *appeal after remand*, 86 A.D.2d 887, *app den.* 56 N.Y.2d 507.

Notably, the remedy “is not designed to provide an unsuccessful party with successive opportunities” to make repetitious applications, “rehash questions already decided” or “*present arguments different from those originally presented* (emphasis added).” See *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept. 1999); *William P. Pahl Equipment Corp. v. Kassis*, *supra*. See also *Gellert & Rodner v. Gem Community Management Inc.*, 20 A.D.3d 388, 797 N.Y.S.2d 316 (2d Dept. 2005); *Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 793 N.Y.S.2d 452 (2d Dept. 2005); *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 781 N.Y.S.2d 125 (2d Dept. 2004).

Counsel for plaintiff argues that this Court, when it rendered its decision denying plaintiff’s motion (Seq. No. 03) for partial summary judgment, may have overlooked the Court of Appeals’ decision in *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 (2018). This Court is aware that in its decision in *Rodriguez v. City of New York*, *supra*, the Court of Appeals addressed the issue of whether a plaintiff is entitled to partial summary judgment on the

issue of a defendant's liability when the defendant has raised an issue of fact regarding plaintiff's comparative negligence. The Court of Appeals determined that the existence of an open question as to a plaintiff's comparative fault did not bar the granting of summary judgment as to the plaintiff on the issue of the defendant's liability. Under *Rodriguez v. City of New York, supra*, a plaintiff's comparative fault (if any) related to the issue of damages, not the defendant's liability. As a result of the decision in *Rodriguez v. City of New York, supra*, a plaintiff is entitled to summary judgment on the issue of the defendant's liability where the motion records *establishes*, as a matter of law, that ***the defendant was negligent and that such negligence was a proximate cause of plaintiff's injuries*** (emphasis added).

However, in the instant matter, the Court did not find that there was an issue as to plaintiff's comparative fault, but rather the Court found "that there are issues of fact as to the exact cause of the subject accident and which party, defendant Nelson or defendant Gaudio, failed to act reasonably under the circumstances and failed to see that which he should have seen through the proper use of his senses. Additionally, the Court finds that the facts and circumstances surrounding the subject motor vehicle accident involve determining the credibility of defendant Nelson and of defendant Gaudio and, in rendering a decision on a summary judgment motion, the Court is not to determine matters of credibility." Plaintiff named both defendant Nelson or defendant Gaudio in her Verified Complaint, and defendant Gaudio brought a cross-claim against defendant Nelson. This Court was unable to find that the record established, as a matter of law, that defendant Gaudio was negligent and that such negligence was a proximate cause of plaintiff's injuries. Therefore, based upon the Court's findings in its

October 18, 2018 Decision and Order, the question of liability should be determined by the trier of fact.

The Court now finds that plaintiff has not demonstrated that the Court overlooked or misapprehended the facts (and viable issues thereto) or law relative to its analysis and subsequent denial of her motion (Seq. No. 03).

Having reviewed its prior determination and the papers submitted herein, this Court concludes that it has not overlooked or misapplied any controlling principles of law. *See William P. Pahl Equipment Corp. v. Kassis, supra; Foley v. Roche, supra*. Nor can the Court glean from the record herein where it had, for some other reason, mistakenly arrived at its earlier decision. *See Long v. Long, 251 A.D.2d 631, 675 N.Y.S.2d 557 (2d Dept. 1998)*.

Re-argument is therefore **DENIED** as plaintiff has failed to demonstrate that the Court misapprehended the facts or misapplied the law. *See CPLR § 2221(d)(2)*.

Accordingly, the Court adheres to its original determination and decision and plaintiff's instant motion is hereby **DENIED**.

All parties shall appear for Trial, in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on May 14, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 27, 2019

ENTERED
MAR 28 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE