

Vazquez v J. Mullen & Sons, Inc.
2021 NY Slip Op 34342(U)
October 28, 2021
Supreme Court, Orange County
Docket Number: Index No. EF004431-2017
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

-----X
RAYMOND VAZQUEZ,

Plaintiff,

-against--

J. MULLEN & SONS, INC. and CENTRAL HUDSON
GAS & ELECTRIC CORPORATION,
Defendants.To commence the statutory time
period 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.-----X
J. MULLEN & SONS, INC.,

Third-Party Plaintiff,

-against--

Index No. EF004431-2017

DECISION AND ORDER

Motion Date: October 13, 2021

ETHAN ALLEN STAFFING CORPORATION; ETHAN
ALLEN PERSONNEL GROUP, INC.; ETHAN ALLEN
STAFFING; ETHAN ALLEN PERSONNEL; ETHAN
ALLEN STAFFING CORPORATION a/k/a ETHAN
ALLEN STAFFING and/or ETHAN ALLEN
PERSONNEL; and ETHAN ALLEN PERSONNEL
GROUP, INC. a/k/a ETHAN ALLEN PERSONNEL and/or
ETHAN ALLEN STAFFING,

Third-Party Defendants.

The following papers numbered 1 to 8 were read and considered on a motion by the
Plaintiff, pursuant to CPLR §2221, for leave to reargue a prior motion for summary judgment on
the issue of liability as against the Defendants J. Mullen & Sons, Inc. and Central Hudson Gas &
Electric Corporation, and upon the same, for an order granting such relief.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Raymond Vazquez was seriously injured while performing his duties as a flagger at a construction site when an excavator rolled backwards and crushed his foot and ankle, ultimately resulting in amputation. He commenced the main action to recover damages for personal injuries arising from, *inter alia*, violations of Labor Law section 241(6) and common law negligence.

The basic allegations concerning the accident are as follows.

On May 13, 2016, the Plaintiff was a flagger working at a jobsite operated by J. Mullen & Sons, Inc. (hereinafter "J. Mullen").

The Defendant Central Hudson Gas & Electric Corporation had hired J. Mullen to replace certain gas main lines and other lines.

At the time of the accident, the Plaintiff was working directing vehicular traffic away from an area where an excavator was replacing and adjusting steel plates over an excavated opening. While the Plaintiff was facing oncoming traffic with his back to the excavator, the excavator backed up and struck him from behind, rolling over his lower leg and crushing it.

Jason Legg (a foreman for J. Mullen) was the spotter for the excavator and was supposed to guide the operator when it was being backed up. However, at the time of the accident, Legg was positioned at the front of the excavator, and was unable to see behind the same.

In prior motion practice, *inter alia*, the Plaintiff moved for summary judgment on the issue of liability as against J. Mullen and Central Hudson.

By Decision and Order dated August 23, 2021, the Court held, *inter alia*, as follows.

First, the Court held, the work at issue fell within the purview of the Labor Law, and J. Mullen was the “general contractor” and Central Hudson was the “owner” of the project.

Further, the Court held, in support of the Labor Law 241(6) cause of action, the Plaintiff had identified one relevant Industrial Code provision, to wit: 12 NYCRR 23-4.2(k), which provides: “Persons shall not be suffered or permitted to work in any area where they may be struck or endangered by any excavation equipment or by any material being dislodged by or falling from such equipment.”

Further, the Court held, the Plaintiff demonstrated, *prima facie*, that both J. Mullen and Central Hudson violated this provision, and that such a violation was a proximate cause of his injuries.

However, the Court noted, issues of comparative and contributory negligence were relevant to a Labor Law § 241(6) cause of action, and both J. Mullen and Central Hudson had raised triable issues of fact as to whether the Plaintiff’s own conduct was the sole or a contributing factor to the happening of the accident.

Concerning sole proximate cause, the Court held that, contrary to the contentions of both J. Mullen and Central Hudson, neither had demonstrated, *prima facie*, that the Plaintiff’s own conduct was the sole proximate cause of the accident. Indeed, the Court noted, in general, cases finding so had required significantly unreasonable behavior by a worker.

Consequently, the Court denied the motions and cross motions for summary judgment on the issue of liability on the Labor Law 241(6) cause of action.

In addition, the Court held that the Plaintiff had also demonstrated a *prima facie* entitlement to summary judgment against J. Mullen on his common law negligence cause of

action.

However, again, the Court denied summary judgment based on triable issues of fact as to the Plaintiff's own negligence.

The Motion at Bar

The Plaintiff moves to reargue its prior motion, and upon the same, for an order granting him summary judgment on his Labor Law § 241(6) cause of action and his negligence cause of action.

In support of the motion, the Plaintiff submits an affirmation from counsel, Andrew Spitz.

Initially, Spitz asserts, there is no rational basis upon which the Plaintiff's own conduct could be found to be the sole proximate cause of the accident.

Thus, Spitz argues that, in accordance with *Rodriguez v. City of New York* [31 NY3d 312], the Court should have granted the Plaintiff summary judgment as against both J. Mullen and Central Hudson, even though there remain issues of fact as to the Plaintiff's own comparative negligence.

In opposition to the motion, Central Hudson submits an affirmation from counsel, Eric Kurtz.

Initially, Kurtz argues, on the prior motion, the Court found that there were questions of fact, *inter alia*, whether the Plaintiff's conduct was the "sole proximate cause" of his injuries. Thus, he argues, the Plaintiff should not be granted summary judgment on his Labor Law Section 241(6) claim.

In opposition to the motion, J. Mullen submits an affirmation from counsel, Kimberly

Hunt Lee.

Initially, Lee notes, the Plaintiff raised the issue of the applicability of *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018) on the prior motion, and the Court correctly found it inapplicable.

In any event, she asserts, it appears that the Plaintiff is mixing standards and equating comparative negligence with sole proximate cause. In *Rodriguez*, she notes, the Court of Appeals addressed only comparative negligence, which is not a defense to a negligence cause of action, but rather goes to damages. By contrast, she argues, sole proximate cause is a defense to an essential element of a Labor Law § 241(6) claim, *i.e.*, causation. Thus, she asserts, *Rodriguez* is not applicable.

In reply, the Plaintiff submits an affirmation from counsel, Andrew Spitz.

Spitz argues that, even if the Plaintiff was comparatively negligent by standing too close to the rear of the excavator, his acts were not the sole proximate cause of the accident. Rather, he asserts, the cases finding such require a much greater degree of culpability.

Discussion/Legal Analysis

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 also Cioffi v S.M. Foods, Inc.*, 129 A.D.3d 888 [2nd Dept. 2015]; *American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 926 N.Y.S.2d 640 [2nd Dept. 2011]. The movant must demonstrate that, as a result of such errors, the Court mistakenly arrived at its earlier decision. *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 A.D.3d 110 [2nd Dept. 2017]. A motion for leave to reargue is not

designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Anthony J. Carter, DDS, P.C. v. Carter*, 81 A.D.3d 819, 916 N.Y.S.2d 821 [2nd Dept. 2011]. The determination to grant leave to reargue a motion lies within the sound discretion of the court. *American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 926 N.Y.S.2d 640 [2nd Dept. 2011].

Here, the case relied upon by the Plaintiff, *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018), may be summarized as follows.

The Plaintiff Carlos Rodriguez commenced a negligence action against the City of New York, and moved for partial summary judgment on the issue of liability.

The City cross-moved for summary judgment.

The Supreme Court denied both motions based on triable issues of fact regarding foreseeability, causation, and Rodriguez's comparative negligence.

The Appellate Division, *inter alia*, affirmed, finding that Rodriguez was not entitled to partial summary judgment on the issue of liability because he failed to make a *prima facie* showing that he was free of comparative negligence.

The Court of Appeals reversed, based on principles of statutory construction.

The *Rodriguez* Court noted as follows.

CPLR 3212 requires a movant to demonstrate, *inter alia*, "that there is no defense to the cause of action." *CPLR 3212 [b]*.

Further, it provides, "[i]f it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages . . . the court may, when

appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion.” *CPLR 3212 [c]*.

Similarly, the Court noted, Article 14-A of the CPLR, which codifies comparative negligence principles, provides: “In any action to recover damages for personal injury * * *, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.” *CPLR 1411*.

Finally, the Court noted, CPLR 1412 provides: “[c]ulpable conduct claimed in diminution of damages, in accordance with [CPLR 1411], shall be an affirmative defense to be pleaded and proved by the party asserting the defense.”

Thus, the *Rodriguez* Court held, placing the burden on the plaintiff to show an absence of comparative fault was inconsistent with the plain language of CPLR 1412.

Indeed, the Court held, it would defy the plain language of CPLR 1411, and would permit a possible windfall to defendants. For example, the Court noted, “assuming in a hypothetical case a defendant's negligence could be established as a matter of law because defendant's conduct was in violation of a statute (see PJI 2:26), and further assuming plaintiff was denied partial summary judgment on the issue of defendant's negligence because plaintiff failed to establish the absence of his or her own comparative negligence, the jury would be permitted to decide the question of whether defendant was negligent and whether defendant's negligence proximately caused plaintiff's injuries. If the jury answers in the negative on the question of defendant's negligence, the plaintiff would be barred from recovery even though defendant's negligence was

established as a matter of law and in contradiction to the plain language of CPLR 1411.” Such a windfall to a defendant, the Court held, would violate section 1411’s mandate that a plaintiff’s comparative negligence “shall not bar recovery” and should only go to the diminution of damages recoverable by plaintiff. Further, the Court held, it is no answer that the trial court could set aside the verdict. Indeed, the *Rodriguez* Court noted, the whole purpose of partial summary judgment is to streamline and focus the factfinder on the issues that need resolution, and avoid having juries make findings that are contrary to law.

In so holding, the *Rodriguez* Court rejected the City’s argument that the plain language of CPLR 3212, requiring a movant to demonstrate “that there is no defense to the cause of action,” required a different result. The Court held that comparative negligence is not a defense to a negligence cause of action because it is not a defense to any element thereof (duty, breach, causation). Rather, it concerned the amount of damages.

Finally, the *Rodriguez* Court noted, it also rejected the City’s argument that granting partial summary judgment on the issue of liability served no practical purpose. Rather, the Court held, a principal rationale of partial summary judgment is to narrow the number of issues presented to the jury. In a typical comparative negligence trial, the jury is asked to answer five questions:

1. Was the defendant negligent?
2. Was defendant's negligence a substantial factor in causing (the injury or the accident)?
3. Was plaintiff negligent?
4. Was plaintiff's negligence a substantial factor in causing (his or her) own injuries?
5. What was the percentage of fault of the defendant and what was the percentage of fault

of the plaintiff?

Where a plaintiff has already established defendant's liability as a matter of law, the Court noted, granting plaintiff partial judgment eliminates the first two questions submitted to the jury, thereby serving the beneficial purpose of focusing the jury on questions and issues that are in dispute.

In the case at bar, the Court grants reargument.

Further, upon the same, the Court finds as follows.

Applying the holding in *Rodriguez* to the findings and conclusions in the prior decision, the Plaintiff should have been granted summary judgment as against J. Mullen on his negligence cause of action, regardless of the pending issues of fact concerning the comparative fault of the Plaintiff.

Further, the Plaintiff should have been granted summary judgment as against both J. Mullen and Central Hudson on his Labor Law § 241(6) cause of action, regardless of the pending issues of fact concerning the comparative fault of the Plaintiff.

In the prior decision, the Plaintiff was denied summary judgment on his Labor Law § 241(6) cause of action insofar as the Court found an issue of fact whether the Plaintiff's conduct was the sole proximate cause of accident. This is because a finding of sole proximate cause goes to an element of the claim (causation), and would negate liability under the statute. *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805 (2005).

However, after considering the parties' arguments on this motion, particularly as they concern the issue of sole proximate cause, the Court concludes that it overlooked or misapprehended the law concerning the same and, as a result, erred in holding that there was a

question of fact as to whether the Plaintiff's negligence was the sole proximate cause of the accident. Rather, in support of his motion, the Plaintiff demonstrated, *prima facie*, that his conduct was not the sole proximate cause of the accident.

In opposition, and upon reconsideration, the Court concludes, and so finds, that Defendants failed to raise a triable issue of fact as to the same.

Indeed, the Court notes, even viewing the allegations and the pre-trial testimony in the light most favorable to the Defendants, the Court is nevertheless compelled to conclude, as a matter of law, that on the evidence presented there could be no valid line of reasoning, nor any permissible inferences derived therefrom, that would lead a rational person or reasonable jury to conclude that the Plaintiff's conduct was the sole proximate cause of accident. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978); *Goldblatt v. Seaman*, 225 A.D.2d 585 [2nd Dept. 1996]. In fact, were a jury to so find, the verdict would not survive a challenge under CPLR 4404. *Killon v. Parrotta*, 28 N.Y.3d 101 (2016).

In sum, reargument is granted, and upon the same, the Plaintiff is granted summary judgment as to liability against J. Mullen and Central Hudson on his Labor Law 241(6) cause of action insofar as it alleges a violation of Section 23-4.2(k); and as against J. Mullen on his common law negligence cause of action. All issues of comparative fault are reserved for trial.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the Plaintiff's motion, which seeks reargument and upon the granting of same summary judgment, is granted as set forth herein; and it is further,

ORDERED, that the parties are directed to proceed to the Court ordered mediation/settlement conference, as set forth in the companion order issued herewith.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 28 , 2021
Goshen, New York.

E N T E R



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