

Fischer v VNO 225 W. 58th St. LLC

2023 NY Slip Op 33158(U)

September 12, 2023

Supreme Court, New York County

Docket Number: Index No. 152811/2018

Judge: W. Franc Perry III

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

PRESENT: HON. W. FRANC PERRY, III PART 23M

Justice

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WILLIAM FISCHER, ANDREA FISCHER,

Plaintiff,

- v -

VNO 225 WEST 58TH STREET LLC, VORNADO REALTY
TRUST, LENDLEASE (US) CONSTRUCTION
INC., LENDLEASE (US) CONSTRUCTION LMB INC.

Defendant.

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INDEX NO. 152811/2018

MOTION DATE 05/13/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 70

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

In this personal injury action, defendants move for an Order pursuant to CPLR §2221(d) for leave to reargue the Court’s decision dated March 18, 2022 and filed with notice of entry on March 23, 2022 and upon granting re-argument, deny the portion of the plaintiff’s cross-motion to strike the defendants’ affirmative defense of comparative fault and for such other, further relief as the Court deems just and proper.

Defendants assert that plaintiff did not meet his prima facie burden entitling the Court to grant that portion of his cross-motion to strike the defendants’ affirmative defense of comparative fault.

Pursuant to CPLR §2221(d), a motion for leave to re-argue must be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion that would change the prior determination. See *Sheridan v. Very, Ltd.*, 56 A.D.3d 305 (1st Dept. 2008). Absent mistake on the Court's part, the Court must adhere to its original

decision. *William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22, 27, 588 N.Y.S.2d 8 [1st Dept. 1992], lv dismissed in part and denied in part 80 NY2d 1005, 592 N.Y.S.2d 665 [1992]). “Re-argument is not designed to afford the unsuccessful party successive opportunities to once again argue issues previously decided . . . or to present arguments different from those originally asserted” (*William P. Pahl Equip. Corp. v. Kassis*, id.; *Matter of Setters v. AI Props. & Devs. (USA) Corp.*, 139 A.D.3d 492, 32 N.Y.S.3d 87 (1st Dept. 2016)).

In the motion at bar, the defendants argue that the Court overlooked or misapprehended relevant facts regarding the plaintiff’s failure to meet his prima facie burden to strike the defendants’ affirmative defense of comparative fault and the evidence in the record creating a question of fact for the plaintiff’s comparative fault for the trier of fact to determine.

Plaintiffs oppose the motion asserting that defendants failed to offer any opposition to their cross motion seeking summary judgment dismissal of their affirmative defense of comparative fault. Specifically, plaintiffs state that it is well established that “facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted, and where there are cross motions for summary judgment, in the absence of either party challenging the verity of the alleged facts, there is, in effect, a concession that no question of fact exists.” *Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 540 (1975). (emphasis added). Accordingly, it is respectfully submitted that Defendants conceded that there was no question of fact sufficient to warrant the denial of Plaintiffs’ cross motion for summary judgment striking its said affirmative defense.

Plaintiffs argue that defendants waived any argument against the dismissal of the affirmative defense of comparative fault by failing to raise this argument at any time in their opposition papers to Plaintiffs’ cross motion for summary judgment or in their reply in further

support of their own motion for summary judgment. see, *Bosco Credit V Trust Series 2012-1 v. Johnson*, 177 A.D.3d 561, 115 N.Y.S.3d 5 (1st Dept. 2019), citing *New York Commercial Bank v. J. Realty F Rockaway, Ltd.*, 108 A.D.3d 756, 969 N.Y.S.2d 796 (2nd Dept. 2013).

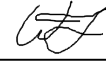
Plaintiffs further assert that defendants failed to present any evidence or sworn statement tending to establish any fault on the part of the Plaintiff in this matter, which evidence would support the granting of defendant's motion. However, plaintiffs conclude that the record does not contain any evidence which establishes that Plaintiff was in any way responsible for the happening of his own accident and therefor, the motion to renew should be denied.

Defendants assert that plaintiff's opposition to their motion for leave to reargue fails to address the undisputed fact that in the motion below, plaintiffs were required to establish their prima facie entitlement to summary judgment. Defendants argue in deciding the motion below, this Court overlooked or misapprehended relevant facts regarding the plaintiff's failure to meet his prima facie burden to strike the defendants' affirmative defense of comparative fault and the evidence in the record creating a question of fact for the plaintiff's comparative fault for the trier of fact to determine.

The motion to renew is denied. In their cross motion to strike defendant's affirmative defense of comparative negligence, the plaintiff submitted admissible evidence in the form of plaintiff's deposition, plaintiff's affidavit, two witness affidavits, and plaintiff's statement of fact to support motion. Defendants did not oppose the motion or offer any argument to support the arguments they raise therein. The Order specifically noted that the evidence submitted by plaintiff was un rebutted. Defendant's silence did not create a triable issue of fact which then obligated the Court to deny the motion for summary judgment.

9/12/23

DATE



W. FRANC PERRY, III

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE