

Ortiz v Barba

2023 NY Slip Op 33378(U)

September 1, 2023

Supreme Court, Queens County

Docket Number: Index No. 705114/2019

Judge: Maurice E. Muir

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

KERRI ORTIZ,

Plaintiff,

-against-

ROBERTO CARLOS CARRERA BARBA,
FEDEX GROUND PACKAGE SYSTEM, INC.,
MANUEL B. PAUCARTENEZACA, and
PRESIDENTIAL TRANSPORT, CORP.,

Defendants.

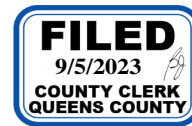
IAS Part - 42

Index No.: 705114/2019

Motion Date: 3/23/23

Motion Cal. No. 27

Motion Seq. No. 11



The following electronically filed documents read on this motion by Roberto Carlos Carrera Barba, FEDEX Ground Package System, Inc. and Presidential Transport Corp. (collectively, the “defendants”) for an order: A. An Order pursuant to CPLR § 2221(f) granting Defendants leave to Reargue and Renew seeking clarifying of this Court’s March 24, 2022 Order and/or reconsideration of the Court’s Order regarding depositions of the defendants; b) dismissing the Second Cause of Action of Plaintiff’s Amended Complaint alleging negligent hiring, supervision, training, and retention as to Defendant Presidential Transport Corp.; c) dismissing the Third Cause of Action of Plaintiff’s Amended Complaint for punitive damages as to Defendants Roberto Carlos Carrera Barba, FEDEX Ground Package System, Inc. and Presidential Transport Corp.; and d) granting such other and further relief as this Court deems just and proper.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	EF 482 - 500
Affirmation in Opposition-Exhibits-Service.....	EF 503 - 520
Affirmation in Reply-Exhibits-Service.....	EF 659 - 662

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

This is an action to recover damages for personal injuries, which Kerri Ortiz (“Ms. Ortiz” or “plaintiff”) allegedly sustained in a multiple motor vehicle collision on the Long Island Expressway (“LIE”) at or near its intersection with the Grand Central Parkway (“GCP”), in the County of Queens, city and state of New York. Specifically, the plaintiff alleges that on March 5, 2019, a vehicle operated by Roberto Carlos Carrera Barba (“Mr. Barba”) and owned by Fedex rear-ended a vehicle owned and operated by Manuel B. Paucartenezaca (“Mr. Paucartenezaca”), who was propelled into the rear of plaintiff’s motor vehicle. As a result, the plaintiff alleges that she sustained serious injuries to her brain/head, left shoulder, left knee, right knee, cervical and lumbar spine. As a result, on March 22, 2019, plaintiff commenced the instant action; and on June 19, 2019, issue was joined wherein, Mr. Paucartenezaca interposed an answer; and on June 26, 2019. After the court issued a preliminary conference order (“PCO”) and a compliance conference order (“CCO”), on February 3, 2021, the plaintiff filed a discovery motion; and the defendants cross-moved to dismiss the complaint, pursuant to CPLR § 3126. Thereafter, on March 23, 2022, the court issued a conditional preclusion order, which states, in relevant part, the following:

ORDERED that branch of plaintiff’s motion to strike FedEx Ground Package System, Inc. and Roberto Carlos Carrera Barba answer is denied; and it is further,

ORDERED that branch if plaintiff’s motion to preclude FedEx Ground Package System, Inc. and Roberto Carlos Carrera Barba from offering any evidence, testimony or submission of an affidavit in defense of this action is denied; and it is further,

ORDERED that branch of plaintiff’s motion for an adverse inference charge to be given at trial with respect to video surveillance is denied; and it is further,

ORDERED that FedEx shall provide the plaintiff with the authorizations for its full and complete property damage file on or before April 30, 2022 or be precluded from offering any evidence, testimony or submission of an affidavit in defense of this action at the damage portion of the trial; and it is further,

ORDERED that FedEx shall provide the plaintiff with an affidavit of excess insurance on or before April 30, 2022 or be precluded from offering any evidence, testimony or submission of an affidavit in defense of this action at the damage portion of the trial; and it is further,

ORDERED that FedEx shall appear for an examination before trial on or before June 15, 2022 either by Skype for Business, Zoom, Skype, Microsoft Teams, in person, or its equivalent; and it is further,

ORDERED that Roberto Carlos Carrera Barba shall appear for an examination before trial on or before June 15, 2022 either by Skype for Business, Zoom, Skype, Microsoft Teams, in person, or its equivalent or be precluded from offering any evidence, testimony or submission of an affidavit in defense of this action at trial; and it is further,

ORDERED that, if not yet done, plaintiff shall respond to FedEx's Second Notice to Produce and Third Notice to Produce on or before May 10, 2022; and it is further,

ORDERED that plaintiff shall provide duly executed HIPAA-compliant authorizations permitting defendants to obtain all applicable records from each and every medical provider that treated or is treating the plaintiff in connection with the subject accident, along with copies of said records on or before May 10, 2022; and it is further

ORDERED that plaintiff shall appear for an examination before trial in person on or before June 10, 2022 or be precluded from offering any evidence, testimony at the damages portion of the trial; and it is further; and it is further,

ORDERED that the physical examination of plaintiff shall be designated by the defendants on or before June 10, 2022; and it is further,

ORDERED that the physical examination of plaintiff shall be conducted person on or before July 20, 2022, and the IME report(s) shall be exchanged within 45 days upon completion of the IME; and it is further,

ORDERED that if plaintiff fails to comply with the directives of this Order, she shall be precluded from presenting evidence and testimony at the time of damages portion of the trial; and it is further,

ORDERED that branch of FedEx's cross-motion to strike plaintiff's complaint and preclude plaintiff from offering testimony at the time of trial is denied; and it is further,

ORDERED that branch of FedEx's cross-motion for a protective order, pursuant to CPLR § 3103, is denied without prejudice; and it is further ...

Now, the defendants seek the above-described relief. It is well settled that the purpose of reargument is to convince the court that it overlooked or misapprehended the facts or the law on the prior motion, or for some reason mistakenly arrived at its earlier decision. (CPLR § 2221(d); *Fuessel v. Chin*, 179 AD3d 899 [2d Dept 2020]; *Deutsche Bank Nat. Trust Co. v. Ramirez*, 117 AD3d 674 [2d Dept 2014]; *Bolos v. Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]). A motion to reargue is not to be used as a means by which the unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]), nor

does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted. (*Giovanniello v. Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]; *Pryor v. Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *Frisenda v. X Large Enters.*, 280 AD2d 514 [2d Dept 2001]; *Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). Furthermore, a motion to reargue is addressed to the sound discretion of the court. (see *MAAD Constr., Inc. v. Cavallino Risk Mgt. Inc.*, 178 AD3d 816 [2d Dept 2019]; *HSBC Bank USA, N.A. v. Halls*, 98 AD3d 718 [2d Dept 2012]; *Matter of Swingeam*, 59 AD3d 556 [2d Dept 2009]). Here, the court finds that the defendants' motion to reargue is untimely. Pursuant to CPLR § 2221(d)(3), it states, in relevant part, that "[a] motion for leave to reargue: shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Even though the court rendered its decision on March 23, 2022, and the plaintiff served the defendants with notice of entry on March 24, 2023, the latter filed the instant motion on April 29, 2022. (*Itzkowitz v. King Kullen Grocery Co., Inc.*, 22 AD3d 636 [2d Dept 2005]; see e.g., *Tafalla v. Aldrich Management, LLC*, 172 AD3d 778 [2d Dept 2019]). Notwithstanding the same, the court neither overlooked nor misapprehended the facts or the law on the prior motion. (CPLR § 3116(a); *Elentuck v. New York City Transit Authority*, 188 AD3d 825 [2d Dept 2020]; *Nationwide General Ins. Co. v. Bates*, 130 AD3d 795 [2d Dept 2015]; *Memenza v. Cole*, 131 AD3d 1020 [2d Dept 2015]; *Yassin v. Blackman*, 188 AD3d 62 [2d Dept 2020]; *Country-Wide Ins. Company v. Lobello*, 186 AD3d 1213 [2d Dept 2020]).

Furthermore, that branch of the defendants' motion to dismiss the Second Cause of Action of plaintiff's Amended Complaint alleging negligent hiring, supervision, training, and retention as to Defendant Presidential Transport Corp. has already been decided. On December 13, 2021, this court granted to the defendants' motion (Seq. No. 4), wherein the court found that under "New York law . . . no liability may arise for negligent hiring, supervision, training and retention where negligence is undisputed and where vicarious liability exists for the negligent act/omission of an agent. In other words, ". . . where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat superior, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training." (*Ambroise v. United Parcel Service of America*, 143 AD3d 929 [2d Dept 2016] see also *Fludd v. City of New York*, NY Slip Op 06344 [2d Dept 2021]). This

holding is law of the case, which also applies to Presidential Transport Corp. It is well settled that “[t]he doctrine of the ‘law of the case’ is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned” (*Fishon v. Richmond University Medical Center*, 171 AD3d 873 [2d Dept 2019] citing *Martin v. City of Cohoes*, 37 NY2d 162, 165 [1975]; *Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.*, 116 AD3d 667 [2d Dept 2014]; *Ramanathan v. Aharon*, 109 AD3d 529 [2d Dept 2013]; *Erickson v. Cross Ready Mix, Inc.*, 98 AD3d 717 [2d Dept 2012].) The doctrine forecloses reexamination of an issue previously determined by a court of coordinate jurisdiction “absent a showing of newly discovered evidence or a change in the law” (*Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.*, 116 AD3d at 669; see *Martin v. City of Cohoes*, 37 NY2d at 165, 371 N.Y.S.2d 687, 332 N.E.2d 867).

Lastly, the branch of the defendants’ motion to dismiss the Third Cause of Action of Plaintiff’s Amended Complaint for punitive damages as to Defendants Roberto Carlos Carrera Barba, FEDEX Ground Package System, Inc. and Presidential Transport Corp. is granted. It is well settled that “New York does not recognize an independent cause of action for punitive damages” (*Gersham v. Ahmad*, 156 AD3d 868 [2d Dept 2017] citing *Randi A.J. v. Long Is. Surgi-Ctr.*, 46 AD3d 74 [2d Dept 2007]; see *Rocanova v. Equitable Life Assur Socy. of U.S.*, 83 NY2d 602 [1994]; *Yong Wen Mo v. Gee Ming Chan*, 17 AD3d 356 [2d Dept 2005]; *Park v. YMCA of Greater N.Y. Flushing*, 17 AD3d 333 [2d Dept 2005]; *Li v. Shih*, 207 AD3d 444 [2d Dept 2022]). However, a plaintiff’s request for punitive damages in the “ad damnum clause” of the complaint is proper. (*Gersham v. Ahmad*, 156 AD3d 868 [2d Dept 2017]). Furthermore, “[p]unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives” (*Moskowitz v. Masliansky*, 198 AD3d 637 [2d Dept 2021] citing *Gravitt v. Newman*, 114 AD2d 1000, 1002 [2d Dept 1985]; see *Thomas v. Farrago*, 154 AD3d 896, 898 [2d Dept 2017]; *Nooger v. Jay-Dee Fast Delivery*, 251 AD2d 307 [2d Dept 1998]; *Spinosa v. Weinstein*, 168 AD2d 32, 42-43 [2d Dept 1991]). Here, the plaintiff’s allegations against the defendants amount to nothing more than allegations of mere negligence and do not rise to the level of moral culpability necessary to support a claim for punitive damages (see *Thomas v. Farrago*, 154 AD3d at 898; *Aronis v. TLC Vision Ctrs., Inc.*, 49 AD3d 576, 578 [2d Dept 2008]; *Anderson v.*

Elliott, 24 AD3d 400 [2d Dept 2005]; *Nooger v. Jay-Dee Fast Delivery*, 251 AD2d at 307; *Zabas v. Kard*, 194 AD2d 784 [2d Dept 1993]).

Accordingly, it is hereby

ORDERED that branch of the defendants' motion to reargue the decision dated March 23, 2022 and entered on March 24, 2022, pursuant to CPLR § 2221(d), is denied, in its entirety; and it is further,

ORDERED that branch of the defendants' motion to renew the decision dated March 23, 2022 and entered on March 24, 2022, pursuant to CPLR § 2221(e), is denied, in its entirety; and it is further,

ORDERED branch of the defendants' motion to dismiss the Second Cause of Action of Plaintiff's Amended Complaint alleging negligent hiring, supervision, training, and retention as to Defendant Presidential Transport Corp. is granted; and it is further,

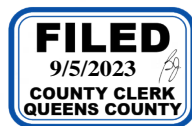
ORDERED branch of the defendants' motion to dismiss the Third Cause of Action of Plaintiff's Amended Complaint for punitive damages as to Defendants Roberto Carlos Carrera Barba, FEDEX Ground Package System, Inc. and Presidential Transport Corp., is granted; and it is further,


ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

ORDERED that the defendants shall serve a copy of this decision and order with notice of entry upon the plaintiff, via certified mail and NYSCEF, on or before October 5, 2023.

The foregoing constitutes the decision and order of the court.

Dated: September 1, 2023
Long Island City, NY




MAURICE E. MUIR, J.S.C.