

Siewert v Greater Atl. Beach Water

2009 NY Slip Op 33298(U)

September 17, 2009

Sup Ct, Nassau County

Docket Number: 3507-06

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

DAVID W. SIEWERT,
Plaintiff,

-against-
GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Defendant.

INDEX NO: 3507/06
Action #1

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,

-against-
THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,

FRANK LIVECHI,
Plaintiff,

-against-
THE ATLANTIC BEACH SEWER DISTRICT and
THE GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Defendants.

INDEX NO: 16433/06
Action #2

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,

-against-
THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,

ESTATE OF ANN MARIE H. WALSH and
JOHN F. WALSH,

Plaintiffs,

-against-

THE INCORPORATED VILLAGE OF
ATLANTIC BEACH SEWER DISTRICT and
THE GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Defendants.

Motion Sequence #5
Submitted June 16, 2009

INDEX NO: 16770/06
Action #3

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Third-Party Plaintiff,

-against-

THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,

Third-Party Defendants,

NEAL FLOMENBAUM, M.D. and MRS.
MEREDITH FLOMENBAUM,

Plaintiffs,

-against-

THE GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Defendant.

INDEX NO: 288/07
Action #4

GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,

Third-Party Plaintiff,

-against-

THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,

Third-Party Defendants,

**ANDREW GASPAR and NINA GASPAR,
Plaintiffs,**

-against-

**THE TOWN OF HEMPSTEAD, THE
INCORPORATED VILLAGE OF ATLANTIC
BEACH, THE ATLANTIC BEACH SEWER
DISTRICT, THE GREATER ATLANTIC
BEACH WATER RECLAMATION DISTRICT,
Defendants.**

**INDEX NO: 11514/07
Action #5**

**GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,**

-against-

**THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants,**

**BETH GARNETT, MILES GARNETT and
PAULA GARNETT,**

Plaintiffs,

-against-

**THE DEPARTMENT OF PUBLIC WORKS, THE
GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT, THE COUNTY OF
NASSAU, THE TOWN OF HEMPSTEAD,
Defendants.**

**INDEX NO: 16838/06
Action #6**

**GREATER ATLANTIC BEACH WATER
RECLAMATION DISTRICT,
Third-Party Plaintiff,**

-against-

**THE COUNTY OF NASSAU and THE
INCORPORATED VILLAGE OF ATLANTIC BEACH,
Third-Party Defendants.**

The following papers were read on this motion:

TOWN Notice of Cross-Motion.....1
WRD Affirmation in Opposition.....2
GARNETT Affirmation in Opposition.....3
Reply Affirmation.....4

Defendant in the GASPAR and GARNETT actions, the TOWN OF HEMPSTEAD (hereinafter referred to as the "TOWN"), moves for an order, pursuant to CPLR §2221, to reargue the prior order of the Court, dated January 9, 2009, that denied its motion for summary judgment dismissing the complaint and all cross-claims against it on the ground that questions of fact precluded said relief and, upon reargument, for an order granting said relief. An Affidavit of Service reflects service of the instant motion on counsel for all parties and the *pro se* litigant in the above captioned actions, on June 17, 2008, but only counsel for co-defendant, THE GREATER ATLANTIC BEACH WATER RECLAMATION DISTRICT (hereinafter referred to as "WRD"), and counsel for plaintiffs, BETH GARNETT, MILES GARNETT and PAULA GARNETT (hereinafter referred to as "GARNETT"), oppose the motion, which is determined as follows:

Initially, the Court notes that a Stipulation discontinuing the action against the TOWN, dated January 12, 2009, was filed in the above captioned WALSH action. The plaintiffs in the various proceedings commenced the respective actions for alleged damages to their respective properties caused by a sewer backup that occurred in the Atlantic Beach area on October 14, 2005. Essentially, the motion to reargue asserts that the Court misapprehended issues of law and fact in finding that WRD is a "mere department" of the TOWN, and not a separate, independent entity whose commissioners are authorized to establish and run the sewer district without involvement of the TOWN.

Moving counsel argues that the sewer system that caused property damage to the plaintiffs' homes was not owned, operated, maintained or repaired by the TOWN and only WRD has jurisdiction over the sewer system in its district, which was created by a special statute, 1928 N.Y. Laws, Ch. 516, and not by Town Law §61 or 198.

The prior order of the Court was based primarily on analysis of the Town Law and case law that supported same. Upon reargument, the TOWN has presented clarification of the special 1928 statute that authorized the TOWN to create the WRD, as distinct and different from the Town Law sections that were created four (4) years after the 1928 statute. In *Crouch v Funk*, 263 AD 719, 30 NYS2d 649 (2nd Dept. 1941), Second Department held that the 1932 Town Law statutes that abolished district commissioners and put them under the jurisdiction of town boards only pertained to those districts that were created by the old Town Law, and not districts created by special statutes like the WRD statute. The Court concludes that the 1928 WRD statute created a board of commissioners to run the district and, to this date, residents of WRD still elect their commissioners who have full jurisdiction of the subject sewer district.

A motion for leave to reargue, pursuant to CPLR §2221(d) "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." The purpose of a motion for leave to reargue is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided, nor to present arguments not originally presented. See, *Giovanniello v Carolina Wholesale Office Machine Co., Inc.*, 29 AD3d 737, 815 NYS2d 248 (2nd Dept. 2006); *Amato v Lord & Taylor*, 10 AD3d 374, 781 NYS2d 125 (2nd Dept. 2004).


Accordingly, after a careful reading of the submissions herein, it is the judgment of the Court that the prior order of the Court warrants modification as the TOWN has no duty with respect to the subject sewer system which is under the jurisdiction of the WRD. It is therefore

ORDERED, that the TOWN's motion for reargument is granted, and upon reargument the Court grants the TOWN's motion for summary judgment dismissing the GASPAR and GARNETT complaint and all cross-claims against it.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 17, 2009



WILLIAM R. LaMARCA, J.S.C.

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