SHORT FORM ORDER

INDEX NO. 24476/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ERNEST REECE, as Administrator of the Estate of ARTHUR WILLIAM REECE, Deceased, on Behalf of Infants, and as Conservator of JEZOAR REECE and ZAHYR REECE,

Plaintiffs,

-against-

Action No. 1
Index No. 24476/2010

J.D. POSILLICO, INC., JOHNSON ELECTRICAL CONSTRUCTION CO., WILEY ENGINEERING, P.C., ATHENA LIGHT & POWER, TOPINKA & DANGELO, INC. and HAPCO,

Defendants.

TOPINKA ASSOCIATES, INC. d/b/a TOPINKA & DANGELO INC. and KEARNEY-NATIONAL INC. d/b/a HAPCO,

Third-Party Plaintiffs,

- against -

AKRON FOUNDRY COMPANY,

Third-Party Defendant.

KENDRA ANDERSON, Administratrix of the Goods, Chattels and Estate of DELANO MIGUEL ANDERSON, KENDRA ANDERSON, Administratrix of the Goods, Chattels and Estate of LAURISSA SEIGE REECE, and KENDRA ANDERSON,

Plaintiff,

-against-

Action No. 2
Index No. 2306/2011

COUNTY OF SUFFOLK, and ERNEST N. REECE, Administrator of the Goods, Chattels and Estate of ARTHUR W. REECE JR.,

Defendants.

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ORIG. RETURN DATE: OCTOBER 15, 2015
FINAL SUBMISSION DATE: JANUARY 14, 2016
MTN. SEQ. #: 023
MOTION: MD

ORIG. RETURN DATE: OCTOBER 30, 2015
FINAL SUBMISSION DATE: JANUARY 14, 2016
MTN. SEQ. #: 024
MOTION: MD

ORIG. RETURN DATE: OCTOBER 30, 2015
FINAL SUBMISSION DATE: JANUARY 14, 2016
MTN. SEQ. #: 025
MOTION: MD

ORIG. RETURN DATE: NOVEMBER 5, 2015
FINAL SUBMISSION DATE: JANUARY 14, 2016
MTN. SEQ. #: 026
MOTION: MG

ORIG. RETURN DATE: MAY 22, 2017
FINAL SUBMISSION DATE: MAY 25, 2017
MTN. SEQ. #: 027
MOTION: MD

Upon the following papers numbered 1 to 27 read on these motions TO RENEW AND REARGUE, FOR SUMMARY JUDGMENT, AND TO RESTORE TO CALENDAR. Notice of Motion (seq. #023) and supporting papers 1-3; Reply Affirmation 4; Notice of Motion (seq. #024) and supporting papers 5-7; Reply Affirmation and supporting papers 8, 9; Notice of Motion (seq. #025) and supporting papers 10-12; Reply Affirmation 13; Affirmation in Opposition to Motions to Renew and Reargue and supporting papers 14, 15; Notice of Motion (seq. #026) and supporting papers 16-18; Affirmation in Opposition and supporting papers 19, 20; Reply Affirmation 21; Notice of Motion (seq. #027) and supporting papers 22-24; Affirmation in Opposition 25; Affirmation in Opposition 26; Affirmation in Opposition 27; it is,

ORDERED that this motion (seq. #023) by third-party defendant AKRON FOUNDRY COMPANY ("Akron") for an Order: (1) pursuant to CPLR 2221 (e), to renew and reargue Akron's prior motion for summary judgment pursuant to CPLR 3212, dismissing the third-party complaint of third-party plaintiffs TOPINKA ASSOCIATES INC. d/b/a TOPINKA & DANGELO INC. ("Topinka") and KEARNEY-NATIONAL INC. d/b/a HAPCO ("Hapco"); and (2) pursuant to CPLR 2221 (e), to renew and reargue Akron's prior motion for summary judgment pursuant to CPLR 3212, dismissing the cross-claims of defendant ATHENA LIGHT & POWER ("Athena") and any other cross-claims in this action against Akron, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #024) by defendants/third-party plaintiffs Topinka and Hapco, for an Order, pursuant to CPLR 2221 (e), to renew the prior motion for summary judgment of Topinka and Hapco based on a change in the law; and (2) pursuant to CPLR 2221 (d), to reargue the prior motion for summary judgment of Topinka and Hapco, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (#025) by defendant Athena for an Order, pursuant to CPLR 2221 (e), to renew the prior cross-motion for summary judgment of Athena based upon a change in the law; and, pursuant to CPLR 2221 (d), to reargue the prior cross-motion for summary judgment of Athena, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #026) by defendant JOHNSON ELECTRICAL CONSTRUCTION CO. ("Johnson") for an Order, pursuant to CPLR 3212, dismissing the complaint of plaintiff ERNEST REECE, as Administrator of the Estate of ARTHUR WILLIAM REECE, Deceased, on Behalf of Infants, and as Conservator of JEZOAR REECE and ZAHYR REECE

("plaintiff") and all cross-claims against Johnson, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #027) by plaintiff for an Order: (1) that the automatic stay be lifted; and (2) the case to be immediately placed back on the active trial calendar, is hereby **DENIED** as moot, given that defendants' motions have been decided herein and that the case was never on the Court's trial calendar.

By Order dated July 16, 2015, this Court decided motions for summary judgment made by Topinka and Hapco, Athena, and Akron ("Prior Order"). Within the Prior Order, the Court, among other things, granted Topinka and Hapco's motion for summary judgment as to plaintiff's claim for strict products liability based upon a defect in design, a defect in manufacturing, and breach of warranty of fitness for a particular use, and denied summary judgment as to plaintiff's claim for strict products liability based upon a duty to warn and/or a failure to warn. Topinka and Hapco's request for common law indemnification against Akron was referred to the trial court for determination in the event there is a finding of liability for strict products liability based upon a duty to warn and/or a failure to warn as against Topinka and Hapco. Athena's cross-motion for summary judgment seeking dismissal of plaintiff's complaint against Athena was denied, and its request for summary judgment on its cross-claim for the imposition of common law indemnity as against Topinka and Hapco was referred to the trial court for determination in the event there is a finding of liability for strict products liability based upon a duty to warn and/or a failure to warn as against Athena. The Prior Order also denied Akron's cross-motion for summary judgment seeking dismissal of the third-party complaint of Topinka and Hapco, and denied the branch of Akron's motion seeking the dismissal of the cross-claims of Athena.

Akron, Topinka and Hapco, and Athena have now filed the instant motions to renew and/or reargue the Prior Order. The Court has received an affirmation in opposition to these motions from counsel for plaintiff. All three motions proffer substantially the same arguments in support of renewal and reargument.

The branches of the motions seeking renewal are based upon an alleged change in the law. Topinka and Hapco also seek to reargue the prior determination to deny dismissal of the duty to warn and/or failure to warn claim.

With respect to an alleged change in the law, defendants indicate that by separate Orders of the Appellate Division, Second Department, both dated August 19, 2015, the appellate court reversed this Court's denials of prior summary judgment motions made by defendants J.D. POSILLICO, INC. ("Posillico") and WILEY ENGINEERING, P.C. ("Wiley"). The Second Department set forth the law applicable to these two defendants as follows:

> Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party. The Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely

(*Reece v J.D. Posillico, Inc.*, 131 AD3d 597, 597 [2015]; *Reece v J.D. Posillico, Inc.*, 131 AD3d 596, 596 [2015] [citations omitted]). With respect to Posillico, the Second Department found that Posillico met its initial burden of establishing that none of the exceptions above were applicable as against it and, in opposition, plaintiff failed to raise a triable issue of fact. Regarding Wiley, the Second Department found that the only exception alleged in the pleadings relative to Wiley was that Wiley launched a force or instrument of harm. Similarly, the appellate court found that Wiley met its initial burden by demonstrating, *prima facie*, that it did not launch a force or instrument of harm creating or exacerbating any allegedly dangerous condition and, in opposition, the plaintiff failed to raise a triable issue of fact (*Reece*, 131 AD3d 597; *Reece*, 131 AD3d 596).

Based upon the foregoing, defendants argue that these appellate decisions represent a change in the law as they "require a finding that the alleged condition (i.e. a base without a pole attached more than 30 feet off the roadway) is not dangerous or hazardous as a matter of law." Therefore, defendants contend that there is no duty to warn of a condition that is neither hazardous nor dangerous.

A motion for leave to renew must be based on new facts or a change in the law "not offered on the prior motion that would change the prior determination" and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see Ramirez v*

Khan, 60 AD3d 748 [2009]; *Lardo v Rivlab Transp. Corp.*, 46 AD3d 759 [2007]). While a court may grant renewal upon facts known at the time of the original motion, leave to renew should be denied when the moving party fails to offer a reasonable excuse for not submitting such new facts on the prior motion (*see Sobin v Tylutki*, 59 AD3d 701 [2009]; *Boakye-Yiadom v Roosevelt Union Free School Dist.*, 57 AD3d 929 [2008]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436 [2007]), as it is "not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Matter of Weinberg*, 132 AD2d 190, 210 [1987], *lv dismissed* 71 NY2d 994 [1988]; *see Castillo v 711 Group, Inc.*, 55 AD3d 773 [2008]; *Hart v City of New York*, 5 AD3d 438 [2004]).

Here, the Court finds that defendants failed to proffer new facts or a change in the law that would change the Prior Order. Contrary to the defendants' arguments, the Second Department did not hold that the alleged condition is not dangerous or hazardous. Rather, in the Posillico appeal, the Second Department found that none of the exceptions to the general rule that a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party were applicable as against Posillico, while in the Wiley appeal, the Second Department found that Wiley did not launch a force or instrument of harm creating or exacerbating any allegedly dangerous condition (*Reece*, 131 AD3d 597; *Reece*, 131 AD3d 596). These holdings were specific to the appellants, and did not pass on whether the condition was dangerous or not as a matter of law. Moreover, the appeals of Posillico and Wiley were decided under contract law, while the claims against Akron, Topinka and Hapco, and Athena sound in strict products liability.

Conversely, CPLR 2221 (d) (2) provides that 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. It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*see Bolos v Staten Island Hosp.*, 217 AD2d 643 [1995]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*see Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1984]). Nor does it provide an unsuccessful party with a second opportunity to present new or different arguments from those originally asserted (*see Giovanniello v Carolona Wholesale Office Machine Co., Inc.*, 29 AD3d 737 [2006]).

The Court finds that Topinka and Hapco failed to show that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law when rendering the Prior Order, which would change the determination therein concerning the claim for strict products liability based upon a duty to warn and/or a failure to warn (*see* CPLR 2221 [d] [2]; *Saggomagno v City of New York*, 29 AD3d 979 [2006]; *Foley v Roche*, 68 AD2d 558 [1979]).

Accordingly, these motions to renew and/or reargue are all **DENIED**.

Next, Johnson seeks summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it. Johnson was a subcontractor that entered into a contract with Posillico, dated September 18, 2007, to perform certain electrical work for the project Posillico won from New York State. Johnson alleges that a Change Order dated October 28, 2008, from Posillico to Johnson, directed Johnson to remove certain poles as they were oscillating in the wind. Johnson informs the Court that the poles were removed by October 23, 2008, and that Johnson did no further work on the project until March 3, 2009, when reinstallation of the poles began. The subject accident occurred on January 26, 2009.

Johnson indicates that plaintiff has only asserted a claim for negligence against it, and argues that based upon the Second Department's findings with respect to Posillico and Wiley, the complaint should similarly be dismissed against Johnson. Johnson contends that it merely followed the instructions of Posillico, who received its instructions from the State and Wiley, to remove the oscillating poles in order to avoid a dangerous situation. Further, Johnson alleges that it was not negligent in performing any of its duties under the contract, and performed all work in accordance with the specifications provided by the State at the direction of Posillico. Morever, Johnson informs the Court that its contract with Posillico expressly excludes all maintenance and protection of traffic.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308

AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]). However, mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

In the case at bar, the Court finds that Johnson has made an initial *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]) by establishing that it exercised reasonable care in the performance of its duties under the contract and, therefore, did not launch a force or instrument of harm which created or exacerbated any allegedly dangerous condition. Thus, the burden then shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial with respect to Johnson (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). The Court finds that plaintiff has failed to raise a material issue of fact.

Accordingly, this motion by Johnson for summary judgment is **GRANTED**, and plaintiff's complaint and all cross-claims asserted against Johnson are hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: March 19, 2018

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**