Law Offices of Ty Hyderally, PC
96 PARK STREET
MONTCLAIR, NEW JERSEY 07042
TELEPHONE (973) 509-0050
FACSIMILE (973) 509-2003
Attorneys for Plaintiff: John R. Amatulli

JOHN R. AMATULLI, **PLAINTIFF,** **VS.** **ROADMASTER TRUCKING, INC., PRESIDENT CONTAINER, INC., STEVE TESTA, JOHN DOES 1-10, AND XYZ CORP. 1-10,** **DEFENDANTS.**	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS L - 002648 03 CIVIL ACTION Date: December 5, 2003 Time: 9:00 a.m. Judge: The Honorable Margaret M. McVeigh, J.S.C.

PLAINTIFF=S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR RECONSIDERATION

Law Offices of Ty Hyderally, PC
96 PARK STREET
MONTCLAIR, NEW JERSEY 07042
TELEPHONE (973) 509-0050
FACSIMILE (973) 509-2003
Attorneys for Plaintiff: John R. Amatulli

Of Counsel:

TY HYDERALLY

On the Brief:

TY HYDERALLY

TABLE OF CONTENTS

INTRODUCTION

Plaintiff, John R. Amatulli (Aplaintiff@ or AAmatulli@), submits this Reply Memorandum of Law in further support of his motion, pursuant to R. 4:49-2, for reconsideration of the Court=s October 2, 2003 Order (the AOrder@), which granted defendant's motion to dismiss Counts I, II, and III of his Complaint.

It is of interest that defendants try to avert the Court's attention to the graveman of his arguments set forth in his initial memorandum by either ignoring the arguments or simply stating what is retrieved from a brief bank that the motion for reconsideration states nothing new and does not meet the standard set forth in R. 4:49-2.

ARGUMENT

I. Procedural Issues

Defendants completely ignore the fact that some rather strange procedural issues occurred. Thus, by not contesting this fact, they must admit to plaintiff's point.

II. Material Facts in Dispute

Interestingly, defendants cite to DaBronzo and utilize it for the proposition of, "[w]hether an individual is an employee o an independent contractor is a question or *[sic]* law to be determined by the Court *in the absence* of a disputed issue of material fact." DaBronzo v. Roche Vitamins, Inc., 232 F. Supp. 2d 306, 315-6 (D.N.J. 2002) (emphasis added). (Def's Br. at 8).

Defendants' statement unintentionally supports the plaintiff's argument. The material facts *are in dispute* as even The Honorable Judge McVeigh, J.S.C. acknowledged in her Order ("There is a dispute between the parties with regard to some material issues that gives this Court some pause in granting summary judgment." Order at 6, lns.10-13). Thus, defendants' motion to dismiss which prevents the issue from reaching the jury and even prevents the taking of any discovery on the subject matter, should have been denied.

III. The Pukowsky Test

Defendant ignores the fact that not only does plaintiff clarify his argument as to the other tests that can be used to determine the independent contractor issue, but plaintiff argues that even under the test set forth in Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1988), the Court failed to appreciate the significance of probative, competent evidence that even under this test, the motion to dismiss should have been denied.

Further, defendants take umbrage with plaintiff's partial reliance on the test set forth in Tofani v. Lo Biondo Brothers, 83 NJ Super. 480 (App. Div. 1964). However, they do not address the fact that the Pukowsky, *supra* case had nothing to do with whistleblower statutes, CEPA claims or claims brought under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505 (1980). Pukowsky addresses a sexual harassment claim and the standard utilized under the federal Age Discrimination in Employment Act. Amatulli's claim has nothing to do with federal anti-discrimination statutes or the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* (the "LAD").

Additionally, defendants point to the fact that the Court did not confine itself to the issue of vacation, benefits, and income taxes. (Def.'s Br. at 9). Defendants then cite to 11 redundant points to demonstrate this assertion. However, 8 or the 11 points are solely on the issue of vacation, benefits, and income taxes. The remaining points argue that plaintiff entered into a lease agreement, plaintiff was paid for the work he performed, and "Plaintiff and Roadmaster maintained a very "distinct and separate relationship." (Def.'s Br. at 9-10). The lease agreement was a document manufactured by the defendant corporation which Amatulli had to execute to commence working for defendants.

What defendants attempt to once again do is divert the Court's attention from the following facts:

> (1) It has been noted that defendants exercise great control and supervision over plaintiff. Defendants exercised control over the means and manner of Amatulli's performance; (2) Amatulli was a truck driver who was supervised by Steve Testa and the dispatchers. Plaintiff is under the supervision and control of defendant at all times through cellular phone and pager/beeper and dispatcher; (3) Amatulli was a blue collar employee who drove a truck rather than a highly skilled and technical employee; (4) Defendants furnished equipment and the workplace. Defendants supply the trailer, the corrugated boxes that are shipped, and has control over the tractor per the lease agreement. Further, defendants supplied the work site in that plaintiff parked his tractor at the back of the President Container warehouse and defendants provided plugs for all the trucks to keep them warm during the winter. (Amatulli Cert. ¶48); (5) Amatulli worked in excess of eight (8) years solely for defendants; (6) Defendants paid Amatulli's toll expenses and part of the insurance

on the tractor and trailer according to the representations of defendants. (Amatulli Cert. ¶50). Defendants 1099'd Amatulli and paid his wages weekly; (7) Defendants have a one year work agreement with plaintiff as reflected in the Lease Agreement. (Hyderally Cert., Ex. 5; the Lease Agreement). In this Agreement the work agreement existed for one year with an automatic one year renewal period. The agreement could only be terminated with 30 days notice unless cause existed. Thus, defendants had to give notice for the termination or an explanation to the termination; (8) There has been no discovery on the topic of annual leave; (9) The integral business of defendants is to ship corrugated boxes. Plaintiff fulfills defendants= business of shipping corrugated boxes; (10) There has been no discovery on the topic of retirement benefits; (11) there has been no discovery on the topic of whether the "employer" pays social security taxes; and (12) Amatulli and the other drivers were certainly under a reasonable belief that they were Aservants@ to Testa and the other supervisors of the defendant companies.

All of these above cited facts support the proposition that plaintiff should be allowed his day in Court on his CEPA and Pierce claims.

IV. Court Failed to Consider Competent Evidence

The Court stated that there was "nothing here to show that Roadmaster controlled when plaintiff worked, how he did his work, required that he take every job that was assigned to him." (Hyderally Cert. Ex. "3" Tr. 10/2/03 at 7, ln.25-p.8, ln. 6). Plaintiff's brief references this omission of the Court which defendants' intentionally do not address. By not addressing this argument they must concede to plaintiff's point.

V. Amatulli Can Establish A Claim Under The New Jersey Constitution

Plaintiff noted that the Court failed to address this issue in the Order. Yet the Court dismissed this cause of action. Defendants fail to even address this point in their response brief and thus must concede to its validity.

VI. President Container Should Remain A Defendant

Plaintiff noted that the Court failed to address the issue of President Container remaining as a defendant in its Order. Yet it signed an Order dismissing this defendant. Defendants fail to even address this point in their response brief and thus must concede to its validity.

CONCLUSION

For all the foregoing reasons, Plaintiff, respectfully requests that the Court reconsider its ruling to dismiss Counts I, II, and III of his Amended Complaint and to dismiss President Container as a party to this litigation. A proposed form of order is attached.

Dated: September 10, 2013

Law Offices of Ty Hyderally, PC
96 PARK STREET
MONTCLAIR, NEW JERSEY 07042
TELEPHONE (973) 509-0050
FACSIMILE (973) 509-2003

_____
By: TY HYDERALLY
For the Firm

C:\Documents and Settings\Tayeb\My Documents\1Law Offices of Ty Hyderally\Amatulli John\Pleadings\112703.Reply BRF Reconsideration.doc