

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33411
G/kmb

_____AD3d_____

Argued - December 5, 2011

PETER B. SKELOS, J.P.
ARIEL E. BELEN
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2010-07708

DECISION & ORDER

Maria Elbaz, respondent, v New York City Housing
Authority, appellant.

(Index No. 35591/06)

Cullen and Dykman, LLP, Brooklyn, N.Y. (Joseph Fegan, Joseph Miller, and
Andrew G. Vassalle of counsel), for appellant.

Berkman Law Office, LLC, Brooklyn, N.Y. (Robert J. Tolchin and Aaron N.
Solomon of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Bunyan, J.), dated May 26, 2010, which granted the plaintiff's motion for leave to renew and reargue her opposition to its motion for summary judgment dismissing the complaint, which had been granted in an order of the same court dated June 10, 2009, and, upon renewal and reargument, vacated the order dated June 10, 2009, and thereupon denied its motion as premature, with leave to renew upon the completion of discovery.

ORDERED that the order dated May 26, 2010, is modified, on the law, by deleting the provision thereof granting that branch of the plaintiff's motion which was for leave to renew her opposition to the defendant's motion for summary judgment dismissing the complaint, and substituting therefor a provision denying that branch of the plaintiff's motion; as so modified, the order dated May 26, 2010, is affirmed, with costs payable to the plaintiff.

The plaintiff allegedly fell outside of the defendant's premises after tripping on debris that had washed off a canopy overhang and was allowed to remain on the ground. After the plaintiff

December 27, 2011

Page 1.

ELBAZ v NEW YORK CITY HOUSING AUTHORITY

commenced this action to recover damages for personal injuries, the defendant moved for summary judgment dismissing the complaint, arguing that it neither created the alleged condition nor had actual or constructive notice of it. The Supreme Court granted the motion, concluding that the plaintiff failed to establish that the defendant had sufficient notice of the alleged condition.

The plaintiff moved for leave to renew and reargue her opposition to the defendant's motion, contending, inter alia, that the defendant's motion was premature because discovery was incomplete. In the order appealed from, the Supreme Court granted the plaintiff's motion, vacated its prior order, and denied the defendant's motion for summary judgment as premature, finding that "a great amount of discovery remain[ed] to be done."

The Supreme Court should have denied that branch of the plaintiff's motion which was for leave to renew, as the motion was not based upon new facts or a change in the law (*see* CPLR 2221[e][2]). However, the court providently exercised its discretion in granting that branch of the motion which was for leave to reargue (*see* CPLR 2221[d]; *Weiss v Fire Extinguisher Servs. Co., Inc.*, 83 AD3d 822, 823; *Smith v City of New York*, 38 AD3d 641, 643). Upon granting reargument, under the circumstances presented here, the court properly denied, as premature, with leave to renew upon the completion of discovery, the defendant's motion for summary judgment dismissing the complaint (*see* CPLR 3212[f]; *Lettieri v Cushing*, 80 AD3d 574, 576; *Botros v Flamm*, 77 AD3d 602, 603; *Smith v City of New York*, 38 AD3d at 644).

SKELOS, J.P., BELEN, LOTT and COHEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court