

Massey v Newburgh W. Realty, Inc.

2010 NY Slip Op 31103(U)

April 26, 2010

Supreme Court, New York County

Docket Number: 107380/07

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN

J.S.C.

PRESENT: _____

PART 11

Justice

6
5-7-10

Index Number : 107380/2007

MASSEY, FANTASIA

vs.

NEWBURGH W. REALTY

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is determined in accordance with the annexed decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): _____

FILED

MAY 07 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: April 26, 2010

[Signature]

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
FANTASIA MASSEY,

INDEX NO.: 107380/07

Plaintiff,
-against-

NEWBURGH W. REALTY, INC.,
Defendant.

FILED
MAY 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

Defendant Newburgh W. Realty, Inc. ("Newburgh") moves for an order pursuant to CPLR 2221(d) granting leave to reargue the decision and order of this court dated January 25, 2010, which denied Newburgh's prior motion for summary judgment. Plaintiff opposes the motion. Leave to reargue is granted and on reargument the court adheres to its original determination.

A motion for "reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979). Reargument is not intended "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided . . . [or] to provide a party an opportunity to advance arguments different from those tendered on the original application." Id at 567-568.

Defendant Newburgh contends that in denying its motion for summary judgment, the court overlooked or misapprehended the following matters of fact and/or law: 1) for the purposes of Newburgh's summary judgment motion, the court should have disregarded the photocopy or

printout of an unauthenticated photograph of the accident location allegedly taken by plaintiff's boyfriend, Michael Valerie; 2) the court overlooked or misapprehended the legal standard applied in determining the sufficiency of the sworn affidavits of Newburgh's expert meteorologist Thomas E. Downs; and 3) the court overlooked or misapprehended the law as to Newburgh's arguments regarding constructive notice.

First, as to plaintiff's photograph of the accident site, Newburgh argues that plaintiff did not list the photograph in her response to Newburgh's demands for discovery and inspection, or in response to the court's preliminary conference order. It is not disputed, however, that plaintiff's counsel faxed the photograph to defendant's counsel prior to plaintiff's deposition, and that defendant's counsel had a full opportunity to depose plaintiff about the photograph. Thus, any issues regarding lack of notice as to the existence of the photograph are without merit.

Newburgh also argues that the court erred in relying on the photograph in connection with the denial of its motion for summary judgment, since the photograph was not properly authenticated. Contrary to this argument, plaintiff submitted an affidavit in opposition to Newburgh's summary judgment motion, in which she explicitly stated, as quoted in the court's prior decision, that the black and white photocopy, and the color laser copy of the photograph "fairly and accurately depict the ice as it appeared at the time and location of the accident." Furthermore, based on the issues previously raised by Newburgh regarding the authenticity of the copies of the photograph, the court at oral argument directed plaintiff to provide a supplemental affidavit from Michael Valerie addressing the circumstances under which the photograph was taken, the type of instrument used to take the photograph and the way the photograph was developed. Plaintiff complied with the court's direction, by submitting a supplemental affidavit

from Valerie dated August 26, 2009. Furthermore, although Valerie failed to appear for a deposition pursuant to a subpoena from Newburgh, when given the option of moving to compel compliance with the subpoena, Newburgh declined. Thus, based on the affidavits from both plaintiff and Valerie, the court properly considered the photograph in determining Newburgh's motion, and as noted in footnote 3 of the court's prior decision, any issues as to the admissibility of the photograph are reserved for trial.

Second, Newburgh objects that the court applied an improper standard of "impossibility" in determining the sufficiency of its expert meteorologist's affidavit. This objection is disingenuous, as Newburgh's counsel asserted in his affirmation in support of the prior motion that "the evidence demonstrates that it would have been *impossible* for the alleged condition to exist at all" [emphasis added]. Moreover, in its memorandum of law, Newburgh argued that "weather conditions would preclude the existence of snow/ice," and quoted the portion of the Appellate Division First Department's decision in Perez v. Canale, 50 AD3d 437 (1st Dept 2008) which uses the word "impossible" in describing the expert's conclusions. This court's use of the word "impossible" in its prior decision was intended simply to reference Newburgh's arguments in support of summary judgment and Newburgh's reliance on Perez. To the extent the prior decision can be read to imply a standard of "impossible" for expert testimony, the court now clarifies that the standard in this instance is a "reasonable degree of meteorological certainty."

Notably, in the expert's affidavit submitted with Newburgh's original motion papers, the expert did not state that his opinions were based on a reasonable degree of meteorological certainty. Not until his reply affidavit did the expert use that standard when he said that "based

on the unusually high temperatures and an absence of any accumulation of wintry precipitation, I can state with a reasonable degree of meteorological certainty that the weather conditions were not conducive to an icy condition on the sidewalk as plaintiff alleges, absent unnatural circumstances.” That affidavit submitted on reply could not have been properly considered in support of Newburgh’s motion, in view of the well settled principle that deficiencies in summary judgment moving papers cannot be cured by the submission of an affidavit in reply. See Scansarole v. Madison Square Garden, L.P., 33 AD3d 517 (1st Dept 2006); Migdol v. City of New York, 291 AD2d 201 (1st Dept 2002); Ritt v. Lenox Hill Hospital, 182 AD2d 500 (1st Dept 1992). However, even if the court were to consider the expert’s reply affidavit, his statement that the “the weather conditions were not *conducive* to an ice condition on the sidewalk” (emphasis added), is insufficient to support a conclusion as a matter of law that the ice as described by plaintiff did not exist on the date of the accident.

Finally, as to the constructive notice issue, Newburgh argues that the court misapprehended the law as applied to the facts in this action, since it was not necessary for Newburgh to submit an affidavit from an employee of the convenience store in order to establish lack of constructive notice. Specifically, Newburgh asserts that it was an out-of-possession landlord that leased the store to a commercial tenant over whom Newburgh had no control, and that the weather records and the experts’ affidavits are sufficient to establish lack of constructive notice.

At the outset it must be noted that it is of no moment whether an employee of the store is employed by the tenant or the landlord, as the court based its conclusion on the absence of any competent proof establishing the absence of ice. The court clarifies that an affidavit of an


[*6]
employee is not necessary, but Newburgh nevertheless is required to present competent evidence establishing entitlement to summary judgment. Newburgh argues that the weather records and expert's affidavits establish lack of constructive notice. For the reasons discussed above and in the court's prior decision, the expert's affidavits are insufficient. Moreover, Newburgh's reasoning is circular, since it is essentially arguing that constructive notice of an ice condition is lacking based on the expert's conclusion that such condition did not exist.

Accordingly, it is

ORDERED that the motion by defendant Newburgh Realty Inc. for leave to reargue is granted and on reargument the court adheres to its original determination denying defendant's motion for summary judgment.

DATED: April 26, 2010

ENTER:



HON. JOAN A. MADDEN
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