

Butkow v City of New York

2010 NY Slip Op 31989(U)

July 22, 2010

Supreme Court, New York County

Docket Number: 112090-05

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHÉ

PRESENT: _____

PART 10

Justice

Pamela Butkow

INDEX NO. 112090-05

- v -

MOTION DATE _____

City of NY

MOTION SEQ. NO. ~~002~~ 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUL 28 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/22/10

HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Pamela Butkow,
Plaintiff,

DECISION/ ORDER
Index No.: 112090-05
Seq. No.: 002

-against-

City of New York, Republican National
Committee, Turner Construction Company,
Universal Builders Supply, Inc. and
New York City Host Committee-2004,

FILED

PRESENT:
Hon. Judith J. Gische
JSC

Defendants.

JUL 28 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Δ NYC, TCC, NYCC2004 n/m (RR) w/FJL affirm, exhs	1
π opp w/BPH affirm, exhs	2
Δ NYC, TCC, NYCC2004 reply w/FJL affirm, exhs	3
Stip re: reply to UBS opp being w/d 7/810	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action in which plaintiff Pamela Butkow ("plaintiff") alleges she was injured on a public sidewalk near where there was ongoing construction.

Defendants City of New York ("City"), Turner Construction Company ("Turner") and the New York City Host Committee ("NYCHC") (collectively "defendants") brought a prior motion for summary judgment dismissing plaintiff's claims against them and all cross claims between them. That motion was granted as the City and NYCHC, but denied as to Turner, for denied for reasons set forth in the court's prior order dated September 4, 2008 filed September 8, 2008 "prior order").

Presently before the court is Turner's motion for renewal (CPLR 2221). The basis

for renewal is that discovery is now complete and new facts have emerged which now warrant summary judgment in favor of Turner as well. The prior order is incorporated herein by reference.

A motion for summary judgment may be renewed if it was denied without prejudice because discovery was incomplete and, therefore, the motion was brought prematurely (CPLR 3212 [f]; Aurora Loan Services, LLC v. LaMattina & Associates, Inc., 59 A.D.3d 578 [2nd Dept 2009]; Mihajlovic v. Cuenca; 109 A.D.2d 694 [1st Dept 1985]). Furthermore, since permission to renew is discretionary with the court, the movant must show additional facts that were not before the court on the original application, which existed at that time, but were then unknown to the movant (see Foley v. Roche, 68 AD2d 568, 569 [1st Dep't 1979]; James v. Nester, 120 A.D.2d 442 [1st Dep't 1986]). Neither standard is met by Turner's motion for renewal. In fact, this is a thinly veiled motion for reargument, brought almost two years after the court's prior order.

Contrary to Turner's assertions, the court did not deny its motion for summary judgment solely on the basis that discovery was incomplete. The court went on to consider the motion on the merits, finding that:

"Even were the court to decide that Turner's motion is not premature, there are triable issues of fact that require the denial of Turner's motion. There is [deposition] testimony that Turner had an active role in sectioning off the construction work from the public walkway. There is, therefore, a factual dispute whether Turner knew, or in the exercise of reasonable care, should have known, of the dangerous condition existing at the RNC project site. There is inconclusive deposition testimony about how long the piece of fencing material was on the ground, where it came from, and whether it was placed there, or it fell from the already erected fence. While Turner surmises that fencing material on the ground "must have" come from UBS and therefore UBS was negligent in the manner it did

[* 4] ,

its work, a motion for summary judgment cannot be based upon speculation. It must be supported by evidence in admissible form tending to eliminate any factual disputes. Thus, Turner has not met its burden of either proving that UBS was negligent, or that it (Turner) was not negligent.”

Turner contends that the plaintiff has now filed her note of issue, certifying the case for trial because all discovery is complete. Although plaintiff raised the issue that Hall, Turner’s site safety manager, had not been deposed at the time Turner (and the other defendants) brought their prior motion and plaintiff argued that defendants motion was premature for that reasons, she has never deposed Hall. Thus, Turner now argues that plaintiff’s failure to depose the site safety manager is significant and plaintiff has no proof Tuner created or had notice of the dangerous condition alleged. This argument, however, presumes that Hall’s testimony would resolve all triable issues in Turner’s favor. In any event, the *absence* of Hall’s testimony is not a basis for renewal.

The other testimony that Turner refers to includes the “new” depositions of Benjamin (3/18/08) and Curry (2/12/08). Although the prior motion for summary judgment (motion sequence no. 2) was made in December 2007, the court’s automated calendar shows numerous adjournments so that the motion was not submitted until June 26, 2008. The court’s prior order is dated September 4, 2008. Clearly, these witnesses were deposed after defendants made their motion, but before the motion was argued and submitted. No argument is made that Turner made a motion to amend its motion to include the “new” facts it now claims existed. As the moving party, Turner knew the depositions had been held and if Turner believed there was new information to help its motion for summary judgment, they could have taken appropriate steps to put that information before the court prior to the motion being decided.

5]

A defendant cannot prevail on a motion for summary judgment by pointing out the flaws or holes in the plaintiff's case. As the movant, Turner has the initial burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Only if the moving party meets that burden does it then shift to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

Turner never met its initial burden of putting forth evidence it did not create or have notice of the dangerous condition alleged. Arguments that Buckingham "admitted UBS was responsible [for maintenance of] the fence . . ." and other safety measures simply rehashes arguments that were already considered and decided against Turner by the court.

The court denies the motion for renewal.

The court's electronic files indicate the case is in mediation and has been adjourned several times. Since the note of issue was filed, this case is considered ready for trial. The plaintiff shall serve a copy of this decision and order on the Trial Support Office so it can be scheduled for trial.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

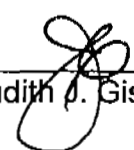
Dated: New York, New York
July 22, 2010

FILED

JUL 28 2010

NEW YORK
COUNTY CLERK'S OFFICE

So Ordered:


Hon. Judith J. Gische, JSC