

Petty v Dumont

2010 NY Slip Op 32032(U)

July 27, 2010

Supreme Court, New York County

Docket Number: 103088/06

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla
Justice

PART 19

Robert Petty

INDEX NO. 103088/06

- v -

MOTION DATE _____

Arnold Dumort

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Renew

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined as

accordance with the
accompanying decision/order.

FILED

AUG 02 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/27/10

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
ROBERT SCOTT PETTY AND HECTOR A. AMAYA,

Plaintiffs,
-against-

Index No.:103088/06
Submission Date: 5/26/2010

ARNOLD DUMONT, THE CITY OF NEW YORK,
THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION AND CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,

DECISION AND ORDER

Defendants.

-----X
For Plaintiff:
Abraham, Lerner & Arnold
292 Madison Avenue, 22nd Fl.
New York, NY 10017

For Defendant Arnold Dumont:
Baker, McEvoy, Morrissey & Moskovits, P.C.
330 West 34th Street, 7th Floor
New York, NY 10001

FILED
AUG 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

For Defendant The City of New York:
Michael A. Cardozo, Corporation Counsel
100 Church Street
New York, NY 10007

Papers considered in review of this motion to renew:

Notice of Motion 1
Affs in Opp 2, 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant The City of New York ("City") moves to renew its September 8, 2009 motion for dismissal and/or summary judgment, which this Court denied in a decision and order dated November 2, 2009.

On October 16, 2005, plaintiffs Robert Scott Perry ("Perry") and Hector A. Amaya ("Amaya") were backseat passengers in a taxicab that collided with a concrete "jersey"

barrier near the intersection of West 66th Street and West End Avenue. The barriers were allegedly placed in that location by the City to surround Consolidated Edison's Energy Control Center as a counter-terrorism measure for furthering public safety in the aftermath of September 11, 2001.

Perry and Amaya commenced this action in or about March 2006 seeking to recover damages for the injuries they sustained as a result of the collision. They alleged that defendant Arnold Dumont ("Dumont") was negligent in his operation of the taxicab at the time of the collision. They further alleged that defendants City, The New York City Department of Transportation ("DOT") and Consolidated Edison Company of New York, Inc. ("Con Ed") were negligent in, *inter alia*, failing to maintain and/or properly place warning signs, barricades, pavement markings or other devices at the accident site to warn operators of vehicles traversing the public street where the concrete "jersey" barriers were located.

On or about September 8, 2009, the City moved for dismissal and/or summary judgment, arguing that the City's alleged actions or inactions were not the proximate cause of Perry and Amaya's injuries. In an order dated November 2, 2009, this Court denied the motion, finding issues of fact as to the defendants' respective liability.

The City now moves for leave to renew its September 8, 2009 motion, arguing that the claims asserted against it must be dismissed because it is immune from liability in this action based on a clarification of the law as set forth in the recent First Department

decision, *Devivo v. Adeymo*, 70 A.D.3d 587 (1st Dept. 2010).¹ In *Devivo*, plaintiff sought to recover damages for injuries she sustained when, due to barricades surrounding the entrance to the Apollo Theaters' premises, she was forced to step onto a roadway and was struck by a car. The Apollo Theater and the City of New York had agreed to erect the barricades for crowd control during Apollo's 70th Anniversary celebration. They agreed on the barricade set-up, which caused pedestrians to walk in the parking lane, access to which was denied to cars on the day of the event. Allegedly, members of the New York City Police Department altered the configuration of the barricades so that pedestrians had to walk on the roadway. Defendant The City of New York moved for summary judgment dismissing the complaint insofar as asserted against it, arguing that it could not be held liable for plaintiff's injuries due to governmental immunity. The court affirmed the grant of the City's motion, holding that the "officers' alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of public safety." *Devivo*, 70 A.D.3d at 587.

The City maintains that the *Devivo* decision clarifies the law of governmental immunity in holding that the reasoning that supports municipal immunity from suit for the discretionary act of direction of traffic also applies to the discretionary act of placing barriers to further public safety, even if no specific oral direction is involved. The City contends that the placement of the concrete barriers in this case was indisputably a

¹ Notably, the City did not raise governmental immunity as a defense in its answer and did not argue the issue of governmental immunity in its September 8, 2009 motion.

discretionary act undertaken by the City to further public safety and therefore, even if the City was negligent in placing the concrete barriers on West 66th Street, such negligence can not support municipal liability.

In opposition, Perry and Amaya first argue that the holding in *Devivo* does not represent a change or clarification of the law as required to establish leave to renew, rather, *Devivo* is simply an application of the well-established principle that a municipality may not be held liable for traditional discretionary governmental functions absent a special relationship.²

They further argue that in any event, *Devivo* is not applicable to this case because *Devivo* involved immunity in connection with a traditional discretionary governmental function whereas this case involves liability for proprietary functions, i.e. the City's alleged failure to place adequate warning signs to oncoming vehicles of the presence of the barriers, failure to paint lane lines on West 66th Street directing traffic into danger, and failure to have adequate safety treatments at the end of the barriers. They further argue that the *Devivo* case is not applicable because it is not factually on point with this case in that the barriers in that case were not permanent and the plaintiff in that case did not come into actual contact with the subject barriers.

² Petty and Amaya also note that the *Devivo* decision is merely a one page affirmation of Judge Karen S. Smith's July 21, 2009 order, in which the same reasoning was applied. They argue that Judge Smith's original order was available at the time of the City's September 8, 2009 motion and thus the instant motion to renew is really just the City's attempt to make another untimely motion for summary judgment.

Dumont also opposes the motion, reiterating the argument that the *Devivo* case is inapplicable.

Discussion

It is well settled that a motion to renew is not available when it is predicated on legal theories not advanced in the prior motion. *Venuti v. Novelli*, 179 A.D.2d 477 (1st Dept. 1992); *Mid-State Elevator Co. v. Empire-Salina Assocs.*, 190 A.D.2d 1061 (4th Dept. 1993); *Brookview Homeowners' Ass'n v. Mark IV Constr. Co.*, 178 A.D.2d 967 (4th Dept. 1991). Here, the City's motion to renew advances arguments which were not raised in its initial September 8, 2009 motion and is thus, improper.

Further, a motion for leave to renew pursuant to CPLR §2221(e) will be granted if the movant demonstrates that there has been a change in the law or an intervening clarification of the law that would change the prior determination. *See Roundabout Theatre Company, Inc. v. Tishman Realty & Construction Co.*, 302 A.D.2d 272 (1st Dept. 2003). Here, the City fails to demonstrate that there has been "a change in the law or an intervening clarification of the law that would change the prior determination." CPLR §2221(e). While the court's holding in *Devivo v. Adeyemo*, 70 A.D.3d 587 (1st Dept. 2010) may support and lend credence to the City's argument here that it is entitled to summary judgment on the ground of governmental immunity, it does not constitute a change or clarification of the law sufficient to meet the requirements for a motion to renew.

In *Devivo*, the court held that the “officers’ alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of public safety.” *Devivo v. Adeyemo*, 70 A.D.3d 587, 587 (1st Dept. 2010). In reaching its holding, the *Devivo* court relied, *inter alia*, on *Balsam v. Delma Eng’g Corp.*, 90 N.Y.2d 966 (1997). In *Balsam*, the court explained that “traffic regulation is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers” and held that “the challenged police failure to close the roadway or divert traffic here similarly falls well within the immunized ‘governmental’ realm of municipal responsibility.” *Balsam*, 90 N.Y.2d at 968. The *Devivo* court merely applied that well established principle to the specific set of facts presented in its case, i.e. the City’s act of traffic regulation through the use and placement of barricades to further public safety, but did not set forth any changes to or clarifications of the doctrine of municipal liability.

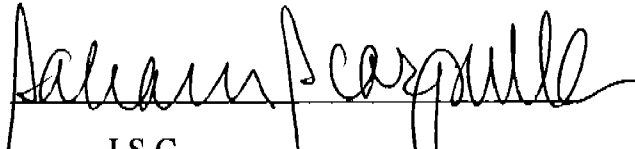
In accordance with the foregoing, it is

ORDERED that the defendant City of New York's motion to renew its September 8, 2009 motion for dismissal and/or summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 27, 2010

ENTER:


J.S.C. **Sal Scarpulla**
J.S.C.

FILED
AUG 02 2010
NEW YORK
COUNTY CLERK'S OFFICE