Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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CLAUDIA ABARCA,

Plaintiff,

-against-

CLARKS SHOES and MACERICH QUEENS LIMITED PARTNERSHIP,

Defendants.

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Index No: 23455/07
Motion Date: 3/10/10
Motion Cal. No: 1
Motion Seq. No: 4

The following papers numbered 1 to 17 read on this motion by plaintiff for an order vacating, rearguing and renewing a prior order of this Court; and upon this cross-motion by defendant Clarks Shoes for leave to reargue.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.....	5 - 9
Answering Affidavits-Exhibits.....	10 - 12
Reply Affirmations-Exhibits.....	13 - 17

Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff as a result of a slip and fall accident on July 18, 2007, which occurred during the course of her employment inside the Coach store ("Coach") located at the Queens Center Mall at 90-15 Queens Boulevard, in Elmhurst, New York. Defendant Macerich Queens Limited Partnership ("Macerich"), the owner and out-of-possession landlord of the mall stores, leased the subject space to Coach, and the premises directly above Coach to defendant Clarks Shoes ("Clarks"). Plaintiff commenced this action on September 17, 2007, alleging, inter alia, that defendants were negligent in allowing water to leak through the ceiling of Clarks and accumulate on the floor of Coach, upon which plaintiff allegedly fell and sustained the injuries for which she complains. After the note of issue was filed, but before depositions were conducted, Macerich and Clarks moved for summary judgment dismissing the complaint against them. By order of this Court dated September 25, 2009, this Court granted Macerich's motion and denied Clarks motion for summary judgment on the basis that Clarks' motion was untimely. In making its determination, this Court stated, in pertinent part, the following:

Under the terms of the lease, Clarks and Coach were each responsible for maintenance of the premises including its plumbing issues. The affidavit of Macerich's witness indicates that water had backed up from the toilet inside Clarks with tremendous force and volume such that it struck the ceiling and subsequently leaked down through the floor of Clarks to the Coach store below. The flooding occurred within spaces which Macerich had leased to Clarks and the Coach store, however, these were not the only stores affected by the storm. As a result of the flooding created by the unprecedented storm, part of Queens was declared a federal disaster area.

"An out-of-possession landlord is not liable for injuries that occur on its premises unless it retains control over the premises or is contractually bound to repair unsafe conditions" (*Taylor v Lastres,* 45 AD3d 835 [2007]; *see Dunitz v J.L.M. Consulting Corp.,* 22 AD3d 455 [2005]; *Roveto v VHT Enters., Inc.,* 17 AD3d 341 [2005]; *Scott v Bergstol,* 11 AD3d 525 [2004]). Here, under the terms of the lease agreements with both Clarks and the Coach store, Macerich had no duty to maintain or repair the leased space; the leases provided that the tenants (Coach and Clarks) had the sole duty to maintain and repair the inside of the stores including the floors, plumbing and toilets.

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Curtis v Dayton Beach Park No. 1 Corp.,* 23 AD3d 511, 512 [2005]; *see Britto v Great Atl. & Pac. Tea Co., Inc.,* 21 AD3d 436 [2005]). Here, Macerich produced evidence that it did not receive notice of the condition complained of until after 10:00 a.m., about one and one-half hour after plaintiff slipped and fell. This evidence was not contradicted.

Macerich also moves for summary judgment in its favor on the ground that the flooding was caused by an act of God. A defendant is exculpated from liability for negligence when the injury is the result of an act of God (*Tel Oil Co. Inc. v City of Schenectady*, 278 AD2d 571 [2000]; *Prashant Enterprises Inc. v State*, 206 AD2d 729 [1994]). The expression "act of God" has been defined as an unusual, extraordinary, sudden, unexpected, and irresistible manifestation of forces of nature; it denotes those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by

> human care, skill, and foresight *(Tel Oil Co. Inc. v City of Schenectady, supra; Prashant Enterprises Inc. v State, supra*). An unusual, extraordinary, and unprecedented event constitutes an act of God when it is of a type that could not be foreseen or avoided (*Prashant Enterprises Inc. v State, supra*). []
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> Here, there was substantial proof of the extraordinary violence of the storm of July 18, 2007. Local newspapers reported that in places several inches of rain fell in a single hour causing sewers to back up and flood businesses and homes in Queens County. Certified meteorological records from Kennedy and LaGuardia Airports confirm that a heavy rain fell between the hours of 7:00 a.m. and 9:00 a.m.. The affidavit of Stephen Turchin avers that the heavy rainfall was unprecedented and was the cause of the back up in the lines of the toilet in Clarks which exploded with such force that it hit the ceiling of Clarks before flooding the Coach store below. In opposition, there was no proof of any negligence on the part of Macerich or Clarks which was a proximate cause of the damage. The storm was unprecedented, was not to be reasonably anticipated, and was an act of God.
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> Plaintiff opposes the motion on the ground that it is premature because no depositions have been conducted as yet. The mere fact that disclosure is incomplete does not preclude the grant of summary judgment (*Chemical Bank v PIC Motors Corp.,* 58 NY2d 1023 [1983]; *Perez v Brux Cab Corp.,* 251 AD2d 157 [1998]). A party opposing summary judgment on the basis that further discovery is necessary must demonstrate how further discovery might reveal material facts in the movant's exclusive knowledge (*see Cooper v 6 West 20th St. Tenants Corp.,* 258 AD2d 362 [1999]; *First City Natl. Bank & Trust Co. v Heaton,* 165 AD2d 710 [1990]). Here, plaintiff proffers no evidence to suggest any sort of testimony which might attribute some responsibility to Macerich for the accident. Since the lease delegated responsibility for the plumbing and toilets to Coach and Clarks, and there is no evidence that Macerich acted negligently or otherwise unreasonably, the court is releasing it from this litigation (*see Doherty v City of New York*, 16 AD3d 124 [2005]).

It is upon the foregoing that plaintiff moves and Clarks cross-moves for an order rearguing this Court's underlying September 25, 2009 order. Plaintiff also moves for renewal of that order.

With regard to that branch of the motion, and cross-motion for reargument, an application for leave to reargue, pursuant to CPLR § 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." See, Everhart v. County of Nassau, 65 A.D.3d 1277; Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 (2nd Dept. 2007); Collins v. Stone, 8 A.D.3d 321 (2nd Dept. 2004); Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2nd Dept. 2003). The purpose of a motion for leave to reargue "[] is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." Foley v. Roche, 68 A.D.2d 558, 567 (2nd Dept. 1979). It is also not an opportunity for an unsuccessful party to present arguments not originally presented. Giovanniello v. Carolina Wholesale Office Mach. Co., Inc. , 29 A.D.3d 737 (2 nd Dept. 2006); Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2nd Dept. 2005). Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2nd Dept. 2004). It is within the court's discretion to grant leave to reargue when it appears that the court may have "overlooked certain facts and misapplied the law in its initial order." Dunitz v J.L.M. Consulting Corp., 22 A.D.3d 455, 456 (2nd Dept. 2005); Marini v Lombardo, 17 A.D.3d 545 (2nd Dept. 2005). Further, CPLR § 2221(d)(3) provides that a motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

Here, the September 25, 2009 order of this Court with notice of entry dated October 2, 2009, was served by Macerich upon plaintiff and Clarks on October 8, 2009. Plaintiff's motion, dated and served on December 7, 2009, is therefore untimely. Thus, that branch of plaintiff's motion for leave to reargue must be denied. See, Selletti v. Liotti, 45 A.D.3d 668 (2nd Dept. 2007). Likewise denied as untimely is the cross-motion by Clarks for leave to reargue. Clarks asserts that it initiated an appeal, by Notice of Appeal dated November 16, 2009. It states that, "to date, Clarks' appeal is pending and therefore the instant motion should be deemed timely." In support of this contention, Clarks proffer the Appellate Division, First Department decision of Leist v. Goldstein, 305 A.D.2d 468, which found that since the "motion for leave to reargue was made at the court's request and after [the] filing of a notice of appeal but prior to the perfection of the appeal, the granting of reargument was an appropriate exercise of the court's discretion (see Liss v Trans Auto Sys., 68 NY2d 15, 20 [1986]; Matter of Budihas v Board of Educ., 285 AD2d 549 [2001]; Matter of Burns, 228 AD2d 674 [1996]; Bermudez v New York City Hous. Auth., 199 AD2d 356 [1993])." Id. at 469. Nevertheless, Clarks' reliance upon this matter is misplaced as Liss v. Trans Auto Systems, Inc., 68 N.Y.2d 15 (1986) and its progeny, the cases that are cited by the Leist Court in support of the aforementioned proposition, hold that "regardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action." Liss at 20. Thus, notwithstanding Clarks' contention to the contrary, this persuasive precedent is inapposite to the instant matter and does not compel this Court to consider its motion timely based upon the holding in Leist. Indeed, the instant motion was neither made upon request of this Court, nor is the underlying order, arising from summary judgment applications, an interlocutory order. The only commonality between the instant application and the Leist action is the fact that Clarks filed a Notice of Appeal prior to moving to reargue.

It is well settled law that, "'[an] appeal must be taken "within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry' (CPLR § 5513 [a]). The time period for filing a notice of appeal is nonwaivable and jurisdictional (citations omitted)." Jones Sledzik Garneau & Nardone, LLP v. Schloss, 37 A.D.3d 417 (2nd Dept. 2007); see, Wei v. New York State Dept. of Motor Vehicles, 56 A.D.3d 484 (2nd Dept. 2008). Here, the record reveals that Clarks filed a Notice of Appeal on November 16, 2009, despite service upon it of the underlying order with notice of entry on October 8, 2009. Thus, this Court finds no basis, discretionary or other, to deem timely the instant cross motion which was dated and filed on February 11 and 17, 2010, respectively.

Arguendo, even if this Court determined that the cross motion was timely, which it does not, the motion for leave to reargue would still be denied. Clarks contends that this Court erred in denying its underlying summary judgment motion as untimely. In support of its position, Clarks relies upon Ianello v. O'Connor, 58 A.D.3d 684, 686 (2nd Dept. 2009), an Appellate Division, Second Department decision, which states[58 A.D.3d at 685-6]:

> Upon a showing of good cause, the Supreme Court is authorized to extend a court-ordered deadline for making a summary judgment motion (see CPLR 2004). Here, since the grounds for summary judgment advanced by the appellants were nearly identical to those advanced in Jacques' pending summary judgment motion, the requisite good cause for the belated motion was established (see CPLR 2004; Joyner-Pack v Sykes, 54 AD3d 727 [2008]; Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616, 618 [2008]; Grande v Peteroy, 39 AD3d 590, 591 [2007]). Accordingly, under the circumstances of this case, it was an improvident exercise of discretion to refuse to consider the appellants' motion for summary judgment on the merits (see CPLR 2004; Joyner-Pack v Sykes, 54 AD3d 727 [2008]).

Clark contends that Ianello is directly analogous to the facts in the instant matter, and therefore good cause was established for this Court to consider its belated motion for summary judgment. It states, inter alia, the following:

> Here, Clarks submits that the requisite good cause has been established because the grounds for summary judgment advanced by Clarks and Macerich were identical. The motions by both parties asserted that the flood was caused by an act of God. [] Therefore, even though the Court failed to reach the substantive arguments raised by Clarks' motion, the same basis exists for granting summary judgment to Clarks as it did for Macerich. As such, it would have been well within this Court's discretion to extend the time limit for Clarks' motion under CPLR 2004 as good cause was established.

Notwithstanding Clarks contentions to the contrary, the crux of the underlying motions were not identical. Macerich moved for summary judgment in its favor on the grounds that: (1) it had no duty to plaintiff; (2) that it had no actual or constructive notice of the condition complained of; and (3) the flooding which caused plaintiff's fall was due to an act of God. With respect to duty, Macerich stated that under the respective lease agreements with Clarks and Coach, it had no duty to maintain or repair the leased space, and such obligation was the sole responsibility of Clarks and Coach to maintain and repair the inside of the stores including the floors, plumbing and toilets. To the contrary, Clarks argued in its underlying motion for summary judgment that Macerich was obligated to repair the plumbing systems not within the premises. Clarks states:

> Counsel [for Macerich] attempts to mislead this Court in his assertion that the leak in question emanated from Clarks Shoes. However it is clear from the affidavit of Steven Turchin that is annexed to the co-defendant's motion for summary judgment [] that the leak in question emanated from a severe rain storm that caused a back up in the main sewer line. The aforementioned affidavit clearly indicates that there were numerous leaks in the mall from the condition. It is also clear that in response to this condition the mall subsequently had a plumber install a backflow valve in the line to Clarks Shoes toilet. This valve only allows water to go in one direction, thus preventing any pressure related flooding through the toilet. It is clear from his affidavit that had this system been installed in the plumbing system maintained by the mall, that this incident would not have occurred.

The final paragraph before the concluding paragraph of the affirmation in support states that "in the event that this Court decided to dismiss this action based on the Macerich's claim that the leak was the result of an Act of God, then [Clarks] respectfully asks this Court to also dismiss the action against Clarks based on the same arguments." In light of the gravamen of Clarks' motion seeking dismissal based upon a contrary position than that asserted by Macerich, this one assertion is simply not sufficient to establish matters of fact or law allegedly overlooked or misapprehended by this Court in determining the prior motion.

Plaintiff also moves to renew that branch of the underlying order which granted summary judgment to Macerich. "'[A] motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion' (citation omitted). A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (citation omitted).'" Sun Whan Lee v. Doe, 57 A.D.3d 651 (2nd Dept. 2008); Elder v. Elder, 21 A.D.3d 1055 (2nd Dept. 2005). A motion for leave to renew is granted sparingly, and "[] should be denied unless the moving party offers a reasonable justification as to why the new facts were not submitted on the prior motion." Osborne v. Evans, 47 A.D.3d 904 (2nd Dept. 2008); see, Sun Whan Lee v. Doe, 57 A.D.3d 651 (2nd Dept. 2008); Leyberman v.

Leyberman, 43 A.D.3d 925 (2nd Dept. 2007); Renna v. Gullo, 19 A.D.3d 472 (2nd Dept. 2005); O'Dell v. Caswell, 12 A.D.3d 492 (2nd Dept. 2004).

Here, plaintiff moves to renew on the ground that the depositions of Stephen Turchin, the Operations Manager for the Queens Center Mall, and Carmen Palaguachi, a Store Manager for Clarks, occurred subsequent to the submission of the underlying motions for summary judgment. Plaintiff asserts the following:

> As a result of those depositions, plaintiff now has sworn testimony from a witness from Clarks, which was unavailable at the time the prior motions were made, which establishes that Clarks experienced flooding prior to the date in question and that Mr. Turchin himself may have had knowledge of the prior flooding.
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> Since Macerich had notice of prior flooding and it clearly is responsible for that section of the plumbing which permitted the backflow to occur (having installed the check valve in its line) the motion for summary judgment must be denied.

In opposition, Macerich states that the motion to renew should be denied as plaintiff certified that the case was ready for trial by filing the note of issue. It states:

> In the case at bar, plaintiff commenced this action in 2007. She filed her note of issue certifying that all discovery was complete in 2009. During the course of discovery, plaintiff did not appear for her own deposition nor did she attempt to take the depositions of defendants. Thus, plaintiff cannot argue that the deposition testimony of the witness from Clarks Shoes was not available. Nor can plaintiff argue th at she had a reasonable justification for failing to take the deposition of defendants earlier.
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> Defendant Macerich then moved for summary judgment, which is the procedural equivalent of a trial. [] Plaintiff failed to present evidence in admissible form showing that Macerich had notice of a dangerous condition. The court then granted Macerich's motion. If plaintiff did not have evidence to prove this essential element of her case, she should not have filed her note of issue and certificate of readiness for trial. The fact that she did, should now bar her from claiming that she needed additional discovery.

In the case at bar, plaintiff has not met the criteria for leave to renew. Although depositions were conducted after the submission of motions for summary judgment, plaintiff's filing of the note of issue was the mechanism by which defendants were permitted to move for summary judgment

in the first instance. The fact that plaintiff failed to exercise due diligence in conducting discovery and submitting to examinations before trial cannot be considered a justifiable reason for failing to present such facts on the prior motions. Indeed, any prejudice that plaintiff claims to have suffered as a result of the discovery failures, should have been resolved before the filing of the note of issue. Thus, plaintiff cannot receive the benefit of alleging that the current application is based upon new facts not offered on the prior motion because the depositions were not conducted at the time the motions were submitted, and using such as a reasonable justification for the failure to present such facts on the prior motion. See, Gale v. Lotito, 50 A.D.3d 903 (2nd Dept. 2008); Marcus & Co., LLP v. Pescitelli, 48 A.D.3d 646 (2nd Dept. 2008). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (citation omitted).'" Sun Whan Lee v. Doe, 57 A.D.3d 651 (2nd Dept. 2008); Elder v. Elder, 21 A.D.3d 1055 (2nd Dept. 2005). Consequently, this Court finds that renewal is unwarranted.

Accordingly, the motion by plaintiff for an order vacating, rearguing and renewing the September 25, 2009 order of this Court, as well as the cross motion by defendant Clarks Shoes for leave to reargue that same order, are both denied.

Dated: April 23, 2010

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J.S.C.