

Leeds v City of New York

2011 NY Slip Op 32737(U)

October 6, 2011

Supreme Court, New York County

Docket Number: 127954/2002

Judge: Saliann Scarpulla

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

PRESENT: Soliani Scarpulla
Justice

PART 19

Index Number : 127954/2002
LEEDS JEANNETTE FINKBINER
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

FILED

OCT 12 2011

Cross-Motion: Yes No

NEW YORK
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Upon the foregoing papers, It is ordered that this motion

decided per the memorandum decision dated 10/6/2011
which disposes of motion sequence(s) no. 8

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

FILED

OCT 12 2011

Dated: 10/6/11

NEW YORK COUNTY CLERK'S OFFICE
Soliani Scarpulla
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: IAS PART 19

-----X
JEANETTE FINKBINER LEEDS and
DAVID LEEDS,

Plaintiffs,

Index No.: 127954/2002

-against-

THE CITY OF NEW YORK, JUDLAU
CONTRACTING, INC., CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., FELIX
EQUITIES, INC., EMPIRE CITY SUBWAY CO.
LTD., MANUEL ELKEN CO., P.C. and
VERIZON COMMUNICATIONS, INC.,

DECISION AND ORDER

FILED

OCT 12 2011

Defendants.

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-----X
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New York, NY 10006

For Defendants Judlau Contracting, Inc. and The City of New York:
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885 Third Avenue, 16th Floor
New York, NY 10022

For Defendant Manuel Elken Co., P.C.:
Cohen, Kuhn & Associates
2 Park Avenue, 6th Floor
New York, NY 10016

For Defendant Consolidated Edison of New York, Inc.:
Richard W. Babinecz
4 Irving Place, Room 1800
New York, NY 10003

For Defendant Empire City Subway Co., Ltd:
Conway, Farrell, Curtin & Kelly, P.C.
48 Wall Street
New York, NY 10005

Papers considered in review of this motion for summary judgment and motion to reargue:

Notice of Motion 1
Notice of Motion 2
Affs in Opp 3,4,5
Replies 6,7

HON. SALIANN SCARPULLA, J.:

This action stems from a personal injury claim in which plaintiff Jeanette Finkbinder Leeds (“Leeds”),¹ alleges that she suffered injuries as a result of a trip and fall. In motion sequence 008, defendant Empire City Subway Co. Ltd. (“Empire City Subway”) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the Leedses’ complaint. In motion sequence 009, the Leedses move, pursuant to CPLR 2221(d), for leave to reargue the portion of the court’s April 5, 2011 decision which granted the summary judgment motions of defendants Judlau Contracting, Inc. (“Judlau”) and Manuel Elken Co. P.C. (“Elken”). Upon reargument, the Leedses seek to have those motions denied. Motion sequences 008 and 009 are hereby consolidated for disposition.

BACKGROUND AND FACTUAL ALLEGATIONS

Leeds’ accident occurred on November 10, 2001 at the intersection of William Street and John Street. She testified that she tripped in what she referred to as a “saucer-like depression” in the intersection. Leeds explained that she did not fall directly in the cross-walk since she had to walk a little bit outside of the crosswalk due to barricades.

At some point prior to September 11, 2001, some of the defendants had been in the area of Leeds’ accident working on installing a new water main. This project had been initiated by the defendant New York City Department of Design and Construction (“The City of New York”). Water main installation consisted of excavating the street, digging

¹David Leeds, plaintiff’s husband, is also a plaintiff in this action.

the trench, installing the water mains, restoring the trench and then placing temporary plates over the trench. After temporary restoration is complete, a final restoration must be done.

Judlau was the contractor for the project, and Elken was the project's consultant. Consolidated Edison Company of New York, Inc. ("Con Edison") was also on-site inspecting the project. However, after September 11, 2001, many of the contractors in the area, including Judlau, stopped working on the water main project and assisted Con Edison and Empire City Subway in laying down wires restoring electricity downtown.

After issue was joined on July 27, 2010, several of the defendants moved for summary judgment. On April 5, 2011, this court granted the summary judgment motions of The City of New York, Judlau, Verizon and Elken. Con Edison's motion for summary judgment was denied.

The court concluded that although Judlau did perform some excavation work at some point prior to Leeds' accident, after September 11, 2001, Judlau did not continue working on the water main project until well after Leeds' accident. The court found that Judlau may have stopped working on the water main project as early as July 2001, and could not resume work on the water main project until one year later. As such, the evidence submitted by the Leedses was "insufficient to prove that Judlau created the roadway defect that caused the accident, or that it had actual or constructive notice of the defect."

In support of their argument that Judlau's work on the water main project was ongoing, the Leedses contended that Judlau was issued work permits for the subject accident area from October 4, 2001 to November 17, 2001, as well as a permit for temporary road closure. In response to Leedses' allegations, the court held that "[t]he issuance of work permits alone without evidence of Judlau's creation of the defect, or notice of the defect, is insufficient to defeat its summary judgment motion." The court concluded by granting Judlau's motion for summary judgment, and held that "plaintiff has failed to establish that it was Judlau's work that created the roadway defect, or that Judlau had actual or constructive notice of the defect."

In the same decision, dated April 5, 2011, the court also granted Elken's motion for summary judgment. The court found that, like Judlau, Elken's work on the water main project ended in July 2001 and then, due to the suspension of all project work due to the events of September 11, 2001, did not resume again until well after Leeds' accident. The court granted Elken's motion for summary judgment and held that "Elken has demonstrated that it did not create the roadway defect at issue, and that it did not have actual or constructive notice of the defect at a time when it owed a duty to pedestrians to keep the area safe."

Empire City Subway now moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint and all cross-claims. The Leedses oppose Empire City Subway's motion as being untimely, since it was filed on May 2, 2011,

which is almost six months past the 120-day deadline. Empire City Subway claims that its motion is timely, as it is based on what the court held for other defendants in the April 5, 2011 decision. Empire City Subway further believes that there is no evidence to demonstrate that it caused or created the condition which caused Leeds' accident.

The Leedses move, pursuant to CPLR 2221 (d), to reargue the portion of the April 5, 2011 decision with respect to Judlau and Elken's summary judgment motions.

DISCUSSION

I. Empire City Subway's Motion for Summary Judgment:

CPLR 3212 (a) provides the following, in pertinent part:

Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

A note of issue was filed on July 27, 2010. Several of the other defendants filed motions for summary judgment in September 2010. Empire City Subway did not make its motion for summary judgment until May 2, 2011, which is six months past the 120-day deadline. Empire City Subway did not seek an extension nor did it explain the reason for the delay. Upon the Leedses' opposition to the current summary judgment motion, Empire City Subway argues that it was waiting for the other defendants' motions to be resolved before it made its own motion, and that Empire City Subway is not liable to the Leedses.

Empire City Subway's arguments are without merit. Empire City Subway failed to serve its motion for summary judgment within 120 days of the filing of the note of issue and did not provide an explanation for its delay. It is well settled that "[i]n the absence of such a good cause showing, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment." *John P. Krupski & Bros., Inc., v. Town Board of Town of Southold*, 54 A.D.3d 899, 901 (2d Dept 2008), citing *Brill v City of New York*, 2 N.Y.3d 648, 652 (2004).

Accordingly, Empire City Subway's motion for summary judgment is denied.

II. Motion to Reargue:

"A motion for reargument ... 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 [internal quotation marks and citation omitted]." *Mangine v. Keller*, 182 A.D.2d 476, 477 (1st Dept 1992). The Leedses argue that issues of fact still remain with respect to Elken and Judlau's negligence and liability. Specifically, the Leedses allege that this court "ignored" the evidence they submitted, including the evidence of the work permits. Con Edison also affirms the Leedses' motion to reargue Judlau's summary judgment motion.

On April 5, 2011, this court granted Judlau and Elken's motions for summary judgment, and dismissed the complaint as against them. The court considered the Leedses arguments, including the argument that certain work permits may demonstrate

that the work of Elken and Judlau was ongoing at the time of Leeds' accident. The court held that both Judlau and Elken had stopped working on the water main project for months prior to Leeds' accident and did not resume their work until many months later. As such, the Leedses have failed to establish that the court "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" with respect to the work permits. *Mangine v Keller*, 182 AD2d at 477.

Additionally, the Leedses believe that there was ample evidence to demonstrate that these defendants failed to meet their duty to provide a safe area for pedestrians and that the court overlooked this evidence. They originally argued this point in their counsel's affirmation in opposition to the defendants' motions for summary judgment dated November 12, 2010. Specifically, the affirmation states, "[e]ven without a finding that Judlau created the defect or that defendants had notice, defendants still owed a duty to account for pedestrian safety." As previously mentioned, after reviewing all of the evidence, including Gersowitz's affirmation, the court granted Judlau's motion for summary judgment.

With respect to Elken, in the April 5, 2011 decision, the court agreed that Elken was responsible for pedestrian safety. However, the court held that, at the time of Leeds' accident, because Elken had not been at the accident for months prior to the accident, "Elken no longer owed a duty under the contract to keep the construction area at issue safe for pedestrians."

The purpose of a motion for reargument, "is not to serve as a vehicle to permit the unsuccessful party to reargue once again the very questions previously decided [internal quotation marks and citations omitted]." *Mangine v Keller*, 182 A.D.2d at 477. As such, because the court has heard these arguments, and has already made a determination which did not misapprehend any facts or law, the motion for leave to reargue is denied.

In accordance with the foregoing, it is hereby

ORDERED that Empire City Subway Co. Ltd.'s motion for summary judgment is denied; and it is further

ORDERED that plaintiffs Jeanette Finkbiner Leeds and David Leeds' motion for leave to reargue is denied.

This constitutes the decision and order of the Court.

Dated: New York, NY
October 6, 2011

ENTER:

FILED

OCT 12 2011

Saliann Scarpulla
NEW YORK COUNTY CLERK'S OFFICE
Saliann Scarpulla, J.S.C.