Bittar v New Growing, Inc.
2011 NY Slip Op 33740(U)
November 17, 2011
Sup Ct, New York County
Docket Number: 111522/07
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Bittan

- v -

New Growing Inc.

INDEX NO. 111522/07

MOTION DATE 10/17/11

MOTION SEQ. NO. 007

MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this motion to/for reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-10

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order

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

FILED
NOV 18 2011
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/17/11

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SCANNED ON 11/21/2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

---X

JORGE BITTAR AND NILDA OCASIO,

Plaintiffs,

-against-

NEW GROWING, INC. AND 158 WEST FOOD CORP., T/A TIMES DELI,

Defendants.

---X

Index Number: 111522/07

DECISION and ORDER

Jane S. Solomon, J:

Plaintiffs move to reargue the court's order dated March 11, 2011 (the Prior Order) which granted defendants' motion for summary judgment and dismissed the complaint.

Parties

Jorge Bittar (plaintiff) alleges that, on January 30, 2007, he tripped and fell on a step at a delicatessen located at 158 West 44th Street, New York, N.Y. operated by 158 West Food Corp. T/A Times Deli (Times Deli) (Prior Order, at 1-2). New Growing, Inc. was a name that Times Deli had previously used (Jimmy Kim EBT, at 7).

The underlying facts are set forth in the Prior Order at pages 1-2 and, consequently, need not be repeated in detail. However, the most salient facts are that plaintiff stated that he did not know what caused him to fall (plaintiff EBT, at 40) and that he "must have stumbled forward" (id.). Additionally, there were no prior incidents or complaints as to the step (Young Kim

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EBT, at 41). Further, the annexed photographs show a painted red stripe on the step, whose existence at the time of plaintiff's accident is supported by Times Deli's manager's testimony (*id.* at 21-22).

Reargument

"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 [and] ... is not 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" (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]; *see also McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material

fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition, or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Open and Obvious and Optical Confusion

Generally, "finding a hazardous condition to be open and obvious is not fatal to a plaintiff's negligence claim, but rather is relevant to plaintiff's comparative fault, and hence summary judgment dismissal is not appropriate" (*Sarotsky v 85*

Kenmarc Realty Corp., 85 AD3d 89, 92 [1st Dept 2011]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72-73 [1st Dept 2004]).

Similarly, optical confusion, due to the alleged failure to provide adequate marking or distinguishing steps can be sufficient to preclude summary judgment (*Saretsky*, 85 AD3d at 92-93; *Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1st Dept 1989]).

However, a readily observable condition is not a hidden trap and is, therefore, not a defective condition (*Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665 [1st Dept 2010]). An open and obvious condition can be so apparent that it does not constitute a hidden trap and, consequently, can not be a defective or dangerous condition (*Lazar v Heaven*, - AD3d -, 2011 NY Slip Op 07492 [1st Dept Oct. 25, 2011]; *Matthews v Vlad Restoration Ltd.*, 74 AD3d 692 [1st Dept 2010]; *Burke v Canyon Rd. Rest.*, 60 AD3d 558 [1st Dept 2009]). This is particularly so where, as in this case, plaintiff had traversed the area in the opposite direction moments before and he cannot identify the cause of his fall and, accordingly, cannot show that optical confusion caused his accident (*Remes*, 73 AD3d at 666; *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418 [1st Dept 2009]; *Goldfischer v Great Atl. & Pac. Tea Co., Inc.*, 63 AD3d 575 [1st Dept 2009]; *Fernandez v VLA Realty, LLC*, 45 AD3d 391 [1st Dept 2007]).

Plaintiffs have not established that the court either

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misapprehended or overlooked the controlling law or the relevant facts in this case. Since plaintiffs have not shown that the court erred, reargument should be denied. However, in the exercise of discretion, the court grants reargument and adheres to its prior decision.

It is, therefore,

ORDERED that plaintiffs' motion for leave to reargue the court's order dated March 11, 2011 that granted summary judgment to defendants dismissing the complaint is granted; and it is further

ORDERED that, upon reargument, the court adheres to its decision and order dated March 11, 2011 dismissing plaintiffs' complaint in its entirety.

Dated: November 17, 2011

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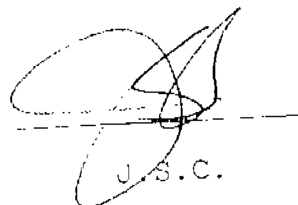

J.S.C.

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