

Esposito v Port Auth. of N.Y. & N.J.
2012 NY Slip Op 32219(U)
August 10, 2012
Supreme Court, New York County
Docket Number: 100051/1994
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK

PRESENT: _____
Justice

PART 2

Index Number : 100051/1994
ESPOSITO, SUSAN
VS.
PORT AUTHORITY
SEQUENCE NUMBER : 020
RENEWAL

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/16/12

Luy J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

-----X
SUSAN ESPOSITO,

Plaintiff,

Index No. 100051/1994

DECISION AND ORDER

-against-

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY

Defendant.
-----X

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

YORK, J.:

Defendant, the Port Authority of New York and New Jersey ("Port Authority") moves, pursuant to CPLR 2221, to renew its motion for summary judgment and/or its motion to set aside the liability verdict in this action and dismiss the complaint of Susan Esposito ("Esposito" or "Plaintiff") on the ground that the decision of the Court of Appeals led to the change of law applicable to this case.

BACKGROUND

Esposito was injured in the evacuation of the World Trade Center ("WTC") in the aftermath of the February 26, 1993 terrorist attack. On January 3, 1994 she, together with more than 100 other plaintiffs, filed a single complaint against the Port Authority alleging that "[t]he ...explosion and fire were caused by reason of the negligence, carelessness and recklessness of the defendant, its agents, servants and/or employees, in the ownership, operation, management, control, maintenance, safe keeping and inspection of the aforesaid premises." The twenty-eighth

cause of action in the complaint concerned compensation for Susan Esposito's injuries and expenses, evaluated at \$750,000.00.

In July 1994 Justice Sklar of the New York Supreme Court ordered that all 174 cases arising from the 1993 attack which were filed in the state court be joined for discovery and trial on the issue of liability. A Steering Committee was appointed to represent plaintiffs' common interests. After discovery was finished, the Port Authority moved for summary judgment dismissing all the claims, arguing, among other matters, that it is entitled to governmental immunity. The court ruled that the duty to provide security in the WTC, and to provide reasonably safe premises for its invitees, was a proprietary, not a governmental function. (Matter of World Trade Ctr. Bombing Litig., 3 Misc.3d 440, 466-467, 776 N.Y.S.2d 713 [Sup.Ct., N.Y. Cty 2004]). The ruling was unanimously affirmed by the Appellate Division without opinion for the reasons stated in Justice Sklar's opinion. (Matter of World Trade Ctr. Bombing Litig., 13 A.D.3d 66, 784 N.Y.S.2d 869 [1st Dept.2004]).

In the trial on the issue of liability the jury held the Port Authority liable to all plaintiffs, including Esposito. The Port Authority's motion to set aside the liability verdict was denied by Justice Figueroa (2007 N.Y. Slip Op. 34467(U)), and the ruling was unanimously affirmed by the First Department. Nash v Port Auth. of New York and New Jersey, 51 AD3d 337, 339; 856 N.Y.S.2d 583 [1st Dept.2008]). The individual cases proceeded to trial on damages. On January 20, 2010, plaintiff Antonio Ruiz was awarded \$824,100.06. The Port Authority requested leave to appeal the judgment directly to the Court of Appeals pursuant to CPLR 5602(a)(1)(ii), bringing up for review the Appellate Division ruling upholding liability.

On September 22, 2011, the Court of Appeals, in a four to three decision, reversed the Appellate Division ruling, holding that the Port Authority's provision of security at the WTC

was a governmental function, and that tort claims against it arising out of the 1993 explosion are barred by governmental immunity. In re World Trade Ctr. Bombing Litig., 17 NY3d 428, 933 N.Y.S.2d 164 [2011]. Ruiz's complaint was dismissed.

In a letter addressed to Justice Silver and at a conference in his chambers, Esposito's counsel argued that her claims are not foreclosed by the Court of Appeals decision, since her injuries were caused not by the Port Authority's failure to provide adequate security or allocate police resources, but by its alleged negligence in failing to provide adequate backup lighting in its stairwells and have appropriate evacuation plans. He further contended that the Court of Appeals decision was particular to the plaintiff in that case.

Defendant now moves to renew its prior motions for summary judgment and/or to set aside the liability verdict and dismiss the complaint.

DISCUSSION

What the Port Authority requests this court to do, to set aside the liability verdict, was accomplished by the Court of Appeals decision. In the Nash ruling, the First Department refused to set aside the jury verdict on liability, and the Court of Appeals reversed. This issue is moot. Defendant ultimately seeks the dismissal of the complaint. The court will consider the alternative request to renew defendant's motion for summary judgment on the ground that the Court of Appeals decision is a "change in the law that would change the prior determination." (CPLR 2221(e)(2)).

The disposition of this case depends on the interpretation of the breadth of the Court of Appeals decision and its consequences for the pending individual cases, given the procedural complexities of this action.

Individualized claims

Esposito proposes her reading of Justice Sklar's order of 1994. She maintains that the Steering Committee set up in the order was to deal with "common issues" of liability, and that some liability matters, peculiar to individual plaintiffs and groups of plaintiffs, were left out and preserved for individual trial (Zucker Aff., ¶¶ 4-5). In the order Justice Sklar referred to "issues of liability and other common issues." (Zucker Aff., Exh. A, ¶9). Liability was a major common issue in this litigation, and the Steering Committee represented plaintiffs on this issue at all stages, from discovery, to trial on liability, to appeal to the Court of Appeals. The order envisioned that some plaintiffs might have "individual or divergent positions," in which case their counsel could act separately and not be bound by the Committee's actions. (*id.*, at ¶12). In the course of these proceedings the Committee argued on Esposito's behalf, and secured a favorable jury verdict on liability. She did not complement the initial complaint with allegations peculiar to her case. Her bills of particulars dealt only with her injuries and details of her medical treatment, not with an additional theory of liability to the effect that that defendant's acts and omissions during evacuation represent a separate instance of negligence (Silbert Reply Aff. Exhs. B-E). It is only after the Court of Appeals issued its decision in September 2011 that her lawyer raised particularized claims. To the extent that these claims may be separate, and based on an alternative theory of liability, they cannot be raised at this stage, long past the filing of the note of issue. Haddad v New York City Tr. Auth., 5 AD3d 255, 256; 773 N.Y.S.2d 296 [1st Dept 2004]; Orros v Yick Ming Yip Realty, Inc., 258 AD2d 387, 388; 685 N.Y.S.2d 676 [1st Dept 1999].

The trial on liability included plaintiffs whose circumstances were different – some were tenants in the building, like Susan Esposito, others transient visitors, some incurred personal

injuries, others economic damages due to interruptions in business. In its motion to set aside the jury verdict, the Port Authority contended that it should have been given an opportunity to contest causation in relation to separate groups of plaintiffs who were similarly situated. In that case, its argument went, it could be found not liable to some of the plaintiffs. Justice Figueroa, refusing to set aside the verdict, reminded the defendant that, based on the agreement of the parties, liability had to be litigated as a common matter, independent of particular circumstances of various plaintiffs. Esposito's current assertion that defendant may be additionally liable towards her, and potentially other plaintiffs injured during evacuation, contradicts the whole organizational setup of this litigation. The only individualized issues which remained after the trial on liability were damages.

Breadth of the Port Authority's governmental immunity

Esposito's second argument in opposition to this motion is that the Court of Appeals did not provide the Port Authority absolute immunity from tort claims arising out of the 1993 attack, and it can still be found negligent. The Port Authority counters that the security measures, for which the Court of Appeals held it protected by governmental immunity, include the evacuation plans and planning for how to maintain life systems in the buildings in case of an emergency. Esposito characterizes these measures as being a proper responsibility of a landlord, which is a proprietary, not a governmental function.

The Court of Appeals used the record developed in the lower courts to present the facts of the case. In particular, it cited Justice Sklar's summary of plaintiffs' claims:

[B]ased on ... allegations that the Port Authority was negligent with respect to security: in failing to adopt, implement, and follow the recommendations in the security reports; in failing to restrict public access to the parking levels; in failing to have an adequate security plan; in failing to provide an electronic security system; in failing to institute a manned checkpoint at the garage; in failing to subject vehicles to inspection and to have security signs; in failing to have

adequate security personnel; in failing to employ recording devices concerning vehicles, operators, occupants, and pedestrians; and in failing to conduct studies of the possible results of a bombing of the complex.

The actual list in Justice Sklar's decision is longer:

The claims also are based on alleged failures with respect to the ventilation system, that is, in failing to have a proper and adequate regular and emergency ventilation system in case of fire and explosion. Plaintiffs also claim that the Port Authority failed to provide adequate lighting, to use air-cooled emergency generators, and to have adequate communications and backup communications systems. They further claim that the Port Authority failed to properly train and communicate with the fire wardens, and train employees on proper evacuation procedures.

In re World Trade Ctr. Bombing Litig., 3 Misc 3d 440, 453; 776 N.Y.S.2d 713 [Sup Ct, NY Cty 2004].

These claims, which Esposito tries to present as not covered by the liability trial, were asserted from the beginning and were vigorously litigated. Justice Sklar referred to numerous security reports that considered the aftermath of a potential bombing and pointed to the WTC vulnerabilities. The Terrorist Planning Section warned that the underground public parking garage was highly vulnerable and, if attacked, could critically affect the WTC's infrastructure. (*id.*, at 445). The Office of Special Planning predicted that a car bomb placed in the World Trade Center parking area would affect "[v]irtually all of the important building systems, such as power, water, heating, [and] cooling" because those systems all were located in and around the parking areas. (*id.*, at 449). Another report, by Science Applications International Corporation, found that a "well-placed vehicle bomb in [the vehicle ramps] would likely damage at least half of the WTC's support services (fresh water, steam, cooling water, electrical and telephone) and recommended certain upgrades, including installing blast deflectors around critical support service components (water, electrical, phone)" (*id.*, at 450-451).

It is clear from these extracts that the security experts considered effects of the attack as an integral part of their security assessments. They made concrete recommendations to mitigate

the catastrophic effects of a blast in the underground garage. The Port Authority reacted to these recommendations as it did to almost all other professional advice related to security, namely by finding that to implement them would be too costly. The consequences followed.

The explosion destroyed the communications system, the police area and operations control center, and vital utility systems, including water and electrical, and fire standpipes ... Because of the loss of the operations control center, the Port Authority lost the ability to communicate with tenants and their employees in the complex, and to institute its emergency evacuation procedures.

(*id.*, at 452-53)

In reaching its determination that the Port Authority's actions are covered by governmental immunity, the Court of Appeals did not disturb the lower courts' factual findings. It arrived at a different legal conclusion on the issue of "whether the precise failures for which the Port Authority was found liable were governmental or proprietary in nature." In re World Trade Ctr. Bombing Litig., 17 NY3d 428, 447; 933 N.Y.S.2d 164 [2011].

The Court unambiguously ruled that claims of proprietary negligence are precluded by governmental immunity, being tightly related to the provision of security to the general public.

While some of plaintiffs' claims may touch upon the proprietary obligations of a landlord, when scrutinizing the purported injury-causing acts or omissions they allude to lapses in adequately examining the risk and nature of terrorist attack and adopting specifically recommended security protocols to deter terrorist intrusion. These actions are not separable from the Port Authority's provision of security at the WTC.

(*id.*, at 447-48)

[T]hese failures lie, not within the safety measures that a reasonable landowner would implement, but within security operations featuring extensive counterterrorism planning and investigation that required discretionary decision making with respect to the strategic allocation of police resources.

(*Id.*, at 448).

But, unlike safety precautions required of every reasonable landowner, the Port Authority's security operations featured policy-based decision making involving

due consideration of pertinent factors such as the risk of harm, and the costs and benefits of pursuing a particular allocation of resources.

(*id.*, at 449).

That the WTC was primarily a commercial building complex or that the bombing incident pertained, in part, to security measures within the parking garage may implicate some proprietary responsibility, but it cannot overcome the governmental tenor of the security strategy established by the Port Authority to counteract terrorist intrusion.

(*id.*, at 452).

While the instant terrorist bombing occurred within the parking garage and may focus some attention on proprietary responsibility, the Port Authority's police resources were devoted to countering criminal incidents for the benefit of all who visited the WTC. Any failure to secure the parking garage against terrorist attack predominantly derives from a failed allocation of police resources.

(*id.*, at 455).

The Court's interpretation of the police function, bringing the Port Authority under the protection of governmental immunity, is relatively broad. It does not make a fine distinction between what are proper police measures, such as assigning police patrols, and other measures of security – a distinction urged by the lower courts and the dissenting opinion. (In re World Trade Ctr. Bombing Litig., 3 Misc 3d 440, 466-467; 776 N.Y.S.2d 713 [Sup Ct, NY Cty 2004]; Nash v Port Auth. of New York and New Jersey, 51 AD3d 337, 344; 856 N.Y.S.2d 583 [1st Dept 2008]. “[H]ere the decisions made by the Port Authority were made in its capacity as a landlord involved in the quintessentially private enterprise of running a parking garage in a major commercial building complex that was operated for profit.” In re World Trade Ctr. Bombing Litig., 17 NY3d 428, 465; 933 N.Y.S.2d 164 [2011]). All security measures at the WTC were found to be of a governmental nature. This holding applies equally to measures to prevent terrorist attacks and to minimize injuries to persons and property damage in an

aftermath. Thus the Port Authority is not liable in negligence for its evacuation efforts and failure to maintain the backup infrastructure.

The effect of the Ruiz judgment on this case

Plaintiff argues that the Court of Appeals decision in the Ruiz case is applicable only to that plaintiff, and does not warrant dismissal of her complaint. The Ruiz decision overturned the verdict on liability reached after the jury trial. That trial was the first part of a bifurcated process, the second stage of which was to establish damages of individual plaintiffs, including Esposito. Some of them already proceeded to trial, like Antonio Ruiz and Linda Nash, others were awaiting it, like Susan Esposito, when the decision was handed down. In light of the decision which shielded the Port Authority of tort liability, the issue of damages cannot proceed to trial. In a similar case arising out of an explosion in New York City, the First Department granted a motion by defendant City of New York to vacate a judgment previously entered against it and in favor of plaintiffs on the ground that, in a companion case, the Court of Appeals had reversed the interlocutory judgment of liability on which the final judgment was based. McMahon v City of New York, 105 AD2d 101; 483 N.Y.S.2d 228 [1st Dept 1984]. In the present case there was no final judgment on damages. The court in the McMahon case commented: "Obviously, the Court of Appeals ruling would be binding in all the cases arising out of the explosion in which the question was still open." (*id.*, at 103). Another conclusion would make the trial on damages futile, since any verdict would be necessarily set aside.

This excruciatingly long litigation must have been very difficult for the victims of the 1993 bombing. They came very close to winning the case, and one of the plaintiffs who secured a verdict in his favor lost as a result of the Court of Appeals decision. This court has no other option but to dismiss Susan Esposito's complaint, because the law of the case dictates it.

CONCLUSION

For the foregoing reasons, it is

ORDERED that the motion of defendant Port Authority to renew its motion for summary judgment is granted; and it is further

ORDERED that upon renewal, the complaint of Susan Esposito is dismissed; and it is further

ORDERED that the Clerk of the Court enter the judgment accordingly.

Dated: 8/10/10

FILED**AUG 21 2012****NEW YORK
COUNTY CLERK'S OFFICE**

ENTER:

Roy
LOUIS B. YORK
J.S.C. J.S.C.