

Nunez v City of New York

2012 NY Slip Op 32773(U)

November 7, 2012

Supreme Court, New York County

Docket Number: 109152/08

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 109152/2008
KUPFER, DANIEL
VS.
CITY OF NEW YORK *CAL. # 59*
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

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

DECIDED IN ACCORDANCE WITH
APPOINTING DECISION / ORDER

FILED

NOV 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/7/12
NOV 07 2012

Barbara Jaffe, J.S.C.
BARBARA JAFFE

- 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 : PART 5

-----X

DANIEL KUPFER,

Plaintiff,

-against-

CITY OF NEW YORK and THE PORT
AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendants.

-----X

IGDALIA NUNEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE PORT AUTHORITY
OF NEW YORK AND NEW JERSEY, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NEW YORK
CITY DEPARTMENT OF ENVIRONMENTAL
PROTECTION, TULLY CONSTRUCTION CO., INC.,
and CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Defendants.

-----X

BARBARA JAFFE, J.S.C.:

These actions are consolidated for disposition. Defendant Port Authority of New York and New Jersey (PA) moves, pursuant to CPLR 2212, for reargument and renewal of my decisions dated March 2, 2012 and January 24, 2012.

Plaintiffs allege that they suffered injuries caused by defects in sidewalks abutting property belonging to PA. Pursuant to the Administrative Code of the City of New York § 7-210, with exceptions not relevant here, liability for injuries caused by defects in a sidewalk shifted from City to the owner of the abutting real property. "It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition." (Administrative Code § 7-210 [a]). PA argues that, because it is a bi-state agency, it

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Argued: 8/14/12
Seq. No. 4

DECISION AND ORDER

Index No. 105344/09

Argued: 8/14/12
Seq. No. 6

DECISION AND ORDER

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NOV 14 2012

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is not subject to the duty imposed by Administrative Code § 7-210.

In each decision, I denied PA's motion for an order summarily dismissing the complaint against it. I held in pertinent part as follows:

In *Locario v State of New York*, 90 AD3d 547 (1st Dept 2011), the First Department held that the two exceptions to the waiver set forth in Court of Claims Act § 8 are exclusive, and thus, that the State may be held liable as an abutting landowner pursuant to Administrative Code § 7-210. (*See id.* [there exists no "exception to the [S]tate's waiver of sovereign immunity on the basis of tort liability created by local law"]).

Given that section 7106 of the New York Unconsolidated Laws and Court of Claims Act § 8 are nearly identical, and that exceptions to the waiver of PA's immunity are specifically enumerated, as are exceptions to the State's waiver, and utilizing the rule of statutory construction employed by the court in *Locario* (McKinney's Cons Laws of NY, Book 1, Statutes § 240 [where law expressly describes particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded]), PA is not exempted from the waiver of sovereign immunity for tort liability pursuant to local law. Consequently, it may be held liable as an abutting landowner. (*See also Japan Airlines Co., Ltd. v Port Auth. of New York and New Jersey*, 178 F3d 103 [2d Cir 1999] [PA not immune from liability for negligent maintenance of airport as airport operator]).

(*Kupfer v City of New York*, 2012 NY Slip Op 30513[U], [Sup Ct, NY Co., Jaffe, J]; *see also Nunez v City of New York*, 2012 NY Slip Op 30187[U], [Sup Ct, NY Co., Jaffe, J.] [same]).

As *Locario* was handed down after the oral arguments held in the instant actions, and as PA contends that my analogy to it is flawed, PA has stated a ground for reargument. There, the court observed that the State's waiver of sovereign immunity set forth in Court of Claims Act § 8 does not provide an exception to liability based on Administrative Code § 7-210, and reasoned that, had the Legislature intended to bar liability imposed by a local law, it would have included such an exception together with those limitations on the waiver of immunity it enacted. I too decided, analogizing Court of Claims Act § 8, that as PA's consent to liability set forth in Unconsolidated Laws § 7106 does not provide for such an exception, PA thereby consents to liability based on Administrative Code § 7-210.

According to PA, however, Unconsolidated Laws §§ 7102-7105 contain no exceptions to liability, and thus, they are not analogous to Court of Claims Act § 8.

In Unconsolidated Laws § 7104, the Legislature provided that PA's waiver of immunity

“does not extend to civil suits, actions or proceedings for the recovery of statutory penalties,” and in Unconsolidated Laws § 7105, the Legislature provided for a bar of any action for injunctive relief, other than actions brought by the Attorney General of New York, or the Attorney General of New Jersey. Both of these provisions constitute exceptions to PA’s waiver of immunity from liability in tort, one substantive, and the other pertaining to remedies.

PA cites *Santiago v Port Auth. of N.Y. & N.J.*, 203 AD2d 217 (1st Dept 1994), and *Love v Port Auth. of N.Y. & N.J.*, 168 AD2d 222 [1st Dept 1990), for the proposition that it is exempt from municipal regulation. While the court in those decision held that PA is exempt from municipal regulation, the decisions are premised on PA’s status as a State agency. (*Santiago*, 203 AD2d at 217; *Love*, 168 AD2d at 222). In neither decision did court address the bi-State nature of PA. Moreover, the reasoning does not survive *Locario*, in which the court held that the State is subject to Administrative Code § 7-210.

In *Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428 (2011), *cert denied* __US__ 2012 WL 1642607 (2012), also cited by PA, the Court held that the waiver of sovereign immunity set forth in Unconsolidated Laws § 7106 does not entail a waiver of the common-law defense of governmental immunity. (*Id.* at 442-445). There, as the Court observed, PA was sued for acts taken in its governmental capacity. (*Id.* at 455). Here, by contrast, it is undisputed that PA’s alleged liability is predicated on its proprietary ownership of the land abutting the allegedly unsafe sidewalks, and the availability of the common-law defense of governmental immunity is irrelevant.

Matter of Agesen v Catherwood, 26 NY2d 521 (1970), and its progeny is also inapposite. There, the Court distinguished the internal operations of PA from those of its actions that affect the general public, and held that New York’s minimum wage law was not applicable to the PA. Similarly, in *Salvador-Pajaro v Port Auth. of N.Y. & N.J.* (52 AD3d 303 (1st Dept 2008), the court held that PA is not subject to Labor Law § 27-a, because employer/employee relations are part of its internal operations.

And, in *Bailey v Port Auth. of N.Y. & N. J.*, Sup Ct, NY County 1994, *affd for reasons stated* 216 AD2d 42 (1st Dept 1995), the court held that an application of Human Rights Law § 296 (1) (a) to PA would “violate the [Port Authority’s] Compact and constitute a unilateral regulation by one state upon the power vested in the Authority to determine the qualifications of its employees.” (*Id.* at 5 [Record on Appeal, at 10]), citing *Agesen*. Here, PA does not maintain that the safety of the sidewalks abutting its properties is a matter pertaining to its internal operations.

Moreover, “[t]he Legislature is presumed to know what statutes are in effect when it enacts new laws.” (*Matter of Gerald T.*, 211 AD2d 17, 21 [1st Dept 1995]; *see also Brady v Village of Malverne*, 76 AD3d 691 [2d Dept 2010]). Municipal Home Rule § 11 (1) (j), which the court discussed in *Locario* in a different context, expressly refers to city law that “transfers to abutting property owners its liability for failure to maintain its sidewalks and gutters in a reasonably safe condition.” Consequently, the Legislature is reasonably presumed to have been aware that a number of municipalities in the State shifted pre-existing liability for injuries caused by defects in the sidewalk to the owners of real property abutting the site of an accident caused by such a defect. Nonetheless, it did not exempt actions brought pursuant to such laws from the general consent of PA to liability in tort.

Absent any persuasive authority for the proposition that the provision in Unconsolidated Laws § 6408 that PA “shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other” excludes liability based upon local law, and for the reasons set forth above, there is no such exclusion or exemption.

Accordingly, it is hereby

ORDERED that, in Action 1, the motion of defendant the Port Authority of New York and New Jersey to renew its motion for summary judgment is denied; and it is further

ORDERED that said defendant’s motion to reargue said motion to dismiss the complaint

is granted; and it is further

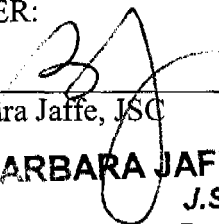
ORDERED that, upon reargument, this Court adheres to its Decision and Order, dated March 2, 1012, denying said motion for summary judgment; and it is further

ORDERED that, in Action 2, the motion of defendant the Port Authority of New York and New Jersey to renew its motion for summary judgment is denied; and it is further

ORDERED that said defendant's motion to reargue said motion for summary judgment is granted; and it is further

ORDERED that, upon reargument, this Court adheres to its Decision and Order, dated January 24, 2012, denying said motion for summary judgment.

ENTER:


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

FILED

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DATED: November 7, 2012
New York, New York
NOV 07 2012