

Rappel v Wincoma Assoc., Inc.

2013 NY Slip Op 30345(U)

February 5, 2013

Sup Ct, Suffolk County

Docket Number: 11483-2008

Judge: John J.J. Jones Jr

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: **HON. JOHN J.J. JONES, JR.**
Justice

MOTION DATE: 1-14-2013
MOTION NO.: MG

-----X
JACQUELINE RAPPEL,

Plaintiff,

-against-

WINCOMA ASSOCIATION, INC.,

Defendant.

-----X
WINCOMA ASSOCIATION, INC.,

Third-Party Plaintiff,

-against-

ROGER AMBROSIO INC. and A&J ANTORINO
COMPANY, INC. ,

Third-Party Defendants.

-----X
WINCOMA ASSOCIATION, INC.,

Second Third-Party Plaintiff,

-against-

FRANK RAPPEL and SUSAN RAPPEL,

Second Third-Party Defendants.
-----X

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Upon the following papers numbered 1 to 43 read on this application for an order

granting reargument and upon reargument denying summary judgment in favor of the defendant, Wincoma Association, Inc.; Notice of Motion/Order to Show Cause and supporting papers 1-23; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 24-37; Replying Affidavits and supporting papers 38-43; Other ____; it is

ORDERED that this motion by the plaintiff, Jacqueline Rappel [“Rappel” or “the plaintiff”], for an order granting leave to reargue the order of this Court dated November 14, 2012, pursuant to CPLR 2221 (d) is granted; and it is further

ORDERED that upon reargument, so much of the Order dated November 14, 2012, that granted the motion for summary judgment made on behalf of the defendant Wincoma Association, Inc. [“Wincoma”], dismissing the plaintiff’s complaint and all cross claims against it, or alternatively, granting judgment for common law indemnification in favor of Wincoma on its cross claim against Roger Ambrosio, Inc., is vacated; and it is further

ORDERED that upon reargument, so much of the Order dated November 14, 2012, that granted the motion for summary judgment made on behalf of the defendant Wincoma dismissing the plaintiff’s complaint and all cross claims against it, is denied; and it is further

ORDERED that the plaintiff’s complaint against Wincoma is reinstated; and it is further

ORDERED that Wincoma’s cross claim for common law indemnity against the defendant Roger Ambrosio, Inc. [“Ambrosio”], is likewise reinstated.

This action for personal injuries arises out of a trip and fall type accident that occurred some time in the early afternoon on July 14, 2007. The plaintiff was driving on a private road owned and maintained by Wincoma that led to a gated private beach in Huntington Bay. The plaintiff’s car was the third in a line of three cars that was stopped due to an apparently malfunctioning entry gate. While stopped in the line of three cars the plaintiff exited her vehicle in an attempt to investigate and/or ameliorate the problem with the gate.

Upon exiting her car the plaintiff recognized her friend, non-party witness Gina Fortunato [“Fortunato”], who was present at the scene to attend the birthday party of the plaintiff’s two children inside the private beach area. Upon seeing Fortunato standing at the locked gate, the plaintiff took four strides toward Fortunato and in the process, tripped with her right foot over a ten foot long asphalt water-diverting berm that resembled a speed bump. The plaintiff testified that she was looking at Fortunato when the accident occurred.

The berm was constructed in August of 2006 at the request and with the approval of the President of Wincoma. The purpose of the asphalt berm was to divert run-off water to the shoulder of the road and prevent water and debris from cascading down the hill in that vicinity.

In moving for summary judgment the defendant provided photocopies of photographs of the berm that had been authenticated by the plaintiff at her deposition. The copied photographs depicted the berm which, as one approached the entry gate, was on the left side of the roadway and extended ten feet from the shoulder into the middle of the roadway. The berm was approximately four inches high and sixteen to eighteen inches thick.

In support of summary judgment the defendant argued that it did not create the condition but that the berm was constructed by the defendant, Ambrosio. Based on Ambrosio's construction of the berm, the defendant urges that it had no duty to the plaintiff for any negligence in the berm's construction.

The defendant also contended that it did not have notice of a dangerous or defective condition of the berm. Alternatively, the defendant urged that the berm was open and obvious and not inherently dangerous. Finally, the defendant argued that if the court found that there was a defect involving the berm, Wincoma was entitled to summary judgment on its cross claim for common law indemnity claim against Ambrosio, the installer of the berm.

In its prior decision the Court concluded that based upon the authenticated photographs, the asphalt berm was not concealed, was open and obvious and not inherently dangerous. This conclusion was based, at least in part, on the testimony of one of Ambrosio's witnesses, Peter Walter, to the effect that when installed in 2006, the berm was painted a fluorescent yellow to prevent vehicles from driving over it.

On reargument the plaintiff points out, correctly, that based on the testimony of Wincoma's witness, Neil Heimerich, the subject berm was not painted fluorescent yellow until almost two months after the plaintiff's accident. In addition, Heimerich also testified that it was Wincoma's practice and custom to paint all the speed bumps yellow within the private community to bring them to the attention of drivers and pedestrians. Heimerich also testified that he regularly walked around the private community and made note of conditions that required repair or correction.

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (see *Matter of Swingearn*, 59 A.D.3d 556, 873 N.Y.S.2d 165). A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (*CPLR* 2221[d][2]). Further, even where a motion for reargument is technically untimely under *CPLR* 2221(d)(3), a court has discretion to reconsider its prior ruling (see *CPLR* 2004; *Itzkowitz v. King Kullen Grocery Co., Inc.*, 22 A.D.3d 636, 638, 804 N.Y.S.2d 350; *Garcia v. The Jesuits of Fordham*, 6 A.D.3d 163, 165, 774 N.Y.S.2d 503).

To demonstrate entitlement to summary judgment in a trip-and-fall case, the defendants had to establish that they maintained the premises in a reasonably safe condition and that they did not

create a dangerous or defective condition on their property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it (*see Molloy v. Waldbaum, Inc.*, 72 A.D.3d 659, 897 N.Y.S.2d 653; *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634, 636, 896 N.Y.S.2d 85; *see also Hayden v. Waldbaum, Inc.*, 63 A.D.3d 679, 880 N.Y.S.2d 351; *Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681).

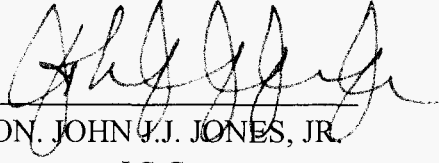
Here, considering the motion on reargument, the defendant failed to meet its burden of establishing that, as a matter of law, it maintained the premises in a reasonably safe condition (*see Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d at 636, 896 N.Y.S.2d 85). Although Wincoma argued, *inter alia*, that the water-diverting berm was an open and obvious condition which was not inherently dangerous, under these circumstances, it cannot be determined, as a matter of law, that the defendant was entitled to summary judgment dismissing the complaint (*see Shah v. Mercy Med. Ctr.*, 71 A.D.3d 1120, 898 N.Y.S.2d 589; *Cooper v. American Carpet & Restoration Servs., Inc.*, 69 A.D.3d 552, 895 N.Y.S.2d 96; *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, 864 N.Y.S.2d 554; *Salomon v. Prainito*, 52 A.D.3d 803, 861 N.Y.S.2d 718; *Mauriello v. Port Auth. of N.Y. & N.J.*, 8 A.D.3d 200, 779 N.Y.S.2d 199; *Cupo v. Karfunkel*, 1 A.D.3d 48, 52, 767 N.Y.S.2d 40).

“The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury” (*Shah v. Mercy Med. Ctr.*, 71 A.D.3d at 1120, 898 N.Y.S.2d 589). Moreover, “[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*id.*; *see Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, 864 N.Y.S.2d 554). Here, given Mr. Heimerich’s testimony that the berm was only painted in August or September of 2007, and that the plaintiff fell on July 14, 2007, a triable issue of fact exists as to whether the unpainted berm was an open and obvious condition.

Moreover, “[p]roof that a dangerous condition is open and obvious merely negates the defendant’s obligation to warn of the condition, but does not preclude a finding of liability against a landowner for failure to maintain the property in a safe condition” (*Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d at 636, 896 N.Y.S.2d 85; *see Cupo v. Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40). Thus, the defendants failed to establish, as a matter of law, that the subject berm was not inherently dangerous (*see Cooper v. American Carpet & Restoration Servs., Inc.*, 69 A.D.3d 552, 895 N.Y.S.2d 96; *Salomon v. Prainito*, 52 A.D.3d 803, 861 N.Y.S.2d 718; *Cupo v. Karfunkel*, 1 A.D.3d 48, 52, 767 N.Y.S.2d 40).

Based on the foregoing, the defendants’ motion for summary judgment dismissing the complaint should have been denied regardless of the sufficiency of the plaintiff’s opposition papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642).

The court notes that the prior decision also granted Ambrosio's motion for summary judgment dismissing the plaintiff's complaint and all cross claims against Ambrosio. The plaintiff has not moved to reargue so much of the court's prior order that dismissed her complaint against Ambrosio. Understandably, in light of the dismissal of the complaint, Wincoma did not move to reargue so much of the Court's prior order that granted dismissal of its cross claim for common law indemnification against Ambrosio. In light of the foregoing discussion, and the reinstatement of the complaint against Wincoma, only Wincoma's cross claim for common law indemnification against Ambrosio is reinstated. The same issues of fact that preclude summary judgment in favor of Wincoma with respect to the plaintiff's complaint, preclude summary judgment on Wincoma's cross claim for common law indemnification against Ambrosio (*see generally McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 953 N.E.2d 794 [2011]).

DATED: 5 Feb. 2013
HON. JOHN J. JONES, JR.
J.S.C.CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION