

Scandiffio v City of New York

2014 NY Slip Op 30574(U)

March 7, 2014

Supreme Court, New York County

Docket Number: 112649/2010

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 112649/2010
SCANDIFFIO, DON
vs
CITY OF NEW YORK
Sequence Number : 002
REARGUMENT/RECONSIDERATION

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

COL: # 577

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


DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 12 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3-7-14
MAR 07 2014


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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
DON SCANDIFFIO,

Plaintiff,

-against-

DECISION/ORDER
Index No. 112649/2010
Seq. No. 002

THE CITY OF NEW YORK,

Defendants.

FILED

MAR 12 2014

-----X
HON. KATHRYN E. FREED:

NEW YORK
SOUTH COUNTY CLERK

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1,2(Exs. A-F)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....4.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant the City of New York moves, pursuant to CPLR 2221, for an order granting reargument of its cross-motion pursuant to CPLR 3211 to dismiss the complaint for failure to state a cause of action or, in the alternative, for summary judgment dismissing the complaint pursuant to CPLR 3212.¹ After oral argument and a review of the motion papers and the relevant case law, this

¹The plaintiff initially moved to compel discovery from the City. As discussed below, that motion was resolved on February 5, 2013, on which date this Court directed the City to provide the discovery demanded by the motion.

court **grants** the City's motion for reargument and, upon reargument, **adheres to** its initial determination denying summary judgment dismissing the complaint against the City.

Factual and Procedural Background:

Plaintiff seeks monetary damages for personal injuries he allegedly sustained on or about September 27, 2009 when he was riding his bicycle in the northbound lane of Riverside Drive, approximately 40 feet from the southeast corner of the intersection of Riverside Drive and West 139th Street in New York County, and his front wheel hit a pothole, causing him to be propelled to the ground. As a result, he sustained injuries including, but not limited to, a fracture of his left distal radius requiring surgical repair.

Plaintiff filed a notice of claim on December 10, 2009. Thereafter, plaintiff commenced the instant action via service of a summons and verified complaint on or about October 1, 2010. The City served its answer on or about October 15, 2010. At his hearing conducted pursuant to General Municipal Law §50-h on March 5, 2010, plaintiff testified that he was injured just north of the intersection of Riverside Drive and West 139th Street. At that point, Riverside Drive had two northbound lanes and he was in the lane closest to the curb. On or about December 17, 2010, he served a verified bill of particulars alleging, inter alia, that he was injured in the northbound roadway of Riverside Drive approximately 40 feet from the southeast corner of Riverside Drive and West 139th Street. Plaintiff testified at his deposition that his accident occurred as he headed northbound approximately 40 feet north of the intersection of Riverside Drive and West 139th Street. At that location, Riverside Drive had two lanes going north and two going south. He further stated that the road split at that point.

[* 4]

On or about September 14, 2012, plaintiff moved to compel the City to provide post-accident records regarding the repair of the pothole. The City cross-moved for an Order, pursuant to CPLR 3211(a)(7), dismissing plaintiff's complaint for failure to state a cause of action or, in the alternative, granting it summary judgment pursuant to CPLR 3212.

In its cross-motion, the City argued that it was entitled to summary judgment pursuant to New York City Administrative Code §7-201(c) because it did not have prior written notice of the alleged condition, which is a condition precedent plaintiff is required to plead and prove to maintain this action. The City also argued that it was entitled to summary judgment because it did not cause and/or create the alleged condition.

In support of its motion, the City submitted, inter alia, the affidavit of Cynthia Howard, an employee of the Department of Transportation of the City of New York ("DOT"). Ms. Howard stated that, as a member of the DOT's Office of Litigation Services and Records Management, she searched for permits, applications for permits, corrective action requests, notices of violations, inspections, contracts, maintenance and repair orders, complaints, sidewalk violations, resurfacing/milling records and Big Apple Maps. She also searched in the pertinent electronic database and hard copy locations for the aforementioned kinds of records for the roadway located at Riverside Drive between West 139th Street and West 142nd Street. Ms. Howard further stated that the location searched was "a single roadway segment [of] Riverside Drive between West 139th Street and West 142nd Street and not the service road located at Riverside Drive between West 139th Street and West 140th Street." She stated that her search, which encompassed a period of two years prior to and including September 27, 2009, the date of the accident, revealed no records pre-dating the alleged accident. Additionally, Ms. Howard stated that her search for Big Apple Maps for an area

including the subject location revealed two maps which were served upon DOT by the Big Apple Pothole and Sidewalk Protection Corporation on October 23, 2003, more than 15 days prior to the accident. The Big Apple Map was annexed to the City's cross-motion.

In opposition to the City's cross-motion, plaintiff argued that, since the pothole, described by plaintiff as 1 ½ feet long and 8-10 inches deep, was an open and obvious hazard, the City could be liable for the condition even in the absence of prior written notice. Plaintiff further asserted that the City's motion had to be denied since there was outstanding discovery regarding subsequent repairs which could show that the City had control over the area in which the accident occurred.

The parties appeared for oral argument of the motion and cross-motion on February 5, 2013. On that date, this Court granted plaintiff's motion and directed the City to provide documentation regarding post-accident repairs within 60 days. This discovery, which included proof that the City repaired the pothole after the accident, as well as a Big Apple Map of the area in question, was provided to plaintiff's counsel and to this Court on March 18 and 19, 2013, respectively.

After oral argument of the City's cross-motion on May 14, 2013, this Court denied the City's motion for summary judgment without prejudice as "premature at this juncture" given that the City had only recently provided plaintiff with evidence of a subsequent repair of the pothole. This Court, citing *Ferris v County of Suffolk*, 174 AD2d 70 (2d Dept 1992), further held that, where a condition is "easily visible, apparent upon visible inspection, inspection of the site has been made for the purpose of discovering just such defects, and the defects have existed for a sufficient length of time prior to the accident to allow the municipality to discover and remedy them, the need for written notice has been abrogated."

The City now moves to reargue its cross-motion and plaintiff opposes the application.

Positions of the Parties:

The City argues that it is entitled to reargument of its cross-motion since this Court found that the City could be liable if it had constructive notice of the alleged condition. The City maintains that it can be held liable for plaintiff's accident only if it had prior written notice of the alleged pothole or created the defect.

Plaintiff opposes the City's motion, asserting that it is untimely, that this Court properly determined that the City was not required to have prior written notice of the alleged defect, and that the subsequent repair of the pothole by the City establishes that it had control over the area and should have been aware of the dangerous defect. Plaintiff further asserts that the evidence submitted by the City in support of its cross-motion was insufficient to establish its entitlement to summary judgment.

In its reply affirmation, the City asserts that its motion for reargument is timely and that it is entitled to reargument because this Court mistakenly held that constructive notice was an exception to the prior written notice rule set forth in §7-210.

Conclusions of Law:

A motion for leave to reargue "shall be based upon matters of fact allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to

reargue issues previously decided (*see Pro Brokerage v. Home Ins. Co.*, 99 A.D.2d 971 [1st Dept. 1984]), or to present arguments different from those originally asserted. *William P. Pahl Equip. Corp. v. Kassis*, *supra* at 27; *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374 (2d Dept. 2004). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v. Browning School*, 80 A.D.2d 790 (1st Dept. 1981). Professor David Siegel in N.Y. Prac, § 254, at 449 (5th ed) succinctly instructs that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

Initially, this Court finds that the City's motion for reargument is timely. In asserting that the motion was untimely because the City failed to move within 30 days, plaintiff's counsel fails to consider CPLR 2103(b)(2), which permits a movant an extra five days to move where, as here, it was served with the Order by mail.

This Court grants reargument to the City on the ground that this Court overlooked a question of law regarding the applicability of New York City Administrative Code §7-210. As the City correctly asserts, that statute provides that the City can only be held liable for a roadway defect where it had prior written notice thereof. *See Amabile v City of Buffalo*, 93 NY2d 471 (1999); *Batts v City of New York*, 93 AD3d 425 (1st Dept 2012); *Tucker v City of New York*, 84 AD3d 640 (1st Dept 2011). The only exceptions to this rule are where the City either created the condition or a special use conferred a benefit on the municipality. *Id.*, at 474. To the extent that this Court relied on the case of *Ferris v County of Suffolk*, *supra*, such reliance was misplaced since that decision addressed a statute, unlike §7-210, which contained a specific constructive notice exception to the prior written notice rule.

* 8]

However, upon reargument, this Court adheres to its decision denying summary judgment to the City. It is well-settled that the proponent of a motion for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978).

In support of its motion for summary judgment, the City submitted, inter alia, the affidavit of Cynthia Howard of the DOT. Ms. Howard searched the DOT’s records for prior complaints and other documents related to the area where the alleged incident occurred and stated that the search, which included a two year period prior to and including the date of the occurrence, produced no results. However, Ms. Howard stated that the location searched was “a single roadway segment [of] Riverside Drive between West 139th Street and West 142nd Street and not the service road located at Riverside Drive between West 139th Street and West 140th Street.” Since plaintiff testified that he was injured on Riverside Drive, that the roadway had two lanes in each direction, and that the roadway “split” at the area where the alleged incident occurred, it is unclear whether Ms. Howard’s search for records relating to a “single roadway segment” included a roadway containing two lanes in each direction. Since this Court cannot discern from the papers submitted whether Ms. Howard searched for records relating to the area in which the alleged accident occurred, the City has failed to establish its prima facie entitlement to summary judgment dismissing the complaint on the ground that it did not have prior written notice of the alleged defect. *See Burwell v City of New York*, 97 AD3d 617 (2d Dept 2012).

Although this Court inadvertently overlooked the Big Apple Map submitted by the City in support of its cross-motion, also warranting reargument, consideration of the map does not entitle the City to summary judgment. First, as noted just above, the City has failed to establish that it had no prior written notice of any complaints regarding the alleged pothole. Further, there is no indication that the map, which identifies defects relating to sidewalks, curbs, and crosswalks, had any relevance to plaintiff's accident in the roadway north of the intersection of Riverside Drive and West 139th Street.

In accordance with the foregoing, it is hereby:

ORDERED that the motion by the defendant City of New York for leave to reargue its motion for summary judgment is granted; and it is further,

ORDERED that, upon reargument, this Court adheres to its Decision and Order dated August 12, 2013 denying the motion by the defendant City of New York for summary judgment without prejudice; and it is further

ORDERED that this constitutes the Decision and Order of the Court.

DATED: March 7, 2014

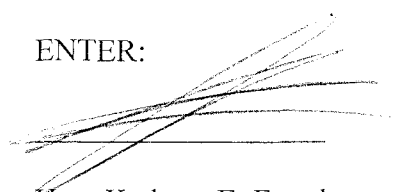
FILED

MAR 5 7 2014

MAR 12 2014

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



Hon. Kathryn E. Freed,

J.S.C.

HON. KATHRYN FREED
JUDGE OF SUPREME COURT