Yick Tak Cheung v City of New York
2014 NY Slip Op 30909(U)
April 7, 2014
Supreme Court, New York County
Docket Number: 157328/2012
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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YICK TAK CHEUNG, HAO DONG ZHANG, and YEUNG SUN POULTRY MARKET, INC.,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 157328/2012
Seq. No. 004

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NORTHEAST REMSCO CONSTRUCTION, INC., NICHOLSON CONSTRUCTION COMPANY, CORPORATIONS XYZ NOS. 1-5 and JOHN DOES NOS. 1-10,

Defendants.

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REMSCO CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590208/2013

BRIERLY ASSOCIATES, LLC,

Third-Party Defendant.

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HON. KATHRYN E. FREED:

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-E)
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:

In this action arising from damage to plaintiffs' premises as a result of excavation and construction work, defendants The City of New York ("the City") and The New York City Department of Environmental Protection ("DEP") move, pursuant to CPLR 2221, to reargue their motion seeking dismissal of the complaint, and all cross claims against them, pursuant to CPLR 3211(a)(7) for failure to state a cause of action or, in the alternative, for summary judgment dismissing the complaint pursuant to CPLR 3212. After hearing oral argument and considering the parties' motion papers and the relevant statutes and case law, the motion for reargument is **denied**.

Factual and Procedural Background:

In or about February of 2010, the City's DEP began work on a project to upgrade the Gowanus Canal Wastewater Pumping Station ("the WPS") in Brooklyn. Excavation and subsurface construction was performed in connection with the project directly adjacent to 183 and 185 Columbia Street, which were owned by plaintiff Hao Dong Zheng and plaintiff Yick Tak Cheung, respectively, and leased to plaintiff Yeung Sun Poultry Market, Inc. ("YSPM"). Defendant Northeast Remsco Construction, Inc. was the general contractor on the project. Defendant Nicholson Construction Company worked on the project as well.

Plaintiffs claim that, on December 23, 2011, the premises located at 185 Columbia Street partially collapsed and were thereafter demolished as a result of the excavation and subsurface construction performed at the WPS. They further claim that the work caused YSPM to vacate 183 Columbia Street until August of 2012 and that it caused a decrease in the "present day and future value" of the premises. Plaintiffs claim that the work at the WPS by the City and DEP resulted in

an "inverse condemnation" warranting damages of at least $5 million.

By notice of motion dated April 12, 2013, the City and DEP moved, pursuant to CPLR 3211(a)(7), 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. The City and DEP also sought dismissal of the cross claims asserted against them. The sole basis for the motion was that plaintiffs failed to file a timely notice of claim pursuant to General Municipal Law ("GML") §50-e or seek leave to file a timely notice of claim within one year and ninety days after their claim arose. They claimed that plaintiffs were required to file a notice of claim because they alleged negligence resulting in property damage. In support of the motion, the City and DEP submitted the summons and complaint, the answers served in the action, and the affidavit of a City employee who confirmed that plaintiffs had not filed a notice of claim.

In an order dated September 10, 2013, this Court denied the motion "on the ground that [plaintiffs'] complaint against the City [and DEP] alleges a claim for inverse condemnation which is not a tort."

The City and DEP now move, pursuant to CPLR 2221, for reargument of their motion to dismiss. In support of their motion, the City and DEP submit the September 10, 2013 order, their initial motion to dismiss, emergency vacate orders pertaining to the premises, and the affidavit of a DEP engineer regarding the demolition of 185 Columbia Street.

Positions of the Parties:

The City and DEP argue that their motion for reargument must be granted because this Court "overlooked or misapprehended the relevant facts" in rendering its order of September 10, 2013.

Specifically, the City and DEP assert that "[p]laintiffs are mislabeling the cause of action as inverse condemnation in order to circumvent the [notice of claim] requirement of GML §50-e."

In opposition to the motion, plaintiffs argue that this Court correctly held that they had no obligation to comply with GML §50-e since they assert a claim for inverse condemnation and do not allege a tort. They further assert that the City and DEP impermissibly present a new argument, i.e., that the complaint fails to state a cause of action for inverse condemnation and, also impermissibly, rely upon documents not submitted in support of their initial motion.

In their reply affirmation in further support of the motion, the City and DEP reiterate their argument that, since the gravamen of plaintiffs' claim sounds in negligence, they were required to file a notice of claim.

Conclusions of Law:

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (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. *See William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d *supra* at 27; *Foley v. Roche*, 68 A.D.2d 558 (1st Dept 1979). 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 434 [4th 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, the motion by the City and DEP is denied on procedural grounds. The movants' papers are deficient because they fail to include a complete set of the papers submitted in connection with their underlying motion to dismiss. *See* CPLR 2214(c); *Biscone v JetBlue Airways Corp.*, 103 AD3d 158 (2d Dept 2012), *appeal dismissed* 20 NY3d 1084 (2013). CPLR 2214 (c) provides, in pertinent part, that "[t]he moving party shall furnish...all other papers not already in the possession of the court necessary to the consideration of the questions involved." The court does not retain motion papers after it decides a motion "and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions." *Sheedy v Pataki*, 236 AD2d 92, 97 (3d Dept 1997), *lv denied* 91 NY2d 805 (1998). The movant is responsible for assembling *complete papers documenting the procedural history of the motion* and providing a proper foundation for the relief requested (*See Fernald v Vinci*, 13 AD3d 333 [2d Dept 2003] [*emphasis added*]), and a court may refuse to consider improperly submitted papers. *See Wells Fargo Home Mtge., Inc. v Mercer*, 35 AD3d 728 (2d Dept 2006). Although the City and DEP submit their own underlying motion to dismiss and the exhibits annexed thereto, they do not submit a copy of plaintiffs' papers in opposition to the underlying motion and have thus failed to provide this Court with all papers required.

In any event, the motion by the City and DEP must be denied on the merits. As noted above, the sole basis for their underlying motion was that, because plaintiffs alleged that defendants' negligence resulted in damage to their premises, they were required, but failed to, file a timely notice

of claim pursuant to GML §50-e. However, as this Court held in its order of September 10, 2013, plaintiffs' claim against the City and DEP is for inverse condemnation. Since "a cause of action sounding in inverse condemnation is not founded in tort . . . compliance with the notice of claim provisions of [GML §50-e] is unnecessary." *Clempner v Town of Southold,* 154 AD2d 421, 425 (2d Dept 1989) (*citations omitted*).

Although the City and DEP assert that plaintiffs have failed to state a valid claim for inverse condemnation, which claim was asserted solely to evade the requirements of GML §50-e, this contention is, in this Court's opinion, disingenuous. Despite plaintiffs allegation in the complaint, in bold and capital letters, "AS AND FOR A FIRST CAUSE OF ACTION AGAINST THE CITY AND [DEP] FOR INVERSE CONDEMNATION", the City and DEP did not move to dismiss based on the insufficiency of the inverse condemnation claim. On the contrary, the City and DEP appeared to have ignored this allegation, seemingly assuming, as plaintiffs suggest, that the claim sounded in tort and therefore required the filing of a notice of claim. Whatever the reason, it is clear that the City and DEP did not attack the sufficiency of the inverse condemnation claim in their initial motion. Having failed to raise this issue in their underlying motion, the City and DEP cannot seek reargument based on this Court's alleged misapprehension of the facts or law regarding the inverse condemnation claim. *See Foley v. Roche, supra* at 567-568; *William P. Pahl Equip. Corp. v. Kassis, supra* at 27.

Additionally, as plaintiffs note, the reargument motion contains several exhibits which were not attached to the underlying motion. Since a reargument motion "shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d][2]), these exhibits cannot be considered by this Court in deciding the instant motion.

To the extent that the movants seek to have their application considered as one for renewal based on the additional exhibits, this attempt must fail as well, since they neither specifically identified the motion as one for renewal (CPLR 2221 [e][1]) nor set forth "reasonable justification for the failure to present [the new exhibits] on the prior motion." (CPLR 2221[e][3]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for reargument by defendants The City of New York and New York City Department of Environmental Protection is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: April 7, 2014

APR 07 2014

ENTER:

Hon. Kathryn E. Freed,

HON. KATHRYN E. FREED
JUSTICE OF SUPREME COURT