

Locker v Scarsdale Improvement Corp.

2014 NY Slip Op 32987(U)

July 10, 2014

Supreme Court, Westchester County

Docket Number: 51267/2012

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

-----x
IRENE LOCKER,

Plaintiff,

Index No. 51267/2012

-against-

DECISION & ORDER

SCARSDALE IMPROVEMENT CORPORATION and JP
MORGAN CHASE & CO.,

Defendants.
-----x

The following papers numbered 1 to 7 were read on defendants' motion to reargue this Court decision and order dated January 7, 2014 which denied their motion for summary judgment dismissing the complaint:

PAPERS NUMBERED

Notice of Motion/Affirmation/Exhibits	1-3
Affirmation in Opposition/Affidavit/Exhibits	4-6
Reply Affirmation	7

Factual and Procedural Background

On June 21, 2011, plaintiff, age 95, fell while exiting a Chase Bank. Plaintiff had been at the same bank about a week before the accident. At the time of the accident, plaintiff was wearing sneakers, was not using a cane, or crutches and was carrying only her pocketbook. She was wearing her glasses and the weather was nice. Plaintiff testified at her deposition that she had no difficulties using this same exit when she was last at the

Bank a week before, but said that it was difficult, because "they don't have that white strip, you know, but I walk very slowly." There are two steps above the sidewalk on the East Parkway entrance where plaintiff fell. Mrs. Locker knew that there was a handrail on the right side, but she was not sure whether there was a handrail on both sides. While in the Bank, Mrs. Locker spoke to a couple of the employees, and two of them — Laura Noka, and another employee whose name Mrs. Locker believes is Carol, but she is unsure — walked her out. Mrs. Locker told them to make sure that they told the new manager to put the white strip on. They just walked her to the little entrance for the ATM Machine. Those two women held the door for Mrs. Locker, and walked back.

Plaintiff walked down the first step and fell on the second step. She missed the second step; she was looking straight ahead at the time. Although she was holding on to the rail, she fell down onto her back on the sidewalk. The bank employees did not see Mrs. Locker fall, but they did come out to help.

In January 2012, plaintiff commenced this personal injury action. Issue was joined on March 6, 2012.

By decision and order dated January 7, 2014, this Court denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff's and defendants' experts had differing opinions regarding whether the stairs which caused plaintiff's fall were in a safe condition. The Court noted that generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury (*see Losito v JP Morgan Chase & Co.*, 72 A.D.3d 1033, 899 N.Y.S.2d 375 [2nd Dept 2010]; *Trincere v County of Suffolk*, 90 NY2d 976, 977 [2nd Dept 1997]). Therefore, since the parties submitted two conflicting expert opinions

regarding the condition of the stairs at the time of plaintiff's fall, the evaluation of competing evidence (the battle of the experts) falls within the province of the trier of fact at trial, and it was not appropriate for the Court to dismiss the complaint on a motion for summary judgment. (See *Dietrich v. Puff Cab Corp.*, 63 AD3d 778 [2nd Dept 2009]; *Duffel v. Green*, 84 N.Y.2d 795 [1995]; *Lopez v. Sanatore*, 65 N.Y.2d 1017 [1985]).

Defendants now move to reargue on the ground that the Court misapprehended the fact that the stairs, constructed in 1934, were not in violation of current building codes since they were inapplicable to them. Therefore, in the absence of a code violation summary judgment dismissing the complaint should be granted.¹ Defendants also seek leave to renew and upon renewal be permitted to submit the medical records of plaintiff's physician Dr. Weiss who on December 17, 2010 determined that plaintiff was legally blind from macular degeneration. Defendants claim that plaintiff's vision condition was the cause of her fall.

In opposition, plaintiff argues that reargument should not be granted because defendants are not submitting any new arguments. With respect to defendants' renewal application, plaintiff notes that she provided defendants with authorizations to obtain Dr. Weiss's records in November 2012, however, defendants did not request the records until April 16, 2013. They made a second request on August 22, 2013. Plaintiff notes that defendants' summary judgment motion was made on May 17, 2013. Plaintiff argues that since defendants were in possession of the authorizations in November 2012 there is no

¹The absence of a code violation does not "per se" establish as a matter of law that the steps were in a safe condition. Notably, there is conflicting testimony proffered by plaintiff's expert that the steps do not satisfy the provisions of any building code in New York State from as far back as 1964.

excuse for not obtaining Dr. Weiss's medical records before the submission of their summary judgment motion.

Discussion

A motion to reargue is designed to give a party a chance to convince the court that relevant facts were overlooked or misapprehended or a controlling principle of law was misapplied and is addressed to the court's reasonable discretion. Its purpose is not to permit a party to reargue once again the very questions the court has already decided. (See *Foley v. Roche*, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588, 593 [1st Dept 1979], citing *Fosdick v. Town of Hempstead*, 126 N.Y. 651, 27 N.E. 382 [1891]; *American Trading v. Fish*, 87 Misc.2d 193, 383 N.Y.S.2d 943 [N.Y. Sup., 1975]).

Contrary to defendants' arguments this Court does not find it overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. The within motion is nothing but an attempt to get a second bite of the apple.

"A motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered, but to point out controlling principles of law or fact that the court may have overlooked." (*Simon v. Mehryari*, 16 A.D.3d 664, 665, 792 N.Y.S.2d 543, 545 [2nd Dept 2005]).

Further, a "motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' (CPLR 2221[e][2]) and 'shall contain reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3]." (*Caraballo v. Kim*, 63 A.D.3d 976, 882 N.Y.S.2d 211 [(2nd Dept 2009)], citing *Ramirez v. Khan*, 60 A.D.3d 748, 874 N.Y.S.2d 257 [2nd Dept 2009]; *Dinten-Quiros*

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v. Brown, 49 A.D.3d 588, 852 N.Y.S.2d 793 [2nd Dept 2001]; and *Madison v. Tahir*, 45 A.D.3d 744, 846 N.Y.S.2d 313 [2nd Dept 2007]). "A motion to renew is not a second chance given to a party who failed to exercise due diligence when making their initial factual presentation. (See *Renna v. Gullo*, 19 A.D.3d 472, 797 N.Y.S.2d 115 [2nd Dept 2005] quoting *Rubinstein v. Goldman*, 225 A.D.2d 328, 329, 638 N.Y.S.2d 469 [1st Dept 1996]; see also *Caraballo v. Kim*, *supra*; *O'Dell v. Caswell*, 12 A.D.3d 492, 784 N.Y.S.2d 803 [2nd Dept 2004]).

Here, defendants have not established why, through due diligence, they were not able to obtain Dr. Weiss's records despite the fact that they had plaintiff's authorizations as early as November 2012. Further, to the extent plaintiff suffers from vision problems that evidence would go to the issue of comparative negligence and not to whether the stairs were in a safe condition.

Based on the foregoing, defendants' motion for leave to renew and reargue is DENIED.

The parties are to appear in the Settlement Conference Part on October 8, 2014 room 1600 at 9:30 for further proceedings.

Dated: White Plains, New York
July 10, 2014



HON. WILLIAM J. GIACOMO, J.S.C.