Perez v Mangroo
2015 NY Slip Op 32152(U)
October 7, 2015
Supreme Court, Bronx County
Docket Number: 307902/11
Judge: Eddie J. McShan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

NELIDA PEREZ,

Plaintiff,

-against-

GOWTAM MANGROO, CHAMPAWATTIE MANGROO, THE CITY OF NEW YORK, and JOHN J. CURTIS,

Defendants.

Index No.: 307902/11

DECISION/ORDER

Present:
Hon. EDDIE J. MCSHAN

The following papers numbered 1 to 31 were read on this motion for summary judgment and cross motion for vacatur.

No	on Calendar of PAPERS NUMBERED
Notice of Motion -- Exhibits and Affirmation Annexed	1 - 13
Affirmation in Opposition (Mangroo)	14 - 17
Affirmation in Opposition (Curtis)	18 - 20
Reply Affirmation (City)	21 - 22
Notice of Cross Motion (Mangroo))	23 - 27
Affirmation in Opposition (City)	28 - 29
Replying Affirmation (Mangroo)	30 - 31
Other:	

Upon the foregoing cited papers, the Decision/Order of this Motion is as follows:

Plaintiff commenced the instant proceeding to recover for her alleged injuries caused by the defendants based on their alleged negligence to remove snow and ice on January 13, 2011. Pursuant to a Stipulation of Discontinuance (Discontinuance) filed with the Bronx County Clerk's Office on May 28, 2014, Plaintiff and co-defendants, Gowtam Mangroo and Champawattie Mangroo (Mangroo) agreed to discontinue with prejudice their respective claims against the co-defendant, The City of New York (City). The City now moves pursuant to CPLR § 3212, for an order of summary judgment dismissing Co-defendant, John J. Curtis' (Curtis) cross-claims. The co-defendants, Mangroo and Curtis, oppose the City's application, and Mangroo cross-moved to vacate the Stipulation of Discontinuance filed with the County Clerk. Curtis supported Mangroo's application for vacatur. The City opposed the cross-motion and demanded dismissal. The Court determines the parties' respective applications as follows:

Summary Judgment

Initially, the City's instant motion for summary judgment and dismissal of Curtis' cross-claims is hereby denied in its entirety as untimely. The City failed to file the instant application within 120 days after the filing of the Note of Issue herein (*See Brill v City of New York*, 2 NY 3d 648 [2004]). The Court takes notice that the Note of Issue was filed herein on December 23, 2013. The City filed the instant application on April 7, 2015. The Court finds that the City has not established good cause to extend the time on this record (*Brill*, 2 NY 3d 648). The City's suggestion that it withdrew its first application for summary judgment based upon the Discontinuance noted hereinabove does not explain why the City waited so long to bring the instant application. The Discontinuance only effected the Plaintiff and Mangroo. The instant application for summary judgment has been made almost two years after the filing of the Note of Issue and approximately one year after the original application was withdrawn.

Vacatur of Stipulation of Discontinuance

Mangroo argue that the Stipulation of Discontinuance should be vacated because it was signed by their prior attorney by mistake. They assert that their prior counsel inadvertently signed the Discontinuance and only intended to sign a stipulation adjourning the City's prior motion for summary judgment. Mangroo submitted an affirmation from their prior counsel, Gary A. Farole, Esq., affirming that he inadvertently signed the Discontinuance. Mangroo argue that a unilateral mistake can be the basis for recision if failing to rescind would result in unjust enrichment of one party at the expense of the other, and the parties can be returned to the *status quo* without prejudice. They insist that the City will not be prejudiced if the Discontinuance is vacated because their cross-claims were addressed in the current motion for summary judgment.

The City asserts that the Discontinuance cannot be vacated because it is with prejudice and has been signed and filed with the County Clerk. The City notes that the attorneys who signed the Discontinuance did not make any efforts to vacate it for approximately one year until it made the application for summary judgment. The City noted that none of the attorneys attempted to contact it regarding the Discontinuance. The City suggests that Mangroo does not provide a reasonable excuse for the alleged error and that they waited too long to make the application. The City asserts that it would be prejudiced if the Discontinuance is vacated because it withdrew the first application for summary judgment based upon the discontinuance.

Caselaw has established that an agreement may be voided on a unilateral mistake if enforcement would be unconscionable; the mistake is material and made despite the exercise of ordinary care by the party in error; the innocent party had no knowledge of the error; and it is possible to place the parties in status quo ante (*See for example 104-106 East 81st Street, LLC v Obrien*, 12 Misc 3d 1175(A) [NYC Civil Ct 2006]). This Court does not find enforcement of the alleged unilateral mistake allegedly made by Mangroo's prior counsel to be unconscionable. Neither Curtis nor Mangroo present any admissible evidence on this record to suggest that the City had actual or constructive notice of the specific condition that caused Plaintiff's alleged injuries to suggest failure to vacate the Discontinuance would be unconscionable. Moreover, neither co-defendant presents any facts nor evidence to suggest that the specific condition that allegedly caused Plaintiff's injuries were the result of a dangerous and unusual condition caused by the City. In addition, the Court finds that the City would be prejudiced by vacatur of the Discontinuance because it withdrew its prior application for summary judgment and its request for the same relief has been denied as determined hereinabove.

In light of the foregoing, it is hereby

ORDERED AND ADJUDGED that the City's motion for summary judgment is denied as untimely; and it is further

ORDERED AND ADJUDGED that the Mangroo's cross-motion to vacate the Discontinuance is also hereby denied.

The foregoing shall constitute the decision and order of this Court.

Dated: October 7, 2015

A.J.S.C.