Maggio v Town of Hempstead
2015 NY Slip Op 32647(U)
June 1, 2015
Supreme Court, New York County
Docket Number: 18433-2010
Judge: James P. McCormack

[* 1]

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____x

VINCENZO MAGGIO,

Plaintiff(s),

-against-

TOWN OF HEMPSTEAD, KEYSPAN ENERGY DELIVERY and LONG ISLAND WATER CORPORATION,

Defendant(s).

_____x

TRIAL/IAS, PART 40
NASSAU COUNTY

Index No. 18433-2010

Motion Seq. No.: 003
Motion Submitted: 4/30/15

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant Town of Hempstead (the Town) moves this court for leave to reargue this court's order dated December 16, 2014 which denied the Town summary judgment. In the alternative, the Town moves for an order dismissing the complaint pursuant to CPLR §3211(a)(7). Should reargument and the motion to dismiss be denied, the Town seeks a stay of the trial of this matter, pursuant to CPLR §2201, while its appeal of the December 16, 2014 order is pending.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on April 30, 2010. Plaintiff alleges that he slipped and fell at a defective and/or dangerous condition located in the street at the curb line in front of the premises located at 2356 Pershing Boulevard, Baldwin, New York. Plaintiff further alleges in his bill of particulars that the Town was negligent "in that they carelessly, negligently and recklessly allowed a defective and/or dangerous condition to exist at the aforesaid location; in causing and/or creating a defective and/or dangerous condition at the aforesaid location; in failing to inspect and/or repair the aforesaid location; in failing to properly and adequately backfill the area which was cut open in the street; in creating a defective condition from the moment in time in which the backfill took place; in allowing the ground/asphalt that was paved over to settle into a location in a negligent and careless fashion; in failing to take cognizance of the defective and/or dangerous condition when it was put in place at the aforesaid location."

In opposition to the Town's motion for summary judgment on the prior motion, Plaintiff submitted, *inter alia*, the affidavit of its expert, a structural engineer. It was largely based upon the expert's findings that the court denied the Town's motion for summary judgment. The Town now argues that reliance upon the expert's affidavit was in error.

REARGUMENT

A motion for leave to renew or reargue is addressed to the sound discretion of the

Supreme Court *(see Matter of Swingearn*, 59 AD3d 556 [2d Dept. 2009]). 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]). It is not designed, however, to provide an unsuccessful party with successive opportunities to re-litigate the issues previously decided (*see Foley v. Roche*, 68 AD2d 558, 567 [1st Dept. 1979]), or to present arguments different from those originally tendered (see *Giovanniello v. Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept. 2006]). Pursuant to CPLR 2221(d)(3) a motion for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry". The Town's motion herein was timely made.

The Town argues that Plaintiff's expert's affidavit is based upon pure conjecture and is therefore inadmissible. Further, because the expert partially relied upon the affidavit of a neighbor who saw work being performed at the location of the accident some time prior to the accident, but could not specify who performed the work, the Town believes there was not enough admissible information for the court to find a triable issue of fact. The court disagrees. The expert states, within a reasonable degree of engineering certainty, that the road where Plaintiff fell was defectively constructed, and it was this defective construction that caused the depression upon which Plaintiff tripped. The Town has jurisdiction over the road, and while the Town has implied that other unscrupulous

parties may have worked on that area of the road without a permit, there is no proof of that happening. The court agrees that the witness's affidavit alone would not have had much evidentiary value, but the court's prior determination was based upon the expert's report, which the Town did not refute with its own expert, as well as the witnesses's affidavit. The court believed then, as it does now, that the expert's conclusions raise a triable issue of fact. Accordingly, leave to reargue will be denied.

DISMISSAL PURSUANT TO CPLR §3211(a)(7)

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52 AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The Town argues that Plaintiff's complaint fails to state a cause of action because, in separate paragraphs, Plaintiff alleges that The Town, Defendant Keyspan Energy Delivery and Defendant Long Island Water Corporation "owned, managed, maintained,

controlled, inspected, repaired and made special use of" the area where Plaintiff fell, and that each entity "solely" caused or created the defective condition. According to the Town, it is the use of the word "solely" that renders the complaint improper. While the Town acknowledges that inconsistent theories may be pled, they argue that three entities cannot "solely" own or be responsible for the road, thereby rendering the allegation not inconsistent but impossible. In so arguing, the Town relies upon *Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co.*, 157 Misc.2d 198 (NY Sup. 1993) which holds that while theories for legal recovery may be inconsistent, facts cannot. The court finds the allegations the Town cites refer to legal theories, not facts. The language used, that each party "owned, managed, maintained, controlled, inspected, repaired and made special use of" is clearly the language of a legal theory spelling out negligence. As such, inconsistencies or contradictory statements are allowable. (*See generally Kettner v. Carson*, 44 A.D.2d 804 [1st Dept. 1974]). Accordingly, the Town's motion to dismiss will be denied.

STAY

CPLR §2201 gives the court the authority to stay a matter "in a proper case, upon such terms as may be just". The Town's only support for a stay is its conclusory statement that its likelihood of success on its appeal is high. The court has broad discretion in the granting of stays. (*In re Tenebaum*, 81 A.D.3d 738 [2nd Dept. 2011]). While there are circumstances where granting a stay in anticipation of an appellate court's

ruling is appropriate, the lower court should only do so where the appellate court's decision is imminent. (*Miller v. Miller*, 109 Misc.2d 982 [NY Sup. 1981]). The court should take into consideration when the appeal was taken, when arguments are to be heard and when a decision is expected to be rendered. *Id.* Herein, the appeal has not yet been perfected, and may not be perfected for almost two months from the date of this order. At this point in time, the court is unable to even guess when a decision will be issued, but it is clear a decision is not imminent. The court therefore finds no basis to stay the action.

Accordingly, it is hereby

ORDERED, that the Town's motion for leave to reargue is DENIED; and it is further

ORDERED, that the Town's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is DENIED; and it is further

ORDERED, that the Town's motion for a stay of all proceedings pending appeal of the this court's December 16, 2014 order is DENIED.

This constitutes the decision and order of the Court.

Dated: June 1, 2015
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.