

Siegfried v West 63 Empire Assoc., LLC

2015 NY Slip Op 32680(U)

October 21, 2015

Supreme Court, New York County

Docket Number: 101662/12

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

WENDY SIEGFRIED,

Plaintiff,

- against-

INDEX NO. 101662/12

MOTION SEQ. NO. 002

WEST 63 EMPIRE ASSOCIATES, LLC, THE CHETRIT GROUP, LLC, and CGM EMP, LLC,

Defendants.

RECEIVED
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PAPERS NUMBERED

The following papers were read on this motion by plaintiff for leave to reargue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo)

FILED

Replying Affidavits (Reply Memo)

OCT 23 2015

Cross-Motion: Yes No

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NEW YORK

In this personal injury case, Wendy Siegfried (plaintiff) alleges that she was injured when she tripped and fell on a stairwell landing under the control of Ed's Chowder House (subject premises) located at 44 West 63rd Street, Mezzanine, County of New York, NY (the building). Defendants West 63 Empire Associates LLC (West 63) and the Chetrut Group, LLC are the building manager and owner of the property (building defendants), and defendant CGM EMP, LLC (CGM) (collectively defendants) is the owner and manager of the restaurant Ed's Chowder House (the restaurant) which occupies the subject premises.

Before the Court is a motion by plaintiff, pursuant to CPLR 2221 for leave to reargue and renew the Decision and Order of the Court dated August 12, 2014 and entered on August 14, 2014 (August Order), wherein the Court granted CGM's motion for summary judgment dismissing the complaint as against it and also granted the building defendants' cross-motion

for summary judgment dismissing the complaint and all cross-claims asserted against them.

In support of her motion, plaintiff argues that the Court mistakenly overlooked the affidavit of plaintiff's engineer, Robert Grunes (Grunes Affidavit); that the condition was not open and obvious as the conditions surrounding the subject location created an "optical confusion;" and that the Court failed to consider the new evidence in plaintiff's sur-reply, which contained information regarding a subsequent lawsuit, entitled *Bassiur v West 63 Empire Associates, LLC and China Grill Inc. d/b/a Ed's Chowder House*, Index Number 159497/13, filed against defendant West 63 for an accident that took place at the same location as this subject accident. Defendants are in opposition to the herein motion.

DISCUSSION

A motion for leave to reargue "shall 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]; see *Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010] ["A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law"]; see also *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). A motion to reargue shall be made "within 30 days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR 2221[d][3];

A renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2] and [3]). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional

facts on the original application" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed sub nom Matter of Beiny*, 71 NY2d 994 [1988] [internal citation omitted]); *CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431, 432 [1st Dept 2011]). Renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Queens Unit Venture, LLC v Tyson Court Owners Corp.*, 111 AD3d 552, 552 [1st Dept 2013], quoting *Sobin v Tylutki*, 59 AD3d 701, 702 [2d Dept 2009]; see also *Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], citing *Matter of Weinberg*, 132 AD2d at 210, *app dismissed*, 15 NY3d 820 [2010], *reconsideration denied*, 16 NY3d 726 [2011]).

Based upon the papers before the Court, the motion to reargue is granted to the extent that the Court shall consider the Grunes Affidavit, which was attached to plaintiff's original papers yet not as Exhibit A which her papers indicated. However, in doing so, the Court adheres to its original determination as the Grunes Affidavit contains nothing more than speculative, conclusory assertions (see *Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327 [1st Dept 2006]) insufficient to raise triable issues of fact.

Furthermore, the Court finds that the plaintiff does not meet the standard for a motion to renew in as much as she fails to demonstrate there is a change in facts not offered in her previous motion or a "change in the law" warranting a change in this Court's prior decision (see CPLR 2221[e][2]; *Rodriguez v Ford Motor Co.*, 106 AD3d 525, 526 [1st Dept 2013] [plaintiff's submission fails to offer new facts or demonstrate that there has been a change in the law that would change the prior determination]; *Otto v Otto*, 110 AD3d 620 [1st Dept 2013]). The Court has considered plaintiff's remaining arguments in support of her motion and finds them unavailing. As such, plaintiff's motion is denied.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the portion of plaintiff's motion for leave to reargue the prior Order of this Court, dated August 12, 2014 and entered on August 14, 2014 is granted, but upon reargument the Court adheres to its original determination; and it is further,

ORDERED that the portion of plaintiff's motion for leave to renew the prior Order of this Court, dated August 12, 2014 and entered on August 14, 2014 is denied; and it is further,

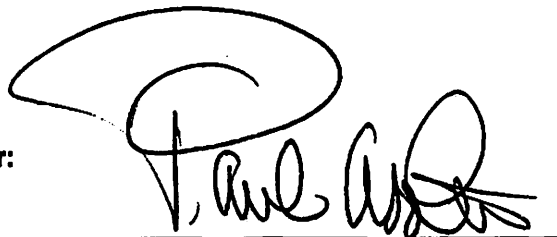
ORDERED that counsel for West 63 is directed to serve a copy of this order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated:

10/21/15

Enter:



PAUL WOOTEN, J.S.C

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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