Partelow v Town of Mt Pleasant
2016 NY Slip Op 32671(U)
May 11, 2016
Supreme Court, Westchester County
Docket Number: 61359/2013
Judge: Linda S. Jamieson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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.

Disp ___ Dec __x__ Seq. Nos.__4-5_____ Type __reargue__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

----------X

LAWRENCE PARTELOW,

Plaintiff,

-against-

Index No. 61359/2013

DECISION AND ORDER

THE TOWN OF MT PLEASANT, VILLAGE/HAMLET OF HAWTHORNE, DANIEL TAGARELLI and DOROTHY TAGARELLI,

Defendants.

----------X

The following papers numbered 1 to 8 were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Affirmation in Opposition	3
Reply Affirmation	4
Notice of Cross-Motion, Affirmation and Exhibits	5
Affirmation in Opposition	6
Affirmation in Opposition	7
Reply Affirmation	8

Defendants each seek to reargue this Court's Decision and Order dated December 15, 2015 (the "Decision") in this case arising from plaintiff's trip-and-fall on a water pipe (which the

parties refer to as a "curb box") set in the middle of the Tagarelli defendants' front lawn.

In the Decision, the Court found that defendants had not established their prima facie cases. Beginning first with the Town, the Court took "issue with the Town's assertion that it is not responsible for the location of the accident and that it did not create the alleged defective condition," finding that "the Town installed the water pipe in 1933, replaced or repaired it in 2003 and selected the height, color and other details and dimensions of the water pipe," as well as the location thereof. The Court went on to state that "As for the Tagarellis, there are questions as to whether it was reasonable for them to fail to install plantings, flags or other signposts to make the water pipe obvious. There is also a question as to whether they should have reminded plaintiff of the water pipe as he set off across the lawn after dinner."

"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. While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present

arguments different from those originally presented." *Rodriguez v. Gutierrez*, 2016 WL 1576440, at *2 (2d Dept. Apr. 20, 2016).

Here, neither party presents the Court with any "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." The Town asserts that **plaintiff** needed to submit evidence in opposition to the motion demonstrating that the Town had negligently installed the water pipe. This is incorrect. Since the Court found that the Town had not met its prima facie burden, plaintiff was under no obligation to prove anything. *Phillips v. Diodato*, 110 A.D.3d 864, 972 N.Y.S.2d 922 (2d Dept. 2013) ("In light of the defendant's failure to meet his prima facie burden, we need not review the sufficiency of the plaintiff's opposition papers."). Moreover, it is pure speculation for the Town to state that "time and weather conditions may have impacted the surrounding earth since the curb box was installed in 1993 and 2003" - both times by the Town. The Town should have submitted evidence to demonstrate that the ground did actually settle, if it wanted to rely on this argument. There is, thus, no reason for the Court to grant the Town's motion for reargument.

Nor is there any reason to grant the motion filed by the Tagarellis. They are mistaken when they state that the Court "incorrectly indicated that the parties did not submit 'any evidence regarding how dark or light it was at the time of the

accident.'" While it is true, as the Tagarellis state, that plaintiff did testify that "it was light enough to see the grass, light enough to see the truck," it does not necessarily follow that it was **also** light enough to see any details, such as the water pipe sticking up out of the grass. The Court cannot assume - as the Tagarellis would have it - that the lighting was adequate. As the Tagarellis, like the Town, have failed to present any reason for the Court to reconsider the Decision, the motions to reargue are denied in their entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
May 11, 2016

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: Michael J. Lombardi, Esq.
Attorney for Plaintiff
81 Main St.
White Plains, NY 10601

Law Office of Steven G. Fauth, LLC
Attorneys for the Tagarelli Defendants
40 Wall St., 28th Fl.
New York, NY 10005

Morris Duffey et al.
Attorneys for the Town
2 Rector St., 22nd Fl.
New York, NY 10006