SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

SHEENA BURTON INDEX NO. 156604/15

MOT. DATE

- v - MOT. SEQ. NO. 005

KHEDOURI EZAIR CORP. et al.

The following papers were read on this motion to/for reargue

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 251-282
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 293, 294, 296-305, 315-318
Replying Affidavits	NYSCEF DOC No(s). 309-310, 311-312, 325-326

This is a personal injury action arising from a slip and fall. Previously, in motion sequence number 002, defendant 7Just One Corp., t/a Iggy's ("Iggy") moved for summary judgment dismissing plaintiff's complaint and all cross-claims against it. Plaintiff opposed the motion and cross-moved for an order striking Iggy's answer due to its failure to provide discovery responses and compelling Iggy to appear for a deposition.

In motion sequence number 003, the Khedouri Ezair Corp (the "Owner") moved for summary judgment dismissing plaintiff's claims and on its cross-claim against Iggy for contractual and common law indemnity. Alternatively, the Owner sought an order striking plaintiff's complaint for failing to provide discovery and comply with court orders. Plaintiff also cross-moved against the Owner to strike the Owner's answer for failing to provide discovery responses and to compel the owner to produce a witness for deposition.

Finally, in motion sequence number 004, H.K. Paris Inc. d/b/a Voila 76 ("Viola") moved for summary judgment dismissing plaintiff's complaint against it as well as for sanctions, and alternatively, for an order striking plaintiff's complaint for failure to comply with discovery. Plaintiff also cross-moved against Viola for the same relief it sought against Iggy and the Owner.

The court consolidated the motions for its consideration and decided them in a decision/order dated August 28, 2017 (the "prior decision") whereby the court granted the motions to the extent that plaintiff's claims against the Owner, Viola and Iggy were severed and dismissed, and denied the cross-motions as moot.

Now, plaintiff now moves to renew and reargue defendants' motions for summary judgment and her cross-motion to strike defendants' answers or alternatively compel discovery in motion sequence

Dated: 4/13/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

number 005. The owner and Viola oppose plaintiff's motion and Iggy cross-moves to reargue that portion of its prior motion which was for sanctions against plaintiff.

A motion to reargue is addressed to the court's discretion, and permission to reargue will only be granted if the court believes some error has been made (see CPLR § 2221[d][2]). In order to succeed motion for reargument, the movant must demonstrate that the Court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to re-litigate the same issues previously decided against him or her (*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments not previously advanced on the prior motion (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; see also *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715 [1st Dept 2005]).

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]). The proponent of a motion to renew must offer a reasonable excuse for the failure to present the "new" facts on the prior motion (*In re Defendini*, 142 AD3d 500 [2d Dept 2016]).

The facts set forth in the court's prior decision are herein incorporated by reference. The court will first consider plaintiff's motion. Plaintiff contends that the court erred in the prior decision by considering deposition testimony which was not submitted in admissible form, and further, that the defendants did not establish lack of notice of the alleged ice condition or that it did not cause or create same. Finally, plaintiff argues that the court misapprehended plaintiff and Hiba Anderson's testimony because they "identify the proximate cause of the subject incident with sufficient specificity to survive the drastic remedy of summary judgment."

As for the prior cross-motions, plaintiff cavalierly argues that defendants have not produced "a witness with specific knowledge of snow and ice removal procedures close in time and proximity to the subject accident" and that "[p]laintiff was ordered by the Hon. Joan Kenney to file the Note of Issue and Certificate of Readiness [] despite necessary, outstanding discovery."

At the outset, plaintiff has wholly failed to demonstrate that there are new facts which would warrant renewal. Therefore, the motion is only considered as one to reargue. However, the court ruled in the prior decision as follows:

> The court rejects these procedural arguments outright since plaintiff does not dispute the accuracy of the deposition transcripts or otherwise demonstrate any prejudice resulting from the court's consideration of these accurate transcripts.

A motion to reargue is not an opportunity for a party to rehash previously unsuccessful arguments. Therefore, the argument that the transcripts were not in admissible form is again rejected.

Next, plaintiff contends that the court impermissibly placed the burden on plaintiff to demonstrate a *prima facie* case, rather than the defendants, as the proponents of a motion for summary judgment. The court disagrees. Rather, the court found, as the defendants correctly point out, that they demonstrated *prima facie* entitlement to judgment as a matter of law because plaintiff could not identify what caused her fall. Indeed, plaintiff testified:

> A. What else – because I had to think what else is – first of all, what else could I possibly fall on, you don't just fall and break your leg for no reason and I just felt it. I just know what it feels like, it's slippery.
>
> ...

Q. So, it's your testimony that you felt that you slipped on something slippery but you physically did not see any ice, what you slipped on?

A. No, I did not see it. No.

This testimony was highlighted by the court in the prior decision, and defendants' motions were granted, in part, because plaintiff could not identify what caused her to fall. Therefore, defendants met their burden and the motions were granted. Plaintiff's argument that the court impermissibly shifted the burden of proof is flawed, since that would mean a defendant would not be entitled to summary judgment if there is no evidence in the record that supports plaintiff's theory of negligence, to wit, that plaintiff slipped on ice. Plaintiff's testimony is fatal to her claim because she can only speculate that it was ice which caused her to slip and fall, and a jury's verdict in her favor would be untenable since there is no evidence which would support her theory of negligence.

Further, while plaintiff's friend, non-party Anderson, saw plaintiff fall while she was driving her vehicle towards Iggy's and testified that plaintiff fell because of black ice, her conclusion is also speculative and does not raise a triable issue of fact. Anderson did not actually see what caused plaintiff to fall, but merely observed ice at or about the location of plaintiff's accident when she went to help her up. Anderson's testimony lacks sufficient factual support and therefore a reasonable factfinder could not conclude that plaintiff slipped and fell because of an icy condition. Since the court did not overlook plaintiff's argument, which is essentially a reframing of her previously unsuccessful argument, or misapprehend the law with respect to it, reargument is not warranted on this point, either.

As for the issue of notice, the court did not impermissibly shift the burden here, either. Rather, the court implicitly found that defendants had established the absence of notice because plaintiff herself could not see the ice she thinks she slipped upon. Further, Anderson, testified:

Q. Do you know what color the ice was?

A. What color?

Q. Was it clear, was it black, was it dirty, you know, can you describe it to me?

A. It was black ice and also it was two o'clock in the morning so, it was dark outside, but it was black ice.

Q. You know, black, ice, how were you able to see it, how did you know it was ice on the ground?

A. That's how close to the ground I had to get to help her up.

Even if plaintiff could demonstrate a triable issue of fact as to whether an icy condition on the sidewalk caused her accident, defendants were also entitled to summary judgment on the issue of notice. There was no evidence on this record sufficient to establish notice, since plaintiff, who entered the subject premises without incident and stood outside it for substantial periods of time, never observed the icy condition which allegedly caused her accident. Anderson never observed the icy condition before plaintiff's accident, either. The court rejects plaintiff's argument that Iggy needed to submit evidence regarding its sidewalk maintenance, when plaintiff's own testimony was sufficient to establish that no reasonable factfinder on this record could conclude that the black ice existed for a sufficient period of time for the defendants to remedy same.

Finally, plaintiff's argument regarding discovery is rejected. As plaintiff correctly points out, she was previously ordered to complete discovery and file note of issue by a judge of coordinate jurisdiction, and that order is law of the case. Plaintiff did not appeal that order. Moreover, the court also expressly re-

jected this argument in the prior decision, when it stated: "plaintiff has not demonstrated that any of the discovery she seeks by way of the cross-motions would lead to evidence on the issue of notice."

Based upon the foregoing, plaintiff's motion is denied in its entirety. Next, Viola's cross-moves to reargue its prior request for sanctions. Viola maintains that there is no theory of liability against it, and therefore sanctions are warranted. 22 NYCRR 130-1.1[c] defines conduct as frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

While plaintiff was unsuccessful on this motion, the court cannot find that plaintiff's motion was frivolous within the meaning of the court rules. Accordingly, Viola's cross-motion to reargue its prior request for sanctions is also denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion and the cross-motion are denied in their entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 4/19/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.