

Rodriguez v Shahana
2018 NY Slip Op 30780(U)
March 20, 2018
Supreme Court, Richmond County
Docket Number: 150170/2015
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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RAYMOND RODRIGUEZ,
Plaintiff,

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER
Index No. 150170/2015

BIBI SHAHANA and NATIONAL GRID,
Defendants.

Motion Seq. No.: 4527-005

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BIBI SHAHANA,
Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK,
Third-Party Defendant.

-----X

The following papers numbered "1" to "3" were fully submitted on the 7th day of February 2018.

**Papers
Numbered**

Notice of Motion and Affirmation by Third-Party
Defendant CITY OF NEW YORK for Re-argument,
with the NYSECF docket annexed, dated November 3, 2017 1, 2

Affirmation in Opposition by Third-Party Plaintiff
BIBI SHAHANA with Exhibits annexed, dated
January 31, 2018..... 3

Reply Affirmation by Third-Party Defendant
CITY OF NEW YORK with NYSECF docket
annexed, dated February 6, 2018..... 4

Upon the foregoing papers, the motion pursuant to CPLR § 2221 for re-argument of this Court's Order dated October 3, 2017, and upon re-argument granting summary judgment to third-party defendant CITY OF NEW YORK, is denied.

Plaintiff commenced this action to recover damages for injuries he sustained when he tripped and fell on what he described as "some kind of missing part of the sidewalk" (Ex. G, 26:16-22)¹ while he was collecting trash as an employee of the Department of Sanitation. The accident occurred on May 13, 2014 at 205 Centre Street in Brooklyn, New York. It is alleged that plaintiff was dragging two garbage cans to a sanitation truck when he "stepped" (Id. 26:21) on this missing part of the sidewalk causing him to fall forward "off the curb" (39:25, 40:1-6) onto his right arm and right side of his body. Plaintiff testified that he observed the area of the sidewalk about one month prior to his fall (31:9-15). He further testified that he never reported the condition at any time prior thereto (66:15-19); did not know the identity of witnesses to the condition (66:25, 67:1-5, 11-19); and was unaware of prior similar accidents at the location (67:6-10). Finally, plaintiff never observed construction at this location (67:20-25, 68:1-5).

This Court denied summary judgment to both third-party plaintiff, Shahana, and third-party defendant, City, by an Order dated October 3, 2017. In denying summary judgment to the City, this Court held that, "Thus, it cannot be said as a matter of law that THE CITY did not have prior written notice of the defect in question. It is a question of fact for the jury whether THE

¹ Plaintiff's deposition transcript dated June 16, 2016, NYSCEF Docket #31. The transcript was annexed as Exhibit "G," to defendant, Shahana's, motion for summary judgment (MS_002). The transcript annexed to defendant City's motion for summary judgment as Exhibit "G," is dated February 8, 2017, after the commencement of the third-party action on August 1, 2016 (NYSCEF Docket #20).

CITY is liable to third-party plaintiff for its proportionate share of liability if it is determined that plaintiff's accident occurred *on the sidewalk and the curb*" (p.8, *emphasis added*).

In support of their motion for "renewal re-argument,"² the City argues that since plaintiff has only sued defendant [third-party plaintiff] Shahana for a sidewalk defect in the main action, only Shahana can be found liable under Administrative Code § 7-210 (Schwartz Aff. ¶10). The City also argues that that "[S]ince liability for a curb defect cannot be imposed on Shahana, there is no basis in this action to impose liability on the City for the newly alleged curb defect" (Schwartz Aff. ¶3). In response, Shahana has argued that the City's argument is invalid because "it pre-supposes that the accident occurred as a result of either a defective sidewalk or a defective curb. However, it fails to consider the third possibility, i.e., that the cause of the accident was both the condition of the sidewalk and the curb" (Passarelli Aff. ¶4). In reply, the City argues for the first time that, "To his detriment, Rodriguez never alleged a curb defect in his pleadings against the [sic] defendant/third-party [City]" (Schwartz Reply Aff. ¶17).

Essentially, it is the City's position that this Court erroneously held that Shahana can seek contribution from the City because the City does not owe a duty to the plaintiff and plaintiff has not sued them directly. The City also argues neither plaintiff nor third-party plaintiff have filed a Notice of Claim, a condition precedent to recovery (Schwartz Aff. ¶17).

"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" (*Pacheco v.*

² Page 1, par. 1 of City's Notice of Motion.

Halsted Communications, Ld., 144 AD3d 768, 769 [internal citations and quotations omitted]). It is not a second chance to remedy the first factual presentation. It is within the Court's discretion to grant such a motion (*Pacheco v. Halsted Communications, Ld.*, 144 AD3d 771-770).

It is also within the Court's discretion to grant a motion for leave to reargue upon a showing that the court either overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at its earlier decision (see CPLR 2221[d][2]; *SantaMaria v. Schwartz*, 238 AD2d 569; *Schneider v. Solowey*, 141 AD2d 813). However, "[A] motion for reargument is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (*Gellert & Rodner v. Gem Community Management, Inc.*, 20 AD3d 388).

A claim for contribution exists independently from a plaintiff's cause of action (See, *DeLeonibus v. Scognamillo*, 183 AD2d 697, 698) and does not accrue until the time of payment of the underlying claim (*Scaccia v. Wallin*, 121 AD2d 709). Therefore, in effort to avoid a "circuitry of action," the Legislature created third-party joinders [actions] thereby enabling such issues to be determined upon evidence in the principal action at trial (*Valstrey Service Corp. v. Board of Elections, Nassau County*, 2 NY2d 413, 416).

A reading of the plain language of General Municipal Law § 50-e reveals that a notice of claim is not required to maintain such a third-party action against a municipality (*Valstrey Service Corp. v. Board of Elections, Nassau County*, 2 NY2d 413, 416). To hold otherwise, would have the impractical result of not extending third-party practice to actions involving municipalities or public corporations (Id.).

Thus, to remedy an injustice to joint-tortfeasors, a third-party plaintiff may recover contribution from a third-party defendant even when the latter does not owe a duty to plaintiff (*Garrett v. Holiday Inns, Inc.*, 58 NY2d 253, 258-259). The Court in *Garrett* specifically recognized that “proportionate liability rights among joint tort-feasors are analytically distinct from the rights and obligations of the parties to the injured person and that the nexus of duty between wrongdoers may exist independently of the respective duties owing a plaintiff” (*Garrett v. Holiday Inns, Inc.*, 58 NY2d 259). The Second Department has applied *Garrett* to actions where a private landowner and the City may share responsibility for a defect in the face of Administrative Code § 7-210. In *Stanciu v. Bilello*, 138 AD3d 824, the Court held that,

Here, it is undisputed that the City did now owe a direct duty of care to the plaintiff, because the 2003 enactment of Administrative Code of City [sic] New York 7-210 shifted liability for injuries arising from sidewalk defects from the City to the abutting property owner. However, if the City owed an independent special duty to the Bilellos, it may be held liable for “for the portion of the damage attributable to [its] negligence, despite the fact that the duty violated was not one owing directly to the injured person. Such a duty is found when a special relationship exists between the municipality and an individual or class of persons warranting the imposition of a duty to use reasonable care for those persons’ benefit. (citing, *Garrett v. Holiday Inns, Inc.*, 58 NY2d 261).

After reviewing the underlying record as maintained by the NYSCEF, the City’s motion, whether one for re-argument or renewal, is without merit.

The argument that a notice of claim was not served upon the City by either plaintiff or third-party plaintiff is not only without merit (*Valstrey Service Corp. v. Board of Elections, Nassau County*, 2 NY2d 413, 416 and *DeLeonibus v. Scognamillo*, 183 AD2d 698), but raised for the first time in support of this motion to reargue in contravention of the statute (*Gellert & Rodner v. Gem Community Management, Inc.*, 20 AD3d 388). The City’s arguments that third-

party plaintiff's pleadings are defective in that the word "curb" is not specifically pled, was also not raised in support of the underlying motion. Rather, this argument was raised for the first time in their reply to third-party plaintiff's opposition hereto. However, a plain reading of the third-party complaint reveals that third-party plaintiff alleged that the City failed to keep the "public thoroughfare area," i.e., "the area between the building and street" in a reasonably safe condition (NYSCEF Doc. No. 20).

The City has further failed to carry their burden that the Court previously overlooked or misapplied the prevailing case law. The law of contribution is such that a third-party defendant may recover that portion of damages payable to plaintiff attributable to City's negligence, if any, in failing to remedy their portion of the defect on the curb in accordance with Administrative Code § 7-210 (*Garrett v. Holiday Inns, Inc.*, 58 NY2d 258-259 and *Stanciu v. Bilello*, 138 AD3d 824). Where, as here, there are factual disputes as to the precise location of the defect and whether the alleged defect is designated on the map, the jury must make the determinations and not the Court (*Vertsberger v. City of New York*, 34 AD3d 453, 455). Again, the City may only be held liable to third-party plaintiff in contribution if the jury determines the City had prior written notice of the defect [or an exception to Administrative Code § 7-201 applies] and that plaintiff's accident occurred on the sidewalk and the curb (*Vertsberger v. City of New York*, 34 AD3d 453 and *Stanciu v. Bilello, supra*).

Accordingly, it is hereby

ORDERED, that third-party defendant, CITY's, motion for re-argument is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: March 20, 2018

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.