SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART 23**

Justice

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DIANE SACCHETTI,

Plaintiff,

- v -

CARDELLA TRUCKING CO., DANNY REYES, THE CITY OF NEW YORK

Defendant.

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INDEX NO. 155993/2013

MOTION DATE 03/27/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 73, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Defendant, The City of New York, (the "City") seeks an order pursuant to CPLR §2221 permitting it to renew and reargue the previous decision of this court, issued on October 24, 2017 and served with Notice of Entry on October 25, 2017, which denied its motion to dismiss and denied its motion for summary judgment. (NYSCEF Doc. Nos. 47 and 83).

BACKGROUND and CONTENTIONS

This action for personal injuries arises out of actions taken by the City's traffic agents on November 29, 2012, when it is alleged that plaintiff was in the crosswalk, with the walk sign illuminated in her favor, while she attempted to cross East 57th Street, a street with four lanes of traffic, from the northwest corner of the intersection to the southwest corner. Defendant Danny Reyes ("Reyes") was employed by defendant Cardella Trucking Co. ("Cardella") and on the date of the accident, he testified that he was driving a truck that was stopped at a red light. Reyes was

waved into the intersection by traffic agent Williams while plaintiff was halfway across the street and she was struck by the truck driven by Reyes. (NYSCEF Doc. No. 35, pp. 44-45).

Agent Williams testified that she was positioned on the northwest corner of 57th Street when the accident occurred. (NYSCEF Doc. No. 28, p. 59). Contrary to the testimony of Reyes, agent Williams testified that the traffic light was about to turn amber when she attempted to pull Reyes' vehicle through, as the front of his truck was protruding into the intersection. (NYSCEF Doc. No. 28, pp. 67, 84). Agent Williams testified that Reyes elected to make a right turn onto 57th Street and at that time the traffic light facing him was red. (NYSCEF Doc. No. 28, pp. 88-90, 97, 167).

This court denied the City's motion to dismiss finding that plaintiff had alleged a cognizable cause of action against the City wherein she claimed that the City was negligent in violating rules, regulations and practices of the City with respect to the direction of traffic, including ministerial violations, in failing to timely stop the vehicle once it had been directed to proceed through the crosswalk that plaintiff had occupied. (NYSCEF Doc. No. 47).

This court also denied the City's motion for summary judgment, finding that the City had not provided relevant discovery that had previously been requested, specifically, the handbook that contains formal rules governing the direction of traffic and for failing to produce traffic agent Hanna, agent Williams partner, for a deposition, despite being ordered to do so by the court.

In denying summary judgment, this court reasoned that the outstanding discovery was critical to resolution of the issues raised by the City's motion, especially considering agent Williams' testimony wherein she referred to the handbook of guidelines and testified that she

lacked the discretion to order a vehicle to turn into an occupied crosswalk. (NYSCEF Doc. No. 47).

The City argues that the more than ten-month delay in filing this motion to renew and reargue should be excused as it was necessitated by the City's adherence to this court's direction that it produce the outstanding discovery and since the City has filed a timely notice of appeal from which the appeal has not yet been perfected. In addition, the City argues that its motion to reargue should be granted as this court overlooked facts and misapprehended the law determinative of the City's motion, namely, that the direction of traffic is a discretionary governmental function for which it cannot be sued, and second, that even if agent Williams did not exercise discretion, it did not owe plaintiff a duty of care.

Plaintiff and defendants Cardella and Reyes argue that the City's motion should be denied as agent Williams assumed positive direction and control of Reyes' truck, waving him through a red light, while plaintiff was crossing the street. Plaintiff argues that the City voluntarily assumed a duty on which she detrimentally relied. Additionally, plaintiff argues that the City's motion to reargue is untimely and should be denied, and that the City has not presented a reasonable justification for its failure to present the "new" evidence it now relies on to support its motion to renew and upon renewal, granting it summary judgment.

STANDARD OF REVIEW/ANALYSIS

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). 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. *Kent v 534 E. 11th St.*, 80 AD 3d 106, 116 (1st Dept. 2010) ("Reargument is not a vehicle permitting a previously unsuccessful party to once again argue the very questions previously decided or to assert new, never, previously offered arguments."); *Foley v Roche,* 68 AD2d 558, 567 (1st Dept. 1979) (a motion to reargue does not properly serve as a "vehicle to permit the unsuccessful party to argue once again the very questions previously decided.").

A motion to renew must be specifically identified as such and 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 shall not contain reasonable justification for the failure to present such facts. CPLR §2221(e)(1)(2)(3). A combined motion for leave to reargue and renew shall identify separately and support separately each item of relief sought. CPLR §2221(f).

CPLR §2221 (d) (3) provides that a motion to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Plaintiff argues that the City's motion to reargue is untimely, notwithstanding the timely filing of a notice of appeal, because the City's motion to reargue was filed long after the 30-day time limit imposed by the statute had expired. The City contends that this court should consider its motion to reargue even though it is "technically untimely pursuant to CPLR 2221 when an appeal is taken." (NYCEF Doc. No. 96, p. 3).

After July 20, 1999, CPLR. §2221(d) was amended and the 30-day time limit did not reference the period within which a timely taken appeal is pending, thus, supplanting the former law. This court, however, in the exercise of its discretion, finds that though "technically untimely pursuant to CPLR 2221 [d]", the motion for reargument will be considered because it is made

after the City's filing of a notice of appeal but prior to the perfection of that appeal (see, *Garcia v. The Jesuits of Fordham,* 6 A.D.3d 163, 165, 774 N.Y.S.2d 503 [1st Dept. 2004], see also, *Leist v. Goldstein*, 305 A.D.2d 468, 469, 760 N.Y.S.2d 191 [2d Dept. 2003]).

The City premised its initial motion and now its motion to renew and reargue, on established precedent that limits municipal liability for damages resulting from negligence in the performance of a governmental function unless a special relationship exists between the municipality and the injured party. *Cuffy v City of New York,* 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987). These identical arguments were advanced in the prior motion to dismiss the complaint based on plaintiff's purported failure to allege facts to support a claim of a special duty owed to her.

The City now argues that this court overlooked and misapplied facts and law that support the City's motion and dismissal of plaintiff's action. Specifically, the City contends that plaintiff has not plead the essential facts to establish a special duty and that this court overlooked the law which, as applied here, holds that traffic agent Williams' decision to wave defendant Reyes into the crosswalk was an inherently discretionary act, which is a governmental function that entitles the City to governmental immunity. In support of its motion the City also relies on this court's decision in *Jagatpal v. City of New York,* 161749/2015 (NY County, Sup. Ct., December 14, 2017).

Notwithstanding the City's contention, the facts at issue in *Jagatpal v. City of New York,* are distinguishable from the facts at issue here and as such, led this court to a contrary conclusion. Specifically, in *Jagatpal,* the traffic agents were at the intersection directing traffic because the traffic light was not functioning. Moreover, the pleadings in that case, unlike the pleadings currently before the court, did not allege a special duty. Accordingly, this court

concluded that plaintiff Jagatpal failed to allege a special relationship between the municipality and the plaintiff, resulting in the creation of a duty to use due care for the benefit of particular persons or classes of persons. *Kohn v City of New York*, 19 Misc.3d 1140[A] (Sup. Ct. N.Y. County 2008); see also, *Ajjarapu v City of New York*, 2011 NY Misc. LEXIS 1379 (Sup. Ct. N.Y. County 2011). (NYSCEF Doc. No. 91).

In addition, in dismissing plaintiffs' complaint in *Jagatpal*, this court found that "[n]ot only has plaintiff failed to allege and establish a special relationship between him and the municipal defendants, there is also no evidence in the record that the traffic officers assumed to act on plaintiff's behalf, nor has plaintiff alleged that he had any contact with the traffic agent or that the traffic agent communicated information to him directly upon which he reasonably and detrimentally relied." *Jagatpal v. City of New York,* at p. 5.

Unlike the facts before this court in *Jagatpal v. City of New York,* here, plaintiff has alleged a special duty and has produced evidence which demonstrates that the actions of agent Williams constituted positive control in the face of a dangerous condition. (*Smullen v City of New York,* 28 NY2d 66, 268 NE2d 763, 320 NYS2d 19 [1971]). Specifically, plaintiff alleges that the City is liable for plaintiff's alleged injuries, predicated on the conduct of agent Williams in directing defendant Reyes to drive through a red light while plaintiff lawfully occupied the crosswalk. Accordingly, here, plaintiff has plead a special duty, and has produced evidence that the governmental action at issue was not discretionary.

Moreover, in denying the City's motion for summary judgment this court based its decision, in part, on the City's failure to produce the handbook governing the direction of traffic, noting that it may provide "facts essential to justify opposition" to the motion for summary judgment, as contemplated by CPLR 3212 (f). (NYSCEF Doc. No. 47, p. 2).

In opposing the City's motion to renew, plaintiff and defendants Cardella and Reyes rely on the Traffic Enforcement Intersection Manual, produced by the City in accordance with this court's decision and plaintiff's prior discovery demands. (NYSCEF Doc. No. 84). Plaintiff argues that the manual demonstrates that agent Williams, as a lower level agent, was not permitted to wave vehicles through a red light into the path of a pedestrian occupying the crosswalk while the walk sign was illuminated. As such, plaintiff contends that the manual provides further evidence that the City is not entitled to immunity for agent Williams' actions because she was not exercising reasoned governmental discretion when she waved Reyes through a red light into the crosswalk occupied by plaintiff.

The manual specifically provides, in pertinent part, as follows: "NYPD policy is that only under the most extraordinary circumstances and if directed by a supervisor, should a TEA over-ride the signals. When over-riding a traffic control device (pulling traffic), extreme caution must be used to prevent accidents. Be mindful of the safety of pedestrians and motorists that are unable to see your directions. Prevent vehicles from turning when "WALK" signal is on. Pedestrians must be allowed to cross safely." (NYSCEF Doc. No. 84, p. 15).

As this court noted when it denied the City's motion, the critical issue here, is whether agent Williams exercised reasoned judgment when she directed Reyes through a red light into the path of plaintiff who was crossing the street while the walk sign was illuminated in her favor. Specifically, this court noted that the City's contention that it is entitled to immunity for its traffic agents' actions is an affirmative defense on which the City bears the burden of proof. See, *Villar v Howard,* 28 NY3d 74, 80-81 (2016).

The doctrine of governmental discretionary immunity is intended to protect reasoned exercises of judgment by public employees. Based on this record, a jury should determine

whether such conduct constitutes the exercise of "reasoned judgment", especially when the manual that informs the traffic agent's conduct cautions against such conduct and emphasizes that "[w]hen over-riding a traffic control device (pulling traffic), extreme caution must be used to prevent accidents. . .. Pedestrians must be allowed to cross safely."

It is well established that when deciding a motion for summary judgment the court's role is limited to "issue finding, not issue determination". (*Pantote Big Alpha Foods v Schefman*, 121 AD2d 295, 296-297 (1st Dept. 1986), and *Double A Limousine Service, Ltd. v New York, New York Limousine Service, Inc.* 130 AD2d 403, 404, (1st Dept. 1987)). Additionally, the Court must view the evidence in a light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Sosa v. 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 (1st Dept. 2012). If there is any doubt as to the existence of a triable fact, the motion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002).

The City has failed to demonstrate that this court misapprehended the facts or law when it denied its motion to dismiss and for summary judgement. The City's liability was triggered by its traffic agent's "positive action in assuming direction and control" over Reyes' vehicle, in the face of a dangerous situation, *i.e.,* waving defendant Reyes through a red light when the plaintiff was crossing the street while the walk sign was illuminated, in violation of the rules set forth in the traffic manual. (see, *Smullen v City of New York,* 28 NY2d 66, 72-73 (1971)("We are not required in this case, however, to determine whether such a basis, or perhaps tentative basis, would support a claim of liability predicated on mere inaction or passivity in the face of the mortal danger so clearly apparent; as here the liability was triggered in any event by the inspector's positive action in assuming direction and control, as the jury could reasonably find").

Viewing the evidence in a light most favorable to the plaintiff, there is a material issue of fact as to whether agent Williams' conduct constitutes the exercise of "reasoned judgment" such that the City is immune from liability. As such, the City's arguments and evidence are insufficient to renew its request for summary judgment. Accordingly, it is hereby

ORDERED that the motion of defendant the City of New York, for leave to reargue its motion to dismiss and for summary judgment, motion sequence no. 002, is granted; and it is further

ORDERED that, upon reargument, the Court adheres to its Decision and Order, dated, October 24, 2017, denying said motion to dismiss and for summary judgment in its entirety; and it is further

ORDERED that the motion of defendant the City of New York, for leave to renew its motion for summary judgment, motion sequence no. 002, is granted; and it is further

ORDERED that, upon renewal, the Court adheres to its Decision and Order, dated, October 24, 2017, denying said motion for summary judgment in its entirety.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

4/8/2019
DATE

W. Franc Perry, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE