

McKenna-Aguirre v City of New York

2019 NY Slip Op 31285(U)

April 22, 2019

Supreme Court, New York County

Docket Number: 160909/2015

Judge: Margaret A. Chan

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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INDEX NO. 160909/2015

MARIE MCKENNA-AGUIRRE,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 008

- v -

THE CITY OF NEW YORK, 36 BLEEKER OWNER, LP, 304
MULBERRY STREET OPERATING COMPANY, L.L.C.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 236, 237, 238, 239, 240, 241, 245, 246, 247, 248, 252, 253, 254, 255, 256

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

In this trip and fall matter, defendant 304 Mulberry Street Operating Company, LLC (304 Mulberry) moves in motion sequence 008 (MS8) pursuant to CPLR 2221(d) for reargument of this court’s July 2, 2018 order which denied 304 Mulberry’s motion for summary judgment and, upon reargument, vacating the July 2, 2018 order and granting 304 Mulberry summary judgment. In the alternative, 304 Mulberry moves pursuant to CPLR 2221(e) for renewal of this court’s July 2, 2018 order and, upon renewal, vacating the prior order and granting 304 Mulberry summary judgment. Plaintiff Marie McKenna-Aguirre opposes the motion. The decision and order is as follows:

FACTS

This matter arises out of an alleged trip and fall accident that occurred on April 11, 2015. On July 2, 2018, this court issued a decision denying 304 Mulberry’s summary judgment motion (NYSCEF #241 – July 2, 2018 Order). In the prior order, this court granted summary judgment in favor of former co-defendant 36 Bleeker Owner, LP, denied summary judgment for 304 Mulberry, and denied plaintiff’s motion to amend her complaint (*id.*). This court found that plaintiff’s testimony alleging that she fell due to sidewalk cracks on 304 Mulberry’s property and contemporaneous photographs showing an injured plaintiff laying next to cracked sidewalk indicated the plaintiff properly identified the cause of her injury and created a triable issue of fact that necessitated jury trial (*id.*). This court found that “plaintiff’s testimony is not purely speculative as she claimed a crack caused her fall and photographic evidence corroborates the plausibility of her account” (*id.*).

STANDARD FOR REARGUMENT AND RENEWAL

A motion for CPLR 2221(d) reargument “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”. The movant bears the burden of demonstrating that “the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present argument different from those originally asserted” (*id.*).

A motion for CPLR 2221(e) renewal “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”. CPLR 2221(e)(3) states that the motion “shall contain reasonable justification for the failure to present such facts on the prior motion”. A motion for renewal “is intended to draw the court’s attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court’s attention” (*William P. Pahl*, 182 AD2d at 27).

DISCUSSION

304 Mulberry’s motion for reargument is denied. 304 Mulberry’s primary proposition on this motion is that “the court misapprehended the controlling law and the facts in concluding that plaintiff’s speculation and immaterial photographs were legally sufficient to establish the cause of her accident” (NYSCEF #237 – Def’s Aff in Support at ¶12). Defendant 304 Mulberry further argues that this court “did not address plaintiff’s testimony acknowledging that she had been moved from the location where she fell to the location where the photograph was taken, nor did the court explain how it could be inferred that the cracks, as opposed to the fence around the tree well or something else could have caused plaintiff to fall” (NYSCEF #237 – 304 Mulberry’s Aff in Support at ¶9). However, 304 Mulberry’s arguments in its motion simply amounts to a rehashing of arguments rejected in its summary judgment motion.

304 Mulberry makes the following claims on its motion for reargument: (1) the court overlooked the law and the facts by concluding that, despite plaintiff’s admission that she never looked at the sidewalk or saw cracks causing her to fall on the day of the accident, her mere conclusory statement that she fell on cracks enabled her to raise a triable issue of fact as to causation without resorting to speculation; (2) the court erroneously opined that a photograph which showed multiple potential defects raised a triable issue of fact as to which of those defects

specifically caused the accident; (3) the court failed to apprehend that the remaining photographic evidence which did not enable plaintiff to identify the cause of her accident; (4) the court overlooked *Louman v Town of Greenburgh*, 60 AD3d 915 [2d Dept 2009], in relying on speculative testimony and photographic evidence, and the court misapprehended the significance of the cases cited in its decision; and (5) the court overlooked the facts when it failed to fully appreciate the fatal contradiction between plaintiff's 50-h testimony and her deposition testimony. Defendant's first, fourth, and fifth arguments are essentially the same: that plaintiff's claims are unduly speculative and must be dismissed. Defendant's second and third arguments are also linked together: that this court should not have relied upon the submitted photographs in its determination. The court will address these arguments in turn.

Defendant's overarching argument that plaintiff's statement was speculative and conclusory was rejected in the prior order and that determination is unchanged here. This court readily acknowledged that plaintiff gave somewhat inconsistent testimony, but plaintiff also clearly stated that she "tripped on the – sidewalk, the – whatever was – the cracks" and identified the crack she tripped on from photographic evidence (NYSCEF #109 – Pl's EBT Transcript at 19, ln 24-25)¹. The photographs clearly show cracks as well. Plaintiff's testimony is not unduly speculative. Plaintiff's inconsistent testimony create issues of credibility for the trier of fact to resolve, but do not necessitate dismissal of plaintiff's action.

Defendant's First Department cases do nothing to change the judicial calculus here. *Morrissey v New York City Trans. Auth.*, 100 AD3d 464 [1st Dept 2012] found that plaintiff was unable to identify the cause of her injury and could only speculate as to the cause and rejected plaintiff's affidavit in opposition as it was "tailored to avoid the consequences of that earlier testimony". Here, there is no indication that plaintiff tailored her testimony and plaintiff testified to the cracks and identified the cracks at her deposition. Next, defendant's citation to *Smith v City of New York*, 91 AD3d 456 [1st Dept 2012] is similarly inapt as that plaintiff testified "that she had no idea how she tripped and fell and she could not identify or mark on photographs" the defect at issue. Plaintiff here never testified that she did not know what caused her accident.

As cited in the July Order, the First Department case on point here is *Aller v City of New York*, 72 AD3d 563 [1st Dept 2010] which held that "the court erred in finding plaintiff's deposition testimony to have been unduly speculative with respect to the location and cause of her injury since she clearly testified that she fell due to 'uneven' ground in the middle of the sidewalk between two buildings. This was consistent with the photographic evidence showing an uneven sidewalk at the location of the accident. The inconsistencies in plaintiff's testimony relied on by defendants raise credibility issues that should be resolved by a jury" (*Aller*, 72

¹ On this motion, plaintiff's EBT transcript was submitted as NYSCEF #238, Exh. A; however, NYSCEF #109 is more legible and the court utilized that version of the EBT transcript in its decision.

AD3d at 564). The facts in *Aller* are nearly identical to the situation posed by the instant matter. While McKenna-Aguirre gave inconsistent testimony, she also clearly stated and identified that a crack on defendant's sidewalk caused her injury and the photographic evidence from the time of the accident confirms that the cracks existed.

As *Aller* is on point, there is no need to look to defendant's Second Department cases such as *Louman*, but this court does note that *Louman* does not square with the facts present in the instant matter. *Louman* found that plaintiff's inability to identify the cause of her fall is fatal to her claim (*Louman*, 60 AD3d at 916). As has been repeatedly stated in this opinion and in the July Order, McKenna-Aguirre clearly identified the cause of her fall: cracks on defendant's sidewalk. The claim is not speculative and *Louman* is inapplicable here.

Defendant's argument that the discrepancy between plaintiff's 50-h hearing testimony and her deposition testimony is fatal to her claim is also rejected. In her 50-h testimony plaintiff states that "something tripped me. Something stopped me from walking for some reason" and that she thought it was the sidewalk (NYSCEF #135 – Pl's 50-h Transcript at 18, ln 21-22). Defendant asked plaintiff if "prior to your fall, did you notice anything with respect to the condition of the sidewalk before you fell" to which plaintiff responded in the negative (*id.* at 19, ln 11-14). However, a year later, plaintiff in her deposition testimony clearly indicated that cracks caused her fall and identified the cracks in photographs of the accident scene.

Defendant argues based off this alleged discrepancy that plaintiff changed her testimony and that *Padernacht v Madison Sq. Garden, L.P.*, 2013 NY Slip Op 33721(U) [Sup Ct, Bronx County 2013] ("*Padernacht I*") should control. *Padernacht I* was a motion to reargue and found that plaintiff's changing testimony in a case involving a trip-and-fall at a theater due to dim lighting necessitated dismissal. Plaintiff in *Padernacht I* testified that she did not know what caused her fall and was then coached by her attorney to describe the dim lighting as "probably" causing her fall. However, 304 Mulberry failed to point out that the *Padernacht I* decision it cites was reargued a second time and vacated by the Bronx Supreme Court (*Padernacht v Madison Sq. Garden, L.P.*, 2014 WL 1873715 [Sup Ct, Bronx County 2014]) ("*Padernacht II*"). Regardless, there is no indication that plaintiff in the instant matter was coached or goaded into providing an answer and plaintiff never stated that she did not know what caused her fall like the plaintiff in *Padernacht I*. *Padernacht I* is therefore inapplicable here. As discussed earlier, resolving the alleged inconsistency in plaintiff's testimony is a credibility matter for a jury.

Turning to defendant's arguments against relying on the photographic evidence in record, defendant's claims are rejected. The court did not erroneously opine on a photograph that showed multiple potential defects – the photographs

clearly showed cracks next to plaintiff as she was being treated by EMTs and plaintiff identified the cracks she tripped on in a second photograph. Even though the photographs show a tree well, plaintiff at no point testified that the tree well caused her injury. There is also no reason to discount the photograph taken shortly after her injury on the supposition that plaintiff was moved. There is nothing in the record to indicate that plaintiff was moved more than a few feet away from the accident site. Defendant's claim is purely speculative on this count and is rejected.

Defendant's reliance on *Teitelbaum v Crown Heights Assn. for the Betterment*, 84 AD3d 935 [2d Dept 2011] does not aid defendant's claim as that court found that "the photograph of the accident site upon which the plaintiff marked the protruding brick from the tree well that allegedly caused her accident – plainly established that the brick was part of the tree well and part of the sidewalk". Plaintiff has at no point claimed that the tree well caused her accident and has consistently claimed that her injury was related to a sidewalk defect. Defendant's citation to *Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011] is similarly inapplicable as that matter dealt with the contested responsibility of a tree well as between the adjacent owner and the contractor who built it – it did not address the issue for which defendant puts it forth, namely, that a photograph of two conditions could not support an inference the 304 Mulberry's negligence caused plaintiff's accident. Indeed, defendant's argument is nonsensical on its face – a picture could show an accident scene containing numerous hazards, but so long as plaintiff is able to identify which hazards caused her injury, she can make a valid negligence claim.

Defendant also points to *Capato v 125th & Lenox LLC*, 2008 N.Y. Slip Op. 31893[U] [N.Y. Sup Ct, New York County 2008] for its 'multiple defects' argument. In that case, plaintiff admitted in his deposition that he could not identify which of the multiple defects caused his accident (*Capato* at *2-4). Plaintiff here, even in her 50-h hearing, identified that something on the sidewalk caused her fall and then identified the cracks at a later deposition. As such, *Capato* is inapplicable here.


Defendant's argument that the court failed to apprehend that the photographic evidence did not enable plaintiff to identify the cause of her accident is again rejected. While it is unclear when the photograph of the cracks that was used by all parties in depositions for identification purposes was taken, the photograph is consistent with the description of the accident scene at the time of the incident and is consistent with the photograph taken of plaintiff as she was being treated by EMTs that showed cracks clearly visible in the sidewalk (*see Karten v City of New York*, 109 AD2d 126, 127 [1st Dept 1985] ["if... there is testimony that the condition at the time of the accident was substantially as shown in the photograph" it is admissible]). Even if the undated photograph is inadmissible, the existence of the other photograph taken as plaintiff was being treated by EMTs shows the cracks in

question and does not require dismissal of plaintiff's claims. As such, defendant's motion for reargument is denied.

304 Mulberry's motion for renewal is also denied. Defendant neither offers any new facts in support of its motion nor claims a change in the law (see NYSCEF #237 - Def's Aff in Support at ¶42). As such, a motion for renewal is inappropriate and must be denied.

Accordingly, it is ORDERED that 304 Mulberry's motion for reargument and renewal is denied in its entirety.

This constitutes the decision and order of the court.

<u>4/22/2019</u> DATE					 MARGARET A. CHAN, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE