

Espinoza v Minus5 HH NYC, Inc.
2020 NY Slip Op 30606(U)
March 2, 2020
Supreme Court, New York County
Docket Number: 152581/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

INDEX NO. 152581/2017
MOTION DATE 02/13/2020
MOTION SEQ. NO. 009

BYRON ESPINOZA,

Plaintiff,

- v -

MINUS5 HH NYC, INC. D/B/A MINUS 5 ICE BAR, THE
MANLYN DEVELOPMENT GROUP, INC and HILTON
WORLDWIDE, INC. D/B/A NEW YORK HILTON MIDTOWN
MANHATTAN,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 268, 269 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

Motion by Plaintiff Byron Espinoza (Seq. 009), pursuant to CPLR 2221, to renew and reargue this Court's decision of December 10, 2019 ("the summary judgment decision")—wherein this Court granted the motion (Seq. 007) for summary judgment, pursuant to CPLR 3212, by Defendant Hilton Worldwide Inc. d/b/a New York Hilton Midtown Manhattan ("Hilton") and dismissed the complaint as against Hilton—is denied for the reasons stated herein.

BACKGROUND

A. Factual Allegations

Defendant Hilton is the owner of a building ("the building") located at 1335 Sixth Avenue in Manhattan. (Affirm. in Supp., Ex. 1 [Seq. 007 Moving Papers] ¶ 10.) In 2012, Hilton leased out a space in the building to Defendant Minus5 HH NYC, LLC d/b/a Minus 5 Ice Bar ("Bar") for the purpose of running an ice bar. (Affirm in Supp., Ex. 19 [Lease].) In 2013, the Bar retained Defendant Manlyn Development Group, Inc. ("Manlyn") to build an ice bar ("the ice bar") in the leased space with walls, sculptures, artwork, and furniture made of ice. (Affirm in Supp., Ex. 9 [Longoria EBT] at 17:09-18.)

From November 2015 to January or February 2016, the Bar again contracted with Manlyn to renovate the ice bar. (Affirm in Supp., Ex. 10 [Lunetta EBT] at 24:18-25:24; Seq. 007 Moving Papers ¶ 23.) As part of the renovation, Manlyn allegedly replaced the ceiling, and removed and re-installed the video cameras. (Lunetta EBT at 33:25-34:19.)

On the evening of November 4, 2016, Plaintiff and his girlfriend Deelsa Vargas went to the ice bar and sat at a table in the VIP section, which was the last table on the right side of the entrance, roughly 4-5 feet away from bar area. (Affirm. in Supp., Ex. 7 [Espinoza EBT] at 22:02-23:19.) According to Vargas, the ice walls in the ice bar looked “wet.” (Affirm. in Supp., Ex. 8 [Vargas EBT] at 21:10-22:17.) The couple was seated when the ice bar “began to shake” and “tremble” and “everybody began to scream.” (Espinoza EBT at 15:10-25.) Plaintiff saw a piece of the “wall with ice” to his left start to come out. (*Id.* at 16:09-13.) Believing that the falling debris might strike Vargas, Plaintiff attempted to “push it away” with his hand and, according to Plaintiff, the debris struck his shoulder and head. (*Id.* at 16:09-27:22.)

B. Procedural Posture

In this action, Plaintiff seeks damages from Defendants Bar, Manlyn, and Hilton, alleging that Defendants’ negligence caused him to be injured by falling ceiling debris. On December 10, 2019, this Court issued a decision from the bench, which granted Hilton’s motion for summary judgment (Seq. 007) and dismissed the complaint as against it but denied Manlyn’s motion for summary judgment (Seq. 008). (Affirm in Supp., Ex. 3 [SJ OA Tr.] at 15:11-23, 41:02-14; Affirm in Supp., Ex. 4 [NYSCEF Doc. 243] [referencing NYSCEF Doc. 236 (Seq. 007)].) In sum and substance, the Court found that Hilton was an out-of-possession landlord, and given the circumstances of the accident, Hilton could not be found liable as a matter of law. (*Id.* at 15:11-21.)

On the instant motion, Plaintiff asks this Court to reconsider the branch of the summary judgment decision dismissing Hilton from this action.

DISCUSSION

A motion for leave to reargue, pursuant to CPLR 2221 (d), “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) [2].) A motion for leave to reargue “is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *lv denied in part, dismissed in part*, 80NY2d 1005 [1992], *rearg. denied*, 81 NY2d 782 [1993].)

“Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted.” (*Setters v AI Properties and Developments (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citations omitted]; *see also Foley v Roche*, 68 AD2d 558, 567-68 [1st Dept 1979].) “On reargument the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked.” (*Macklowe v Browning School*, 80 AD2d 790, 791 [1st Dept 1981].) Where it is demonstrated that the court mistakenly

arrived at its earlier determination, the granting of reargument is a provident exercise of such discretion. (*Grimm v. Bailey*, 105 AD3d 703, 704 [2d Dept 2013].)

A motion for leave to renew, pursuant to CPLR 2221 (e), “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 contain reasonable justification for the failure to present such facts on the prior motion.” (CPLR § 2221 [e] [2]-[3].) A motion for “renewal is granted sparingly . . . it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.” (*Mundo v SMS Hasenclever Maschinenfabrik*, 224 AD2d 343 [1st Dept 1996] [internal quotation marks and citations omitted].)

Plaintiff advances two arguments for why this Court should reconsider its dismissal of Hilton from this case—one for renewal, and one for reargument.

In the branch of Plaintiff’s motion for reargument, Plaintiff points to two facts that it raised in its opposition to Hilton’s underlying summary judgment decision: that Hilton retained the right to reenter and inspect the premises and that Hilton required that the Bar obtain its permission before undertaking alterations to the space. Plaintiff argues that based on these facts, Hilton cannot be dismissed from this case as an out-of-possession landlord. For the same reasons given in the summary judgment decision, (*see* SJ OA Tr. at 11:21-15:23), this Court finds Plaintiff’s argument unavailing and not appropriate for reargument.

It is well settled that a landlord is generally not liable for negligence regarding the condition of property after the landlord transfers possession and control to a tenant unless the out-of-possession landlord: “(1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.” (*Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007] [internal citations omitted]; *see also Malloy v Friedland*, 77 AD3d 583, 583 [1st Dept 2010] [internal quotation marks, citations, emendation omitted].) An out-of-possession landlord with a right to reentry may be liable for injuries caused by a dangerous condition if “it has constructive notice of a significant structural or design defect in violation of a specific statutory safety provision.” *Brignoni v 601 W. 162 Assoc., L.P.*, 93 AD3d 417, 418 [1st Dept 2012] [internal quotation marks and citations omitted].)

As pointed out by Plaintiff in his own motion papers, the subject lease made clear that the Bar took possession of the premises “as is” and that the Bar was solely responsible for “readying the Premises for [its] occupancy and the conduct of [its] business” (Affirm in Supp., ¶¶ 19-20, quoting Ex. 19 [Lease Art. 3.1].) Although Hilton reserved its right to reenter and inspect and its right to approve alterations, the lease did not impose a contractual obligation on Hilton to make repairs or maintain the premises. Further, Plaintiff has failed to raise a triable issue of fact that the ceiling collapse was caused by a significant structural or design defect and that this defect constituted a specific statutory violation. Accordingly, Hilton’s dismissal from the action pursuant to the out-of-possession landlord doctrine was warranted, and this Court has not overlooked or misapprehended matters of fact or law.

With respect to the branch of the instant motion for renewal, Plaintiff argues that the Court of Appeals recently abrogated the aforesaid out-of-possession landlord doctrine, referenced above, in *Xiang Fu He v Troon Mgt., Inc.*, (34 NY3d 167, 174 [2019]). Plaintiff admits that he did not make this argument at the time that the underlying motion for summary judgment was argued but asserts that said argument could not be made because *Xiang Fu He* was decided after Plaintiff's opposition papers were filed.

Notwithstanding that Plaintiff failed to raise the instant argument during the oral argument on December 10, 2019 (*see generally* SJ OA Tr. at 3:04-15:23)—roughly 1.5 months after *Xiang Fu He* was decided—this Court finds that *Xiang Fu He* does not abrogate the common law out-of-possession-landlord doctrine. Rather, *Xiang Fu He* merely held that in the context of Section 7-210 of the Administrative Code of the City of New York – which states that “[i]t shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition” – there is “no exception for out-of-possession landowners and so . . . the duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner.” (*Xiang Fu He*, 34 NY3d at 169.) That is to say, for the limited purpose of sidewalk maintenance, Section 7-210 of the Administrative Code of the City of New York statutorily “displaces” the common law out-of-possession landowner doctrine. (*Id.* at 174.) Plaintiff's argument that *Xiang Fu He* be interpreted as wholly abolishing the common law out-of-possession landlord doctrine is misplaced and without merit.

Further, and to state the obvious, the subject accident did not in any way involve a sidewalk, and, as such, Section 7-210 does not in any way apply to the instant case. Accordingly, *Xiang Fu He* does not change the summary judgment decision.

CONCLUSION

Accordingly, it is hereby

ORDERED that the by Plaintiff Byron Espinoza (Seq. 009), pursuant to CPLR 2221, to renew and reargue this Court’s decision of December 10, 2019 (“the summary judgment decision”)—wherein this Court granted the motion (Seq. 007) for summary judgment, pursuant to CPLR 3212, by Defendant Hilton Worldwide Inc.’s d/b/a New York Hilton Midtown Manhattan (“Hilton”) and dismissed the complaint as against Hilton—is denied; and it is further

ORDERED that within 10 days of the filing date on the instant decision and order, counsel for Hilton shall e-file a copy of said decision and order with notice of entry.

The foregoing constitutes the decision and order of the Court.

3/02/2020
DATE



ROBERT DAVID KALISH, 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	<input type="checkbox"/>	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	<input type="checkbox"/> REFERENCE