

Feurman v Marriott Intl., Inc.
2020 NY Slip Op 32795(U)
August 26, 2020
Supreme Court, New York County
Docket Number: 154317/2015
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 154317/2015

PAUL FEURMAN, as Executor of the Estate of MARTIN
ZEIGER, Decedent, and ELLEN DAVID,

Plaintiffs,

MOTION SEQ. NO. 004

- v -

MARRIOTT INTERNATIONAL, INC., SPRINGHILL SUITES
ARUNDEL MILLS BWI AIRPORT, MCR DEVELOPMENT,
LLC, MCR DEVELOPMENT, INC., and MCR PROPERTY
MANAGEMENT, LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76,
77, 78, 79, 80, 81, 82, 83, 84, 85, 88

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

In this personal injury action, defendants Marriott International, Inc. (“Marriott”), Springhill Suites Abundel Mills BWI Airport (“SSAM”), MCR Development, LLC (“MCR LLC”), MCR Development, Inc. (“MCR Inc.”), and MCR Property Management, LLC (“MCRPM”) (collectively “defendants”) move, pursuant to CPLR 2221(e), for renewal of their prior motion (motion sequence 003) seeking summary judgment dismissing the complaint, which was denied by order of this Court entered September 3, 2019. Plaintiffs Paul Feuerman (“Feuerman”), as Executor of the Estate of Martin Zeiger (“Zeiger”), decedent, and Ellen David (“David”) oppose the motion. After consideration of the parties’ contentions, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts giving rise to this claim are set forth in detail in the decision and order of this Court entered September 3, 2019. Doc. 70. In that order, this Court denied defendants' motion for summary judgment ("the underlying motion") on the ground that the report submitted by their expert architect, Daniel Isackson, was not sworn under penalty of perjury. Doc. 70. In his report Isackson concluded, inter alia, that section 70 of the 2002 National Electric Code/National Fire Protection Association ("NEC/NFPA") did not require the wall switches in the hotel room occupied by plaintiffs' decedent to be illuminated. Doc. 82 at 3.

Defendants now move, pursuant to CPLR 2221(e), to renew their motion for summary judgment. Doc. 72. In support of the motion, defendants argue that their failure to submit an affidavit from Isackson, in addition to his report, was inadvertent, and that plaintiffs did not even oppose their motion for summary judgment on the ground that Isackson did not submit his opinion in admissible form. Doc. 73 at pars. 22-23. Additionally, defendants maintain that, since they moved for renewal less than 30 days after this Court denied their motion for summary judgment, plaintiff will not be prejudiced if the motion is granted. Doc. 73 at par. 24.

In opposition to the motion, plaintiffs argue that defendants' excuse for its failure to submit an affidavit by Isackson in support of its motion for summary judgment is woefully insufficient. Doc. 84 at pars. 3-9. Plaintiffs further assert that, even if this Court accepts defendants' excuse, the motion for summary judgment must be denied since "it appears" that Maryland only uses the 2014 edition of the NEC/NFPA, and not the 2002 edition relied on by Isackson. Doc. 84 at pars. 11-12. Additionally, plaintiffs maintain that, if this Court considers Isackson's affidavit, then it should consider the report of their own expert architect, Anthony J. Shinsky (Doc. 67), which was submitted in opposition to the underlying motion. Doc. 84 at pars. 17-39.

In reply, defendants argue, inter alia, that Shinsky's unsworn report is inadmissible and cannot be considered by this Court. Doc. 88 at par. 22.

LEGAL CONCLUSIONS:

CPLR 2221(e) provides as follows:

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. 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
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Despite the language of the statute, this Court "has discretion to relax the requirement that a motion to renew be based on newly discovered evidence or evidence not previously available, and to grant such a motion in the interest of justice, absent prejudice to the opposing party resulting from any delay." *Hines v New York City Transit Authority*, 112 AD3d 528 (1st Dept 2013) (citations omitted).

This Court deems defendants' motion as one for renewal, since they submit an affidavit from Isackson setting forth his opinions, which had already been disclosed to plaintiffs in the form of an unsworn report, thereby correcting an error in the initial motion papers. *Hines v New York City Transit Authority*, 112 AD3d at 528 (citations omitted). This Court notes that plaintiffs do not even attempt to establish that they would be prejudiced if renewal were to be granted. Doc. 84.

In opposing the motion, plaintiffs cite almost exclusively to decisions of the Appellate Division, Second Department. However,

[t]here is a split in the Appellate Divisions as to the rule which applies to the grant of renewal in the discretion of the lower courts. The Appellate Division, Second Department, has made a bright line rule that, although courts have discretion to grant renewal motions based on evidence which could have been presented on the original motion, the motion to renew must be denied if there is no showing of a "'reasonable justification' for the failure to present such facts on the original motion." *Aronov v Shimonov*, 105 AD3d 787 (2d Dept 2013); *see also Empire State Conglomerates v Mahbur*, 105 AD3d 898 (2d Dept 2013); *Deutsche Bank Trust Co. v Ghaness*, 100 AD3d 585 (2d Dept 2012). However, as noted in *Poag v Atkins* (3 Misc 3d 1109[A], 2004 NY Slip Op 50524[U] [Sup Ct, NY County 2004]), the Appellate Division, First Department, has opted to allow renewal based on previously available facts in the lower court's discretion, even if the movant lacks a reasonable justification for failing to provide the facts previously. *See Vega v Restani Construction Corp.*, 98 AD3d 425, 426 (1st Dept 2012) ("[a]lthough defendants failed to comply with the requirements of CPLR 2221 [e] [3] by not providing a reasonable justification for their failure to present the alleged new facts on the prior motion, under the circumstances, these failures do not require denial of the motion to renew"); *see also Mejia v Nanni*, 307 AD2d 870, 871 (1st Dept 2003) (Court granted renewal "in the interest of justice" even where movants "suggested no excuse for their failure to offer the newly submitted evidence in support of the initial motion"); *Garner v Latimer*, 306 AD2d at 209 (motion court erred in denying renewal "on the basis of delay").

320 W. 13th St., LLC v Wolf Shevack, Inc., 2013 NY Slip Op 31136(U), *6-7 (Sup Ct, NY County 2013).

Despite its more stringent standard, however, the Appellate Division, Second Department has nevertheless held that "CPLR 2221(e) has not been construed so narrowly as to disqualify, as new facts not offered on the prior motion, facts contained in a document originally rejected for consideration because the document was not in admissible form." *Nair v City of New York*, 167 AD3d 761, 763 (2d Dept 2018). Since that is precisely the situation herein, this Court, in its discretion, grants defendants' motion to renew.

Upon renewal, this Court grants summary judgment to defendants dismissing the complaint. Having opined under oath that, contrary to plaintiffs' contention (Doc. 53), defendants were not obligated to provide an illuminated light switch in the bathroom where plaintiffs' decedent was injured, Isackson has established their prima facie entitlement to summary judgment. Since Shinsky submits no sworn affidavit in opposition to the motion, and plaintiffs rely solely on the unsworn report he submitted in opposition to the underlying motion, they have failed to raise an issue of fact warranting the denial of the motion. Additionally, the opinion of plaintiffs' counsel regarding the applicability of certain regulations (Doc. 84 at par. 12) is, of course, of no probative value.

The remainder of the parties' contentions are either without merit or need not be addressed given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants for leave to renew their motion for summary judgment is granted; and it is further

ORDERED that, upon renewal, this Court vacates its prior order, entered September 3, 2019, and grants defendants' motion for summary judgment in all respects; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

8/26/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE