Voloshin v Trump Vil. Section 3, Inc.
2020 NY Slip Op 33049(U)
September 9, 2020
Supreme Court, Kings County
Docket Number: 517689/2018
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of SEPTEMBER, 2020

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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SOFIA VOLOSHIN,

Plaintiff,

-against-

TRUMP VILLAGE SECTION 3, INC.,

Defendants,

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Index No.: 517689/2018
Decision and Order

The following *papers NYSCEF* Doc #'s 42 to 52 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	42-45
Opposing Affidavits (Affirmations)	48-52

After having heard Oral Argument on SEPTEMBER 9, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff, moves for an order (1) pursuant to CPLR 2221(d) granting plaintiff leave to reargue the decision of this Court dated January 29,2020 granting defendant summary judgment on liability. (MS#3). Defendant opposes the same.

ARGUMENTS

Plaintiff contends the courts order of January 29, 2020 misapprehended or overlooked the facts or law in the prior proceeding, contending that the court misapplied the law and the plaintiff was able to identify the cause of her fall.

Defendant contends the plaintiff failed to point out any law misapplied, or fact overlooked by the court. Defendant contends that the court did not overlook or misapply any facts or law and the case cited by the court is applicable to the present case. Additionally, defendants contend the plaintiff did not attach any of the original moving papers to this motion to renew and reargue, therefore the court must deny the motion as procedurally improper.

ANALYSIS

CPLR 2221 in pertinent part states: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. 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; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: "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.

Under the caselaw existing prior to the 1999 amendments, a motion for re-argument was often used when there was a change in the law after the prior order. CPLR 2221(e)(2) now clarifies that the motion to renew, not the motion to reargue, is

the proper expedient when the motion is based on a change in the law that occurs while the case is still subjudice, such as a new statute taking effect or a definitive ruling on a relevant point of law being handed down by an appellate court that is entitled to stare decisis. See *Siegel, New York Practice* 449 (4th ed. 2005). The distinction, made clear in the caselaw and now embodied in the statute, is that the motion to renew involves new proof while the motion to reargue does not; it merely seeks to convince the court that it overlooked or misapprehended something the first time around and ought to change its mind. NY CPLR 2221. Additionally, A court has inherent discretionary power to vacate an order or judgment in the interests of substantial justice. *See Woodson v. Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727, 790 NE2d 1156 (2003).

In the present case, plaintiff contends that in deciding the previous motion in defendants' favor, the Court overlooked or misapprehended relevant facts or misapplied controlling principles of law. The Court can find nothing in plaintiff's renewal which indicates that the Court overlooked or misapprehended relevant facts. Plaintiff fails to set forth any facts that the Court overlooked, however, but contend apparently that the Court misapplied controlling principles of law in regard to granting plaintiffs motion for summary judgment on liability. The Court disagrees.

"'[A] plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation' " (*Rajwan v 109-23 Owners Corp., 82 AD3d 1199, 1200 [2011], quoting Patrick v Costco Wholesale Cor*p., 77 AD3d 810, 810-811 [2010]); *quoting Alabre v. Kings Flatland Car Care Ctr., Inc.*, 84 A.D.3d 1286, 1287, 924 N.Y.S.2d 174 (2011). "To impose liability upon the defendant in a trip and fall

action, there must be evidence that a dangerous or defective condition existed, and that the defendants either created the condition or had actual or constructive notice of it." See *Leary v. Leisure Glen Homeowner's Association Inc.*, 82 AD3d 1170 (2nd Dept. 2011). However, "a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." See *Hargrove v. Baltic Estates*, 278 A.D. 2d 278 (2"d Dept. 2000) (plaintiff tripping over 3/4-inch door saddle found to be trivial defect). A "3/4 of an inch difference in the height elevation between the edge of the concrete slab which had caused a plaintiff to fall and the adjacent concrete slab was too trivial to be actionable." *See Zalkin v. City York*, 36 AD3d 801, 802 (2"d Dept. 2007). "No "minimal dimension test" or "per se rule" exist to determine the triviality of a defect." *Boxer v. Metro Transport Authority*, 52 AD3d 447, 448 (2nd Dept. 2008). "A court must examine the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstances of the injury." *Myshann v.Tobias*, 32 AD3d 1000 (2nd Dept. 2006).

In the present case, the plaintiff has failed to identified any specific defect, or the specific location of the subject incident; has never produced any evidence, photographic, or measurements, of an alleged condition that caused her to fall; and never produced anything other than self-serving testimony that is unsubstantiated by any evidence. There have been no facts presented to this court with regard to width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstances of the injury for the court to examine. As such, upon re-argument this court adheres to its previous decision.

Accordingly, plaintiff's request to reargue is granted and upon re-argument this Court adheres to its previous decision for the reasons stated above. (MS#3).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
September 9, 2020

HON. RICHARD VELASQUEZ

So Ordered
Hon. Richard Velasquez

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KINGS COUNTY CLERK
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