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. 150631/2016

JOSE GAMBINO,

Plaintiff,

MOTION SEQ. NO. 002

- v -

77 AVE D SUPERMARKET CORP., C&C APARTMENT MANAGEMENT LLC., AVENUE D OWNERS LLC., RITE AID OF NEW YORK, INC., and MADISON SB, LLC.,

DECISION + ORDER ON MOTION

Defendants.

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RITE AID OF NEW YORK, INC.,

Third-Party
Index No. 565726/2019

Plaintiff,

-against-

VOLKS SERVICE CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 102, 112

were read on this motion to/for RENEWAL.

In this personal injury action, plaintiff Jose Gambino moves, pursuant to CPLR 2221 (e), for an order granting renewal and reargument of the motion for summary judgment by defendant Madison SB, LLC (MSB) (motion sequence 001), which was granted by this Court by order entered June 9, 2020. (NYSCEF Doc. 80). MSB opposes the motion. After a review of plaintiff's and MSB's arguments, as well as the relevant statutes and case law, this Court decides the motion as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court entered June 9, 2020 (the 6/9/20 order), which granted defendant MSB's motion for summary judgment dismissing all claims and cross claims asserted against it (*id.*). However, a brief summary of the facts, as well as additional relevant facts, are set forth below.

Plaintiff alleges that he was injured on February 5, 2015, when he slipped and fell on ice "on the northeast side of East 6th Street, approximately 17 flagstones west of Avenue D and 2 flagstones south of the fence located in front of 79 Avenue D and 77 Avenue D" in Manhattan (NYSCEF Doc. No. 1 ¶ 7). In support of its motion for summary judgment, MSB argued that neither owned nor was responsible for the area in which plaintiff allegedly fell. MSB supported its motion with its response to plaintiff's notice to admit, in which it represented that it did not own the lot next door to its property (NYSCEF Doc. No. 15). In addition, MSB submitted the affidavit of one of its members, Roopa Bhusri, who stated that MSB owned 77 Avenue D but that the property "consists of a building and the land underneath it, and the property includes no adjacent lots or yards" (NYSCEF Doc. No. 64 ¶ 3). Bhusri also stated that the area in which plaintiff fell "has never been owned, controlled, maintained, leased, occupied, or used in any way by [MSB]" (*id.* ¶ 4). He further asserted that MSB was not responsible for ice and snow removal in the area in question. MSB also submitted plaintiff's deposition testimony and a photograph identifying the precise location of the incident.

Plaintiff opposed MSB's motion on the grounds that it was premature due to the early stage of discovery and that MSB did not establish a prima facie entitlement to summary judgment (NYSCEF Doc. No. 65). He contended that the condition of the entire area, including MSB's

property, was responsible for his fall and that the testimony of Carla Mangual, who worked at a deli on MSB's property, reflected that there were snow and ice patches throughout the area (*id.* ¶¶). He stated that information about MSB's maintenance and policies and procedures was necessary for plaintiff to argue its position (*id.* ¶ 28). Other parties opposed the motion on the same grounds.

This Court held that MSB established its prima facie entitlement to summary judgment. Doc. 80. Among other things, it determined that the photograph of the accident site, on which plaintiff marked the exact location of his fall, established that the incident did not occur on MSB's property. Id. It concluded that MSB's affidavit provided additional evidentiary support that MSB was not responsible for maintenance of the area in question. Id. Further, this Court noted that MSB's showing shifted the burden to plaintiff and the other opposing parties to raise a triable issue of fact, and it concluded that they did not satisfy this burden. Id.

With respect to the argument that summary judgment was premature, this Court found that no party explained how any outstanding discovery could lead to relevant evidence and that, even if they had done so, no party showed that any of this purported knowledge was within MSB's exclusive control. Id. It concluded that "plaintiff's unsubstantiated claim that the area where plaintiff fell was owned by more than one property owner, as well as his conclusory allegation that MSB's negligent maintenance of the area in front of its building caused or contributed to the condition in front of the parking lot, do not alter this Court's opinion" (NYSCEF Doc. No. 80, at **7-8 [citing *Unisol, Inc. v Kidron*, 180 AD3d 570, 571 [1st Dept 2020]). This Court also noted that plaintiff's failure to aggressively pursue the discovery that was outstanding lent further support to the Court's decision.

Plaintiff's primary argument is that renewal is appropriate because this Court incorrectly concluded that he had not actively sought discovery. Because this Court raised the issue *sua sponte*,

plaintiff did not address it directly in the prior motion. He sets forth a list of the numerous discovery conferences the parties attended; explains that defendant 77 Ave D Supermarket Corp. (77 Ave D) changed counsel twice and plaintiff and Rite Aid each changed counsel, causing delays; notes that the initiation of the third-party action forced a postponement of discovery; cites the current pandemic as the source of additional delays; and asserts that, although depositions have not been held, the parties have remained in regular contact.

In addition, plaintiff reiterates his prior argument that MSB may be liable if there was a special use of the abutting property. He suggests that there is an issue of fact as to whether MSB, as an abutting property owner, made a special use of the neighboring lot. According to plaintiff, the fact that the properties are next to each other, by itself, is sufficient to raise this issue. He argues that this Court misapprehended the law in its consideration of MSB's motion, and that reargument is proper.

In opposition, MSB argues that plaintiff has not pointed out any errors in the 6/9/20 order. MSB contends that the Court considered and rejected plaintiff's discovery arguments in its prior order. MSB points out that, as MSB noted in support of its motion, plaintiff testified that the accident occurred at a spot that was at least 10 feet away from MSB's property. MSB stresses that plaintiff again fails to address this point. In fact, MSB contends, plaintiff has neither pointed to any new information nor shown that the Court overlooked any facts or law in its challenged decision. It is insufficient if plaintiff merely hopes that, given the facts at hand, it is possible that supporting evidence may be unearthed. Thus, according to MSB, plaintiff merely attempts to take "another bite at the apple" ((NYSCEF Doc. No. 102 ¶ 4).[1]

[1] MSB also argues that the motion is defective because it does not include the original motion papers. The Court rejects this position. At paragraph 6 of plaintiff's affirmation in support, plaintiff cites to all pertinent documents by NYSCEF document number and incorporates these documents

In reply, plaintiff contends that MSB has not adequately rebutted his position that he vigilantly sought discovery. He argues that this Court did not fully apprehend this matter, and that it is therefore appropriate for him to include facts about which this Court was unaware.

LEGAL CONCLUSIONS

Among other things, the 6/9/2020 order rejected plaintiff's argument that MSB's motion was premature. Specifically, this Court stated that neither plaintiff nor any other party opposing MSB's motion "provided an evidentiary basis for this Court to conclude that further discovery may lead to relevant evidence" (NYSCEF Doc. No. 80, at 7 [citing CPLPR 3212 (4); *Unisol Inc. v Kidroni*, 180 AD3d 570, 571 (1st Dept 2020)]), and that no party showed "that MSB had exclusive knowledge of facts needed to oppose the motion" (*id.*). Plaintiff seeks renewal of this argument.

This Court denies this branch of the motion. Under CPLR 2221 (e) (2), a renewal motion must "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." In addition, plaintiff was required to explain why he did not include these facts in his original papers (CPLR 2221 [e] [3]; *see Singh v QRL Five LLC*, 171 AD3d 614, 614 [1st Dept 2019]). Here, plaintiff seeks renewal based on this Court's consideration of what it deemed his allegedly unreasonable delay in seeking discovery, and he is correct that this Court addressed this issue *sua sponte*. However, his argument fails for other reasons. Primarily, the language in question was not the basis of this Court's decision. Instead, it merely noted "that

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by reference (NYSCEF Doc. No. 84). Further, any other relevant documents are readily available through e-filing.

plaintiff's unreasonable delay . . . further warrants that the motion be granted" (NYSCEF Doc. No. 80, at *7). Thus, the challenged language was essentially dicta. Additionally, this Court was aware of the numerous discovery conferences and specifically referenced them in the 6/9/20 order.

Substantively, this Court held that MSB established its prima facie entitlement to summary judgment and that plaintiff failed to raise a triable issue in response. Plaintiff moved to reargue this branch of the motion. A motion 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] [2]). Plaintiff argues that this Court overlooked or misapprehended the fact that, as an abutting landowner, MSB would be held liable if it had created the problem through its negligent maintenance of snow and ice conditions on its property or if it had made a special use of the property where the accident occurred. This Court denies reargument of this issue. Plaintiff specifically raised this argument in its original motion and it was rejected (*see* NYSCEF Doc. No. 65 ¶¶ 32-34). This Court expressly rejected plaintiff's "conclusory allegation that MSB's negligent maintenance of the area in front of its building contributed to the condition in front of the parking lot" (NYSCEF Doc. No. 80, at **7-8). This Court implicitly rejected plaintiff's "special use" argument as conclusory as well. Plaintiff did not identify any such use, and the assertion that there may have been one was utterly speculative. Mangual's statement at her deposition that the entire area had snow and ice was insufficient to establish that MSB may have been responsible for a fall 10 feet away from its property.

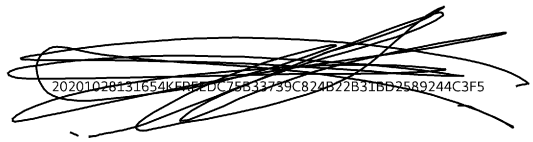
Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion is denied in all respects; and it is further

ORDERED that the telephonic compliance conference scheduled for December 7, 2020 at 4:30 p.m. is cancelled and will be rescheduled upon reassignment of this matter to a different judge*; and it is further

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

*The undersigned has not been recertified as a Supreme Court Justice and is to leave the bench as of December 31, 2020. This matter will therefore be transferred to another Justice of the Supreme Court and the conference will be rescheduled upon reassignment.



10/28/2020
DATE

KATHRYN E. FREED, J.S.C.

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