

Selvaggio v City of New York
2021 NY Slip Op 30985(U)
January 7, 2021
Supreme Court, Richmond County
Docket Number: 100039/2018
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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CHRISTINA SELVAGGIO,

Plaintiff,

- against -

HON. THOMAS P. ALIOTTA, J.S.C.

DECISION & ORDER

THE CITY OF NEW YORK, DOE COURT
HOMEOWNER’S ASSOCIATION, a.k.a., DOE COURT
HOMEOWNER’S ASSOCIATION, LTD., UNITED
STATE LIABILITY INSURANCE COMPANY,
DAWNING REAL ESTATE INC., JOAN and
ROBERT GALLO, YONA and YONI MATON,
a.k.a., AVISHY SHAER and EILEEN MATON,

Index #100039/2018
Motion Sequence 008 and 009

Defendants.
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Recitation as required by CPLR 2219 (a) of the following papers numbered "1" through "5" were marked fully submitted on the 9th day of December, 2020

Papers Numbered

Plaintiff’s Order to Show Cause for Leave to Reargue and Permission to File on NYSCEF, with Affidavit in Support (dated January 28, 2020).....	1
Defendants’ Affirmation in Opposition (dated July 1, 2020).....	2
Plaintiff’s Reply Affidavit (dated July 15, 2020).....	3
Plaintiff’s Notice of Motion to Compel pursuant to CPLR 3106, with Affidavit in Support (dated August 12, 2020).....	4
Defendants’ Affirmation in Opposition (dated October 6, 2020).....	5

Upon the foregoing papers, plaintiff's order to show cause dated January 28, 2020 (Seq. No. 008), *inter alia*, for leave to reargue the Decision and Order of this Court dated January 21, 2020 as well as plaintiff's motion to compel pursuant to CPLR 3106 are denied.

In this action, plaintiff seeks to recover damages for personal injuries sustained on May 15, 2018, when she allegedly tripped on a defect in the street and curb abutting the driveway in front of the premises located at 181 and 183 Freedom Avenue, Staten Island, New York. The premises are owned and managed by defendant Doe Court Homeowner's Association, a.k.a., Doe Court Homeowner's Association, LTD. Plaintiff allegedly fractured her left ankle and tore the meniscus ligament in her left knee.

Plaintiff's Motion for Leave to Reargue

Plaintiff's application for leave to reargue involves (1) a prior motion brought by defendants pursuant to CPLR 3124 and CPLR 3126 (Seq. No. 005), and (2) a motion brought by plaintiff to compel discovery pursuant to CPLR 3106 (Seq. No. 006). Plaintiff sought the production of copies of books, records of accounts, minutes of meetings, and a list of the board members of Doe Court Homeowner's Association; all claims and lawsuits including a claim by a certain member of the board who sued the Homeowner's Association in March 2012; documentation relating to the management of Doe Court; and documentation relating to the seventeen insurance policies issued to Doe Court.

Defendants objected to the demands on the grounds that they were vague, overly broad, and not reasonably calculated to lead to the discovery of admissible evidence. Over objection, Doe Court provided the offering plan and the applicable insurance declaration page for the time period at issue. Doe Court agreed to make the books and records demanded in plaintiff's

February 28, 2019 discovery demand available for her inspection. Doe Court further responded that certain items plaintiff sought were matters of public record.

In a Decision and Order dated January 21, 2020, the Court granted defendants' motion pursuant to CPLR 3126 to the extent plaintiff was ordered to provide certain enumerated authorizations for her medical records pertaining to the period from 2012 to the present. The Court granted plaintiff's motion to compel disclosure solely to the extent that defendants were ordered to provide information pertaining to prior accidents involving the defect alleged in the complaint for the period of 2012 through the date of the accident. The balance of plaintiff and defendants' motions was denied.

More particularly, the Court found plaintiff's demands for discovery were overbroad, burdensome, and seek irrelevant information that is not material or necessary to the prosecution of this action. The Court concluded plaintiff's demand for seventeen insurance policies was palpably improper. It was noted that the books, records, accounts and minutes were made available to plaintiff for her inspection at her convenience, and that she must obtain any publicly available information from the New York State Attorney General's Office through a FOIL request.

The Court further concluded that plaintiff's demand for "all prior claims," including a claim by a certain board member, was overbroad and irrelevant as to any material issues in this matter, including notice. It was noted that the board member's accident occurred at a different location and did not involve the defect alleged in plaintiff's complaint. Since plaintiff was only entitled to information pertaining to prior claims involving the alleged defect at issue, the Court ordered Doe Court provide to plaintiff information pertaining to prior accidents involving the defect alleged in the complaint solely for the period of 2012 to the date of the occurrence.

In support of her motion for leave to reargue, plaintiff maintains, contrary to the Court's finding, the information she sought is "material and necessary" to the prosecution of her action since the role of Doe Court Homeowner's Association and Dawning Real Estate Inc. was to "upkeep common areas" and its failure to do so constitutes "causation and a breach of duty" which requires full disclosure of the Association's "financial or legal problems." She argues that her demand for insurance claims related to other entrances and exits to the development is not irrelevant and/or overbroad. She maintains the Court should have permitted access to "any [insurance] policy created within the last five years [rather than three years], as those relevant claims will prove the negligence by the Board of Directors." She contends the information is reasonably calculated to lead to the discovery of information bearing on her claims.

It is well established a motion for leave to reargue is addressed to the sound discretion of the court and affords the moving party an opportunity to show that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (*see* CPLR 2221[d][2]; *JPMorgan Chase Bank, N.A. v. Novis*, 157 AD3d 776, 778 [2d Dept 2018]; *Cioffi v. S.M. Foods, Inc.*, 129 AD3d 888, 891 [2d Dept 2015]). It is not to be used, however, as a means by which an unsuccessful party is permitted to argue again the very issues previously decided, or to present new or different arguments, or matters of fact not originally tendered (*see Robinson v. Viani*, 140 AD3d 845, 847 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v. Ramirez*, 117 AD3d 674, 675 [2d Dept 2014]; *Nicolia v. Nicolio*, 84 AD3d 1327, 1328 [2d Dept 2011]).

Consonant with the foregoing, plaintiff failed to make the required showing. She failed to demonstrate in her submissions that the Court overlooked or misapprehended relevant facts or controlling law in rendering its Decision and Order dated January 21, 2020. Moreover, plaintiff's

reiteration of the same arguments previously raised in the course of this litigation and her assertion of new and/or additional arguments not raised in the prior motions does not warrant the granting of leave to reargue (*see Diorio v. City of New York*, 202 AD2d 625, [2d Dept 1994], *lv denied* 85 NY2d 857; *JPMorgan Chase Bank, N.A. v. Novis*, 157 AD3d at 778). In any event, her contentions, for the most part, were irrelevant to the required showing in a motion for leave to reargue.

Plaintiff's Motion to Compel pursuant to CPLR 3106

In moving to compel discovery, it is unclear whether plaintiff seeks to “disallow” defendants from performing a further deposition on liability, or to compel defendants to conduct the “remaining” deposition on liability. In any event, plaintiff seeks to (1) preclude defendants from performing an Independent Medical Examination and (2) compel the production of all outstanding documentation pertaining to prior claims relating to the location where she was injured. Notably, the latter has been determined by the Court in its Decision and Order dated January 21, 2020, and shall not be reargued.

Foremost, contrary to plaintiff's belief, her deposition on liability has been held, however, her deposition on damages has yet to be completed. Following the January 21, 2020 Order, plaintiff provided the outstanding medical authorizations for her treating facilities. Those authorizations were produced after the resolution of previous discovery motions wherein she argued, in part, that Doe Court was not entitled to obtain medical records relating to her pre-existing medical conditions. This Court resolved that issue in its Decision and Order dated January 21, 2020. A deposition of plaintiff on damages was scheduled to take place on April 3, 2020, and was adjourned due to the COVID-19 pandemic.

Nevertheless, upon receiving the additional medical records of plaintiff's prior treatment, Doe Court has waived the deposition. It requests that a deadline be designated to perform plaintiff's independent medical examination and exchange the report. Thus, the branch of plaintiff's motion which seeks to preclude a further deposition is rendered moot.

As for the branch of plaintiff's motion which seeks to compel the production of documentation of prior claims relating to the location at issue, the Court's e-file reveals that defendants have provided such records in compliance with the Court's Decision and Order dated January 21, 2020. Specifically, in Doe Court's "Response Pursuant to Court Order dated January 21, 2020," the pertinent "Loss Run Request" forms obtained from its insurance carrier were produced, indicating no claims were filed against defendant for the period of 2012 to the date of the incident.

In view of the foregoing, plaintiff's motion to compel is denied. Defendants shall not be precluded from performing an Independent Medical Examination of plaintiff. Plaintiff's request for permission to file on NYSCEF is moot. This is an e-filed case. New York State Electronic Filing is a program that permits the filing of legal papers by electronic means with the County Clerk or appropriate court and offers electronic service of papers in those cases.

Accordingly, it is hereby

ORDERED, plaintiff's order to show cause dated January 28, 2020 for leave to reargue the Decision and Order of this Court dated January 21, 2020 is denied; and it is further

ORDERED, plaintiff's motion, *inter alia*, to compel pursuant to CPLR 3106 is denied; and it is further

ORDERED, an Independent Medical Examination of plaintiff shall be performed within 90 days of the service of Notice of Entry of this Order; and it is further

ORDERED, the report of said Independent Medical Examination shall be exchanged within 30 days of receipt of the report from the examination physician; and it is further

ORDERED, the Clerk shall mark his records accordingly.

ENTER:

Dated: January 7, 2021



HON. THOMAS P. ALIOTTA, J.S.C