

Sassone v 22 Main St. LLC
2022 NY Slip Op 35258(U)
December 22, 2022
Supreme Court, Rockland County
Docket Number: Index No. 33173/2019
Judge: Thomas P. Zugibe
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
THOMAS SASSONE,

Plaintiff,

-against-

22 MAIN STREET LLC and MAPLESHADE
LANDSCAPING,

Defendants.
-----X

ZUGIBE, J.

DECISION AND ORDER

Index No. 33173/2019
Motion Seq. 3-4

The papers filed electronically as NYSCEF 65-114 were read on these two Notices of Motion by plaintiff for an Order pursuant to CPLR 2221(d) granting leave to reargue the Decision and Order of this Court (Berliner, J.) entered June 22, 2022, which granted the respective CPLR 3212 motions of defendants 22 Main Street LLC and Mapleshade Landscaping for summary judgment dismissing the action against each of them, and upon re-argument denying each such motion.

Upon the foregoing papers, and all prior papers and proceedings in this action, the motions are consolidated for purposes of decision and are determined as follows:

This personal injury action arises from an alleged slip and fall on black ice that had formed on a driveway. By separate Decisions and Orders entered on June 22, 2022, this Court (Berliner, J.) granted the summary judgment motions by property owner 22 Main Street LLC (“22 Main Street”), and its snow-removal contractor, Mapleshade Landscaping (“Mapleshade”), and dismissed this action. As to 22 Main Street, the Court found that 22 Main Street did not have actual or constructive notice of the black ice, based on (1) plaintiff’s deposition testimony that he did not notice any black ice at the location approximately 12 hours earlier, and (2) proof that 22 Main Street lacked actual awareness of a water pooling condition arising from a nearby drainage system that might constitute a recurring dangerous condition (NYSCEF 59). As to

Mapleshade, the Court found that *Espinal v Melville Snow Contrs.* (98 NY2d 136, 138 [2002]) governed any liability of Mapleshade as third-party contractor, and that plaintiff did not expressly plead in the complaint or bill of particulars any of the three *Espinal* exceptions that might give rise to such liability.

Timely pursuant to CPLR 2221(d), plaintiff separately moved for leave to reargue the two motions.

Analysis

A motion to reargue must show that the Court overlooked or misapprehended a relevant matter of fact or law in determining the prior motion (*see* CPLR 2221[d][2]; *Matter of Carter v Carter*, 81 AD3d 819 [2d Dept 2011]). “A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented” (*Flanagan v Delaney*, 194 AD3d 694, 698 [2d Dept 2021] [collecting cases]), and specifically is not a vehicle “merely [to] restate its earlier arguments” (*Williams v Abiomed, Inc.*, 173 AD3d 1115, 1116 [2d Dept 2019]). These matters lie within the motion court’s sound discretion (*see id.*; *Rodriguez v Gutierrez*, 138 AD3d 964, 967 [2d Dept 2016]; *cf. Nicolia v Nicolia*, 84 AD3d 1327, 1329 [2d Dept 2011]).

As a prefatory matter, this Court observes that the judge who issued the underlying orders is unavailable and therefore this action was transferred to the undersigned for determination. In this posture, the CPLR 2221(d) standard functionally requires this Court to discern whether the prior judge overlooked or misapprehended plaintiff’s arguments or case law. Thus, in essence, this posture asks this Court to reverse time and step into the prior judge’s shoes. Lacking access to the unwritten internalities of another judge’s thought process, however, the best this Court (or any court) can do is discern from the four corners of the prior motion papers, and the judge’s decisions on those papers, whether the decisions appeared to overlook or misconstrue any relevant part of their respective motion papers to an extent that would change the result.

As to 22 Main Street, plaintiff is wrong that 22 Main Street did not carry its prima facie burden: plaintiff’s own deposition testimony established a time on the day of the alleged incident that the black ice did not exist, which was relevant to showing that the black ice developed some time after. In turn, that assertion was relevant to 22 Main Street’s prima facie showing that it did

not have actual or constructive notice that black ice formed or would form that day at the site where plaintiff allegedly fell. In any event, this Court did not misperceive or misapprehend plaintiff's contrary argument, and particularly plaintiff's claim that whether 22 Main Street had constructive notice was a question of fact. Again, plaintiff's own deposition testimony specifically adduced that the alleged black ice was not present 12 hours earlier, and that he believed the black ice to have formed between three and four hours before the alleged accident. The Court did not misapprehend that, given the limited time, plaintiff failed to raise a triable issue of material fact as to constructive notice. Neither did this Court misperceive or misapprehend plaintiff's expert affidavit concerning whether 22 Main Street knew or reasonably should have known of such recurring dangerous condition as plaintiff alleges.

As to Mapleshade, plaintiff mainly regurgitates his arguments on the prior motion. He repeats his contention – which this Court took up and rejected – that his bill of particulars as to Mapleshade satisfied the *Espinal* exception-pleading requirement by alleging that Mapleshade undertook a duty to plaintiff of reasonable inspection “should they [*i.e.* Mapleshade] be contractually obligated to do so.” The Court found this pleading language to be equivocal and thus insufficient under *Espinal* – and plaintiff offers no availing demonstration that this Court misapprehended the law on point. This Court also disagreed with plaintiff that Mapleshade had “completely assumed” 22 Main Street's duties to plaintiff. Contrary to plaintiff's assertion now, this Court did not misapprehend or overlook plaintiff's contention Mapleshade had modified its contract with 22 Main Street by a course of performance. Neither did this Court misapprehend or overlook plaintiff's contention that Mapleshade was liable to plaintiff based on actual or constructive knowledge of a dangerous icy condition: rather, the Court found that the source of this alleged condition had no sufficient nexus to the contractual relationship between Mapleshade and 22 Main Street so as to impute to Mapleshade that knowledge and thus a remedial duty.¹

The Court has considered the parties' remaining contentions and deems them to lack merit or to be moot in light of the foregoing. Accordingly it is hereby

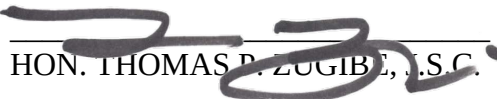
¹ Indeed, on this record, plaintiff's argument is tantamount to holding that a snow-removal contractor risks liability to a non-contracting party if *ever* black ice forms after a ponding condition unrelated to the contractual relationship. Such is not the law.

ORDERED that the motions by plaintiff to re-argue the Decisions and Orders of this Court (Berliner, J.) entered June 22, 2022, are denied; and it is further

ORDERED that the Court's filing of this instrument via NYSCEF shall constitute good and sufficient service hereof on all parties.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
December 22, 2022


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

To: All counsel via NYSCEF