

Figueroa v City of New York

2023 NY Slip Op 31439(U)

April 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156837/2018

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART

Justice

-----X

ELSA FIGUEROA,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, BO BO REALTY CORP.

Defendant.

-----X

INDEX NO. 156837/2018
MOTION DATE 03/28/2023
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 151, 161, 162

were read on this motion to/for REARGUMENT/RECONSIDERATION

Upon the foregoing documents, defendant Bo Bo Realty Corp.'s (Bo Bo Realty) motion seeking an order pursuant to CPLR 2221 (d) granting re-argument of its motion for summary judgment is denied. Bo Bo Realty argues that the Court overlooked matters of law and fact in its decision dated December 6, 2022 which denied Bo Bo Realty's motion. See NYSCEF doc. no. 116. Defendant Bo Bo Realty asserts that a photograph of the incident location and plaintiff's deposition testimony clearly suggests that plaintiff Elsa Figueroa's injury was caused by a defect in the curb abutting the sidewalk. Bo Bo Realty maintains that plaintiff testified that a protruding piece of metal caused her to trip and fall and did not testify to any other defect or condition of the sidewalk that caused her to fall. Further, it asserts that the Court failed to consider the photograph of the incident location. Based on these contentions, Bo Bo Realty again argues that all claims and crossclaims against it should be dismissed because it is only liable for maintaining the sidewalk abutting its property and not the curb, pursuant to New York City Administrative Code § 7-210.

In reviewing Bo Bo Realty's prior motion, the Court considered all evidence submitted, including the photograph and plaintiff's testimony. The photograph does not explicitly show that the protruding piece of metal was a defect in the curb. *See* NYSCEF doc. no. 118. In fact, the protruding metal piece is hardly visible in the photograph and the encircled area is in between the curb and the sidewalk, if not almost entirely on the sidewalk. *See id.* Additionally, although Bo Bo Realty claims that plaintiff did not testify to there being anything else wrong with the sidewalk, plaintiff referenced the worn-down sidewalk as a possible contributing factor to her fall, stating, "It was an iron that was in there when the sidewalk is getting worn down. It was coming out and what was there that's what caused me to fall." NYSCEF doc. no. 117 at 19, lines 9-11. Even if there was not an additional defect on the sidewalk, it is unclear whether the metal piece was protruding from the curb or sidewalk.

Bo Bo Realty relies on plaintiff's testimony to support its motion but would like the Court to ignore plaintiff's testimony in which she is apparently confused about whether she fell on the curb or the sidewalk. It asserts that it does not matter that plaintiff did not know the difference between the curb and sidewalk because it was the protruding metal piece that caused her to trip. However, it does matter whether plaintiff's testimony clearly establishes where she fell or thinks she fell, and there is still a question of fact as to whether the protruding metal piece was located on the curb, the sidewalk, or somewhere in between. This is especially true because plaintiff repeatedly used the term "sidewalk" instead of "curb" in her testimony in reference to where she fell.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221. A

motion for leave to reargue is addressed to the sound discretion of the Court and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *See Oparaji v. Yablon*, 159 AD3d 539 (1st Dept 2018).

Here, Bo Bo Realty seeks to reargue its prior summary judgment motion. On a motion for summary judgment, the movant must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *see also Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman*, 3 NY2d at 404. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d at 521.

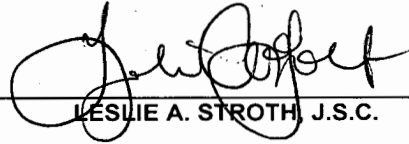
Bo Bo Realty fails to show that the Court overlooked or misapprehended facts or law in considering its prior motion for summary judgment. The Court properly considered all evidence submitted and found that questions of fact still exist as to what caused plaintiff's fall and her resulting injuries. Bo Bo Realty now merely reiterates its original arguments and incorrectly claims that the Court did not consider the photograph submitted with the motion, which, regardless, does not resolve the remaining questions of fact.

Accordingly, it is hereby

ORDERED that defendant Bo Bo Realty Corp.'s motion for an order granting re-argument of its prior motion for summary judgment and dismissing the complaint and all cross-claims as against it is denied; and it is further

ORDERED that within 30 days of entry of this order, counsel for movant shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

The foregoing constitutes the decision and order of the Court.

<u>4/26/2023</u> DATE	 LESUE A. STROTH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE