

Cordell v Brooklyn Union Gas

2023 NY Slip Op 31646(U)

May 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 505479/2018

Judge: Devin P. Cohen

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This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York
County of Kings**

Index Number 505479/2018
Seq. 010

Part 91

DECISION/ORDER

PATRICIA CORDELL,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

| | |
|---|-------------|
| Notice of Motion and Affidavits Annexed | <u>1</u> |
| Order to Show Cause and Affidavits Annexed. . . . | <u> </u> |
| Answering Affidavits | <u>2</u> |
| Replying Affidavits | <u>3</u> |
| Exhibits | <u> </u> |
| Other | <u> </u> |

BROOKLYN UNION GAS, individually and d/b/a
NATIONAL GRID NEW YORK, NEW YORK PAVING INC.,
VERIZON NEW YORK INC., AN W PROPERTIES LLC,
LOS PAISONOS INTERNATIONAL INC., and HALLEN
CONSTRUCTION COMPANY, INC.,

Defendants.

Upon the foregoing papers, defendant ANW’s motion to re-argue and vacate (Seq. 010) is decided as follows:

Introduction

This action arises from an accident that occurred on April 14, 2017, when the plaintiff claims that she tripped and fell on the sidewalk in front of 79-16 Roosevelt Avenue, Elmhurst, N.Y. On March 19, 2018, the plaintiff commenced an action against the abutting property owner, ANW Properties LLC (“ANW”), its lessee-deli store, Los Pisonos International Inc. (“Los Pisonos”), The Brooklyn Union Gas Company, d/b/a National Grid NY (“National Grid”) and Hallen Construction Company (“Hallen”). Plaintiff contends that the accident was caused by the negligence of the defendants, including National Grid and Hallen, in that they created a dangerous condition on the sidewalk or allowed that condition to remain unrepaired and hazardous to pedestrians.

On October 7, 2022, this court issued an order resolving multiple summary judgment motions by the parties. Defendant ANW now moves to reargue that order and, upon reargument, to be awarded summary judgment.

Factual Background

No additional facts have been brought to the court's attention since the prior order, and therefore an abbreviated recitation is provided here. The plaintiff testified that, while walking eastbound on the south side of Roosevelt Avenue, she tripped on an uneven lump of asphalt (*id.* at 27). ANW is a limited liability corporation ("LLC") that owns the commercial premises abutting the subject sidewalk (Anthony Fong, manager and member of ANW, EBT at 15–16). Mr. Fong testified that ANW did not undertake any repairs to the condition of the sidewalk prior to or during April 2017 on the basis that "ANW did not want to interfere with what had been an ongoing gas main project being conducted by those other entities" (Fong Aff. at ¶ 7–8).

National Grid received a work permit from the City of New York to excavate this stretch of sidewalk for the purpose of replacing a gas main on Roosevelt Avenue between 79th and 80th Streets (Walter Stone, a consultant for National Grid, EBT at 25–26). Hallen was the sub-contractor performing the demolition of the sidewalk and running the service line from the main gas line to an abutting building (*id.* at 37–38; *see also* paving contract).

Analysis

To establish a basis for reargument, defendant must show that this court overlooked or misapprehended a point of law or fact, without resorting to arguments different from those originally stated (*NYCTL 1998 I Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966-67 [2d Dept 2016]).

In the instant motion, ANW seeks reargument because 1) ANW contends that the court did not address its cross-claims, and 2) the court erred in finding a question of fact about the duty it owed. ANW is correct in its contention that the court did not explicitly address its alternative request for summary judgment on its cross-claims, and therefore reargument is granted.

Upon reargument, ANW's motion remains denied. The underlying decision is clear that there is a question of fact as to ANW's negligence. Specifically, I found a question of fact as to whether ANW had remedial measures available to it and failed to effect those measures, thereby negligently contributing to the plaintiff's accident. That remains true irrespective of the sentence in the prior order stating that a question of fact exists as to ANW's "responsibility" (Prior Order at 5). That section's conclusion is clear: "it is possible that there were alternative maintenance options available to ANW and that, by failing to effect these measures, ANW breached its § 7-210 duty to the plaintiff. Accordingly, ANW's motion is denied due to questions of fact" (*id.*) ANW has not presented an argument that the court misapprehended the facts or law in reaching this conclusion.

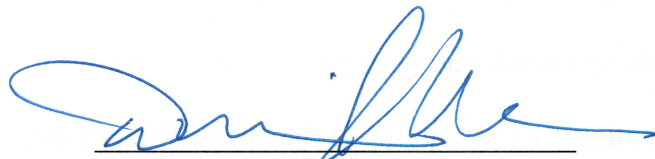
Because of this question of fact, ANW must also be denied summary judgment on its cross-claims, as a party cannot be indemnified for its own negligence (General Obligations Law § 5-321). ANW argues that any negligence it had was purely passive, and therefore should not prevent it from being indemnified. However, this court is not aware of, and ANW has not provided, any case law that a party which *knew about a dangerous condition* and had § 7-210 responsibility would be merely "passively negligent." Mr. Fong testified that he personally observed the allegedly dangerous condition. Unlike the cases cited by defendant, this is not a case where an out-of-possession landlord with no notice of the condition is being held statutorily liable.

Conclusion

ANW's motion is granted to the extent of permitting reargument. However, ANW's requests for relief, including on its cross-claims, are denied due to questions of fact about its negligence in causing the plaintiff's injury.

This constitutes the decision and order of the court.

May 5, 2023
DATE



DEVIN P. COHEN
Justice of the Supreme Court