

Holm v Du City Tri Runs, Inc.

2023 NY Slip Op 33117(U)

August 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 509069/2020

Judge: Wavny Toussaint

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of August 2023.

PRESENT:

HON. WAVNY TOUSSAINT,

Justice.

----- X

KAREN HOLM,

Plaintiff,

- against -

DU CITY TRI RUNS, INC., d/b/a CITY TRY RUNS,

Defendant.

----- X

The following e-filed papers read herein:

Notice of Motion/Order to Shower Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

Index No. 509069/2020

**AMENDED DECISION AND
ORDER**

Motion Seq. 7

NYSCEF Doc Nos.

172-180

181-182

187

Upon the foregoing papers, defendant Du City Tri Runs, Inc., d/b/a City Try Runs (“Tri Runs”) moves (Seq. 7) for an order pursuant to CPLR §2221 granting it leave to reargue and renew the Court’s Order of March 24, 2023 (the “Order”), and upon reargument, reverse the Order and enter judgment in favor of the defendant and against the plaintiff with statutory costs and disbursements. The plaintiff opposes the motion.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff commenced this action for personal injuries on June 3, 2020, as a result of a trip and fall accident on September 8, 2019. On September 30, 2020, defendant joined issue. Subsequently, by notice of motion filed on July 19, 2022, defendant moved, pursuant to CPLR §3212, for an order granting summary judgment dismissing the Complaint in its entirety on the basis that there is no genuine issue of fact (Seq. 6). Plaintiff opposed, arguing defendant failed to make a prima facie showing of entitlement to the relief sought. On reply, defendant argued that the evidence submitted by plaintiff failed to raise a triable issue of fact.

On March 24, 2023, the Court issued the subject Order, which denied defendant's initial motion, finding there were triable issues of fact warranting jury determination. Defendant now moves to reargue, asserting the Court overlooked or misapprehended matters of fact and law when it denied its motion for summary judgment and to renew, asserting waiver and release as a defense, as stated in its amended answer.

DISCUSSION

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, but shall not include any matters of fact not offered on the prior motion (NY CPLR 2221(d)(2) (McKinney); *Foley v Roche*, 68 AD2d 558, 567–568 [1st Dep't 1979][“Foley”]). Here, defendant has merely rehashed the same facts and legal theories previously considered and failed to present any matter of fact or law overlooked or misapprehended by the Court. The proof submitted on the initial motion (Seq. 6) established that there are material issues of

fact that exist as to, *inter alia*, whether defendant is liable for plaintiff's injuries; whether defendant had prior notice of the hazardous condition despite not being a landowner; whether defendant had a duty to perform safety inspections to ensure race participants' safety; and whether the waiver/release agreement was executed by the plaintiff, since the issue of waiver was specially addressed by the Court as if it was asserted as an affirmative defense in the answer. Therefore, defendant's conclusion that the Court should have ruled differently is an insufficient basis to grant reargument (*Foley* at 567–568).

With respect to the branch of defendant's motion seeking to leave to renew, it 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" (NY CPLR 2221(e)(2) (McKinney); *Foley* at 568; *Professional Offshore Opportunity Fund, Ltd. v. Braider*, 121 AD3d 766, 769 [2d Dep't 2014]), coupled with a "reasonable justification for the failure to present such facts on the prior motion" (NY CPLR 2221(e)(3) (McKinney); *Matter of Serviss v Inc. Vil. of Floral Park*, 164 AD3d 512, 513 [2d Dep't 2018]). Here, the defendant failed to present any "new" fact that was not previously considered by the Court that would have changed the prior determination (*Nunez v Yonkers Racing Corp.*, 192 NYS3d 530 [2d Dep't 2023]).

The parties' remaining contentions are without merit.

Accordingly, it is

ORDERED that defendant Du City Tri Runs, Inc., d/b/a City Tri Runs' motion to reargue and renew (Seq. 7) is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER



J. S. C.

Hon. Wavny Toussaint
J.S.C.

KINGS COUNTY CLERK
FILED
2023 SEP -7 AM 9:18