Murphy v City of New York
2011 NY Slip Op 33952(U)
December 12, 2011
Supreme Court Bronx County
Docket Number: 18315/04
Judge: Mark Friedlander

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MELISSA MURPHY,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK YANKEES PARTNERSHIP, and KINNEY PARKING SYSTEM, INC.,

Defendants.

DECISION/ORDER
Index No. 18315/04

Present:
HON. MARK FRIEDLANDER
J.S.C.

The following papers numbered 1 to 6 read on this motion on the calendar of June 7, 2011

	Papers Numbered
Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed	1-2
Answering Affidavits and Exhibits Annexed	3, 4
Replying Affidavits and Exhibits Annexed	5, 6

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision.

DEC 15 2011

Dated: 12/12/11

MARK FRIEDLANDER, J.S.C.

FILED Dec 15 2011 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MELISSA MURPHY,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK YANKEES PARTNERSHIP, and KINNEY PARKING SYSTEM, INC.,

Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 18315/04

HON. MARK FRIEDLANDER:

Plaintiff Melissa Murphy ("Plaintiff" or "Murphy") moves for leave to renew with regard to a motion and cross-motion previously decided against plaintiff by order of this Court dated May 26, 2010. Those applications were submitted by defendants City of New York ("NYC") and Kinney Parking Systems, Inc. ("Kinney") seeking summary judgment, dismissing plaintiff's claims against them. This Court granted defendants' motions, in a decision which was specifically premised on the facts and reasoning contained in an earlier decision by the undersigned.

The earlier decision, in an action brought by plaintiff Jason Provenzano ("the Provenzano case"), had also granted summary judgment to NYC and Kinney. Both the Murphy case and the Provenzano case involved a trip and fall by plaintiff on a strip of pavement at or near the front gate of a Kinney parking lot. The place where the two plaintiffs fell was nearly totally identical. Both cases revolved around issues of whether there was a requirement of prior written notice to NYC, and whether Kinney had contractually undertaken to maintain the area where the two plaintiffs fell. Part of the dispute revolved around whether the place where the two plaintiffs fell was a sidewalk (requiring prior written notice to NYC) or something else.

In the Provenzano case, this Court ruled that the area was a sidewalk, and granted summary

judgment to NYC, based on the lack of prior notice. The Court further ruled that the area was outside the parking lot which Kinney had contracted to maintain, so that, regardless of the extent of Kinney's obligations to NYC under its contract, there were no issues of fact permitting Kinney's liability. Consequently, summary judgment was also granted to Kinney. This Court's decision in the Provenzano case was issued in June 2009.

Provenzano was appealed, resulting in a reversal of this Court's decision by the Appellate Division, First Department. In Provenzano v. NYC, et al, 79 A.D.3d 541, the appellate court ruled that there were issues of fact revolving around whether the area was a part of Kinney's parking lot and whether Kinney, by its contract, had entirely assumed responsibility from NYC for maintenance of the area. Thus, summary judgment in favor of Kinney should not have been granted. The court further ruled that there were issues of fact revolving around whether NYC had made special use of the area in question, which would obviate the need for prior notice, even if it was a sidewalk. Thus, summary judgment should also have been denied to NYC. The appellate decision was issued in December 2010.

Prior to the reversal of Provenzano by the appellate division, this Court found before it the motion and cross-motion for summary judgment in the instant action. In a decision issued in May 2010, this Court noted the extreme similarity between the two actions, including a fall by a plaintiff at the same location, claims against the same defendants, involvement of the same contract, etc. The Court referred to the earlier decision and incorporated into the Murphy decision much of the verbiage which had been in the Provenzano decision, openly acknowledging its origin, and remarking on the judicial economy of finding it possible to handle two separate actions with decisional language that fitted both so aptly. Following the result reached in the earlier decision, the Court granted summary judgment to both defendants.

Unlike Provenzano, Murphy never appealed the decision of this Court. The time to appeal has long since expired. Pursuant to this Court's order, a judgment of dismissal of the Murphy claims was

duly filed. Murphy brought the instant motion in February 2011, seeking renewal on the statutory ground of a subsequent change in law, and citing the appellate division in the Provenzano case. Because this Court's order in the Murphy case was served, with notice of entry, in June 2010, Murphy's time to appeal expired in July 2010, seven months before the instant motion was served.

Murphy now seeks renewal with regard to the earlier motion and cross-motion herein, and, upon renewal, the issuance of a decision declining to dismiss Murphy's claims. Indeed, at first blush, it seems only proper that leave to renew should be granted, so that this Court may have the chance to issue a decision consistent with the ruling of the appellate division in the Provenzano case. This Court has no wish to erroneously deprive Murphy of her potential right of recovery at trial. However, it seems that this Court may well be powerless to do so.

NYC and Kinney both oppose the motion, arguing that Murphy's time to move expired when her time to appeal the earlier ruling ran out. This matter having been dismissed, it cannot now be re-opened, because the interests of finality have been held to outweigh the interests of consistent results.

Defendants cite Glicksman v. Board of Education, 278 A.D.2d 364, for the proposition that a motion to renew citing a change in law must be made before expiration of the time to appeal the earlier order. The cited precedent is on point and could not be clearer. The result is acknowledged to be, possibly, quite "harsh," but the harshness is accepted as a prerequisite for finality in the closure of disposed matters. The Glicksman decision cites the Court of Appeals ruling in Matter of Huie, 20 N.Y.2d 568, which also stands for the same proposition. The delay in the Huie case was five years, rather than the seven months involved in the instant case, but the delay described in the Glicksman decision is not dissimilar to Murphy's.

The ruling in the Glicksman case was re-affirmed more recently in Dinallo v. DAL, 60 A.D.3d 620, wherein the court also noted that a change in law was not required for the making of a renewal motion, but that a clarification of existing law would suffice. It appears from a consideration of the above precedent that the Court''s hands are tied, and that no relief can be granted to Murphy.

It should be noted that movant's reply does not effectively address the arguments as to timeliness raised by defendants. The reply cites two trial court decisions, which are inapposite because, in one, it is apparent that the issue of timeliness was never raised, and, in the other, the order sought to be corrected was not a final order disposing of the case.

Other arguments raised by movants are less persuasive. Kinney argues that the appellate division decision in Provenzano did not create a change in the law, but merely offered a different interpretation of the same or similar fact pattern. Thus, according to Kinney, even if plaintiff were not time barred, there has been no change of law cited which brings this matter within the parameters set forth in CPLR 2221 for making a renewal motion. Kinney cites Jackson v. Westminster, 52 A.D.3d 404, in support of this proposition (as does NYC), but a close reading of that decision reveals that it does not apply here.

In the first instance, it must be remembered that, as was stated in Dinallo, cited supra, a change in law is not required, and a mere clarification of previously enunciated legal holdings will be sufficient for purposes of CPLR 2221. In addition, the appellate court in Provenzano did not base its holding on an older decision, as defendants claim. Although the appellate decision cited Spangel v. NYC, 285 A.D.2d 425, a cursory review of Spangel quickly reveals that it did not in any way form the basis for the ruling which reversed this Court's dismissal of Provenzano's claims.

Finally, the Jackson decision was based on the fact that the trial court was construing a single clause in an agreement; that it had construed the clause so as to impose attorneys' fees on a losing party; that the appellate division subsequently construed the identical clause (in another action) to deny attorneys' fees; that the party sought renewal on this basis, which renewal was denied. The appellate division in Jackson affirmed the denial of renewal, noting that, in yet a third case, (Mogulescu) decided much earlier, it had also construed the same language in a manner precluding attorneys' fees; that since the Mogulescu case was decided before the original motion sought to be renewed, there was no reason that the party could not have relied on Mogulescu, rather than belatedly

seeking renewal based on a later decision. This ruling thus has no application here, in that Murphy has not been shown to have had any possibility of finding an earlier ruling which predicted the reversal in Provenzano. Spangel, supra, certainly does not do so.

Defendants also strain to show that there are differences between the Provenzano and Murphy cases which would prevent the automatic application of the result in one of them, to the other. A review of the decision of this Court in Murphy, however, should be sufficient to demonstrate how close the facts and argument were, and the overwhelming extent to which the later decision relies on the earlier one. In fact, in the one divergence between the two cases, explained at the bottom of page 4 and the top of page 5 of the Court's Murphy decision, it clearly emerges that Murphy's claim could only be somewhat stronger than Provenzano's, not weaker. This Court found that small distinction between the two case to be immaterial, but it is worth noting that there is no factor at all favoring Provenzano''s claim over Murphy's.

Nevertheless, despite all of the unavailing arguments set forth by defendants, the fact remains that plaintiff's renewal motion is untimely. It troubles this Court not to grant relief to which Murphy is arguably entitled by reason of the decision of an appellate court. However, this trial court feels itself powerless to effect such relief. If higher courts can find a way to grant it, so be it. At least at this level, the road appears to be blocked.

For the above reasons, plaintiff's motion to renew is, reluctantly, denied in all respects.

This constitutes the Decision and Order of the Court.

Dated: 12/12/11

MARK FRIEDLANDER, J.S.C.