SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

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MARILYN I. ARTHUR,

Plaintiff,

-against-

TGI FRIDAY'S INC., d/b/a TGI FRIDAY'S, ED-SAND REALTY CORP., and OUTER-COUNTY CONSTRUCTION CORP.,

Defendants.

----------x

TRIAL PART: 10

NASSAU COUNTY

INDEX NO: 008825-10

MOTION SEQ NO.: 6

SUBMIT DATE:04/27/12

The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2

Plaintiff, Marilyn I. Arthur ("Arthur"), moves, for an Order of this Court, pursuant to CPLR §2221(d), granting her leave to reargue the Decision and Order of this Court dated February 16, 2012. Alternatively, plaintiff moves, pursuant to CPLR§ 2221(e), granting her leave to renew the aforesaid Decision and Order of this Court. The motion is denied in its entirety.

This is an action in negligence by plaintiff, Marilyn I. Arthur, a 52 year old woman, to recover for personal injuries she allegedly sustained on January 16, 2008 at approximately 5:00 p.m., when she slipped and fell on a patch of ice in the parking lot behind TGI Friday's located in Manhasset, New York. By a Decision and Order dated February 16, 2012, this Court granted the defendants, TGI Friday's Inc. d/b/a TGI Friday's ("Fridays") and Outer County Construction Corp. ("Outer County") separate motions for summary judgment dismissal of the plaintiff's complaint as asserted against them. Consequently, this Court denied, as moot, Fridays' separate motion, pursuant to 22 NYCRR 202.21(e), to vacate the Note of Issue and Certificate of Readiness in this action. Finally, this Court denied the plaintiff's cross motion for judgment against defendant Ed Sand Realty Corp. ("ESRC").

Specifically, this Court held that with respect to Fridays' motion for summary judgment, since the plaintiff failed to present any admissible evidence to rebut Fridays' prima facie showing

that it neither created nor had notice, actual or constructive, of the alleged dangerous condition upon which the plaintiff fell, defendant's motion would be granted. Indeed, this Court considered the plaintiff's argument in opposition that she observed snow/ice in another area of the parking lot where her friend and daughter were traversing; however, since the plaintiff testified that she never observed the specific piece of ice upon which she fell prior to her accident, this Court held that neither a general awareness nor the fact that plaintiff observed other areas of snow and ice in the parking lot minutes before her fall was sufficient to charge the defendant with constructive notice of the ice upon which plaintiff fell.

In granting summary dismissal of the plaintiff's complaint as against Fridays', this Court consequently denied, as moot, Fridays' separate motion to vacate the Note of Issue and Certificate of Readiness in this action.

With respect to OCC's motion, this Court held that since the plaintiff failed to present any admissible evidence that the defendant, did not exercise reasonable care in the performance of its duties and thus launched a force or instrument of harm, there was no merit to plaintiff's claim that she detrimentally relied on the continued performance of the defendant's snow removal duties, or that the defendant entirely displaced the other party's duty to maintain the premises safely. Accordingly, the defendant OCC's motion for summary judgment was also granted.

Finally, with respect to the plaintiff's cross motion for "an order directing the entry of judgment in favor of the plaintiff against defendant [ESRC]" on the ground that ESRC has failed to appear in this action, this Court determined that since ESRC has not appeared in this action and, more critically, that the plaintiff's time to move for the entry of a default judgment against ESRC has expired (CPLR§ 3215[a]), pursuant to CPLR§ 3215[c], the otherwise "alive" action would be deemed as "abandoned." This Court also held that inasmuch as plaintiff sought summary judgment against the defendant ESRC on the grounds that it has failed to appear in this action, said motion would be denied precisely because issue was not joined in this case.

In an attempt to reverse this Court's determination, plaintiff moves for leave to reargue this Court's Decision and Order dated February 16, 2012.

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or

misapplied a controlling principle of law (CPLR §2221[d][2]). It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2nd Dept. 2005]). Nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2nd Dept. 2004]) or argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept. 2004]; *Frisenda v. X Large Enterprises, Inc.*, 280 AD2d 514, 515 [2nd Dept. 2001]). Instead, the movant must demonstrate the matters of fact or law that he or she believes the court has misapprehended or overlooked (*Hoffmann v. Debello-Teheny*, 27 AD3d 743 [2nd Dept. 2006]). Absent a showing of misapprehension or the overlooking of a fact, the court must deny the motion (*Barrett v. Jeannot*, 18 AD3d 679 [2nd Dept. 2005]). Further, a motion to reargue is based solely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the court (*James v. Nestor*, 120 AD2d 442 [1st Dept. 1986]; *Philips v. Village of Oriskany*, 57 AD2d 110 [4th Dept. 1997]).

Here, in requesting reargument, counsel for the plaintiff argues that this Court overlooked the fact that the plaintiff had observed a "pile of chopped ice, of the sort that does not occur naturally, therefore it can be presumed that some individual must have created this condition." Counsel for the plaintiff submits that "[f]rom this, a jury could reasonably conclude that [Fridays'] employees, who had a duty to remove snow and ice from the parking lot, had actual notice of icy conditions in the parking lot, one that would have put them on the alert to ascertain the existence of additional patches, including the patch on which Plaintiff fell, which was located only a few feet away, and immediately adjacent to a handicapped parking stall" (Aff. In Supp., ¶11). Counsel for the plaintiff also argues that this Court overlooked the weather data presented by the plaintiff "from which a jury could validly infer that the ice must have formed on the overnight period, giving defendant adequate time to notice and correct the defect, which was located directly in front of the entrance to their restaurant, at a location where it ought to have been noticed" (*Id.*, ¶12). In fact, upon this motion, counsel for the plaintiff states that since she ordinarily presented these records in uncertified form on her "reasonabl[e] belie[f] [that] such material would be admissible in that form", now, upon the submission of the records in certified form, her alternate motion seeking leave to

renew this Court's prior Decision and Order should be awarded (*Id.*, ¶¶22-23).

Plaintiff also seeks to reargue that portion of this Court's prior Decision and Order which denied her application for a default judgment against ESRC. Counsel for the plaintiff submits that since she did not previously move for "summary judgment" pursuant to CPLR§ 3212 but rather moved for a default judgment pursuant to CPLR§ 3215[a], and since the Court failed to specifically address plaintiff's showing of good cause or reasonable excuse, her application to reargue should be granted and that the Decision and Order should be reversed.[1]

This Court disagrees. These arguments entirely miss the point and are insufficient to warrant a reargument, or alternatively, a renewal of this Court's prior Order.

First, as to Fridays' motion, counsel for the plaintiff proffers the "new" theory that plaintiff observed a "pile of chopped ice, of the sort that does not occur naturally" and that "therefore it can be presumed that some individual must have created this condition." Initially, it is noted that there is absolutely no reference in the record that this separate piece of ice which plaintiff claims to have noticed at the restaurant was "chopped" or that it did not occur "naturally." At her deposition, plaintiff described the dangerous condition as a "little pile of ice or crunchiness." That plaintiff claims that his Court overlooked this testimony and evidence is completely unfounded. Indeed this Court repeatedly and consistently stated in its prior Decision and Order, as follows:

> Nonetheless, plaintiff clarified that she saw "a little pile of ice or crunchiness towards where [her friend and daughter] were walking" *** However, this was not the pile of ice upon which she slipped.
> ***
> The record herein contains no evidence that anyone, including the plaintiff herself, observed the specific piece of ice prior to the accident. While there is testimony by the plaintiff that she observed snow/ice in another area of the parking lot where her friend and daughter were traversing, neither a general awareness that a dangerous condition may be present *** nor the fact that plaintiff observed other areas of snow and ice in the parking lot minutes before her fall is legally sufficient to charge defendant with constructive notice of the ice upon which plaintiff fell *** (citations omitted).

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[1]Notably, the documentary evidence submitted herein confirms that the plaintiff does not seek reconsideration of the prior Decision and Order of this Court inasmuch as it pertains to OCC. Accordingly, this Court will not revisit that aspect of it's prior Decision and Order (see, OCC Reply Affirmation).

Clearly, the Court considered the argument relating to a separate piece of ice but nonetheless rejected it. Counsel for the plaintiff, in the original opposition, never argued that the pile of ice was not naturally made or that an individual made that pile. This Court rejects plaintiff's new theory of law on this motion for reargument. As stated above, plaintiff is not permitted to advance arguments different from those originally tendered (*Amato v. Lord & Taylor, Inc.*, supra) or argue a new theory of law or raise new questions not previously advanced (*Levi v. Utica First Ins. Co.*, supra; *Frisenda v. X Large Enterprises, Inc.*, supra). Furthermore, claims and "arguments" based on speculation and conjecture are, in any event, insufficient to present an issue of fact in opposition to a motion for summary judgment.

As to plaintiff's claim that this Court overlooked the meteorological records presented in her underlying opposition to Fridays' motion, said claim is also unfounded. First, this Court clearly stated in its previous Decision and Order that "[t]he parties' remaining contentions have been considered...and do not warrant discussion." Second, the uncertified meteorological records were in inappropriate form and did not constitute admissible evidence. Moreover, even if considered, said records do not help defeat defendant's prima facie showing that Fridays created or had notice, actual or constructive, of the alleged dangerous condition upon which the plaintiff fell. Plaintiff's entire argument herein is that as temperatures ranged from 40 degrees to 31 degrees and it is within knowledge of jurors that temperatures are normally coldest in the early hours, a jury "could" infer it was "unlikely" the ice formed that afternoon, is again based on nothing more than conjecture and speculation and is therefore wholly meritless.

Insofar as plaintiff now submits the certified weather records as a basis for her application to renew, said application is also denied.

> Pursuant to CPLR §2221(e):
> A motion for leave to renew: (1) shall be identified specifically as such; (2) shall 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; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion. *See, 515 Ave. I Corp. v. 515 Ave. I Tenants Corp.*, 44 AD3d 707 [2nd Dept. 2007]; *Veitsman v. G & M Ambulette Serv., Inc.*, 35 AD3d 848 [2nd Dept. 2006]).

It is not sufficient that new facts merely be presented to the Court. Specifically, the movant must demonstrate why facts known at the time of the original motion were not then presented to the

Court (*Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle, Inc.*, 271 AD2d 636 [2nd Dept. 2000]). Indeed, "[a] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Lardo v. Rivlab Transportation. Corp.*, 46 AD3d 759 [2nd Dept. 2007]). However, where the facts could not be known at the time of the original motion, or a reasonable justification is given for non-disclosure, the court may properly grant leave to renew (*Lafferty v. Eklecco, LLC*, 34 AD3d 754 [2nd Dept. 2006]).

First, it must be noted that even if the plaintiff had proffered the weather records in certified form in her underlying opposition, said records, as stated above, would nonetheless fall short of presenting an issue of fact.

Second, the plaintiff fails entirely to proffer any reasonable justification for why the certified records were not presented to this Court on the earlier motion. Counsel's argument hat he did not know he was required to provide evidence in admissible form is entirely unavailing.

In the absence of any demonstration by the plaintiff that this Court in fact overlooked or misapprehended the facts and/or evidence below, and noting that counsel for the plaintiff, for the large part, simply regurgitates the arguments advanced in his underlying motion, her instant motion for an Order of this Court, pursuant to CPLR§ 2221(d) for leave to reargue the Decision and Order of this Court dated February 16, 2012, or alternatively pursuant to CPLR§ 2221(e) for a renewal of this Court's prior Decision and Order is herewith denied.

Finally, as to plaintiff's motion seeking leave to reargue it's underlying cross motion for judgment against ESRC, in light of plaintiff's failure to, again, present any evidence that the Court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law therein, her instant motion must be denied (CPLR§ 2221[d][2]).

In this Court's underlying Decision and Order, this Court clearly determined that since ESRC has not appeared in this action and, more critically, that the plaintiff's time to move for the entry of a default judgment against ESRC has expired (CPLR§ 3215[a]), pursuant to CPLR§ 3215[c], the otherwise "alive" action would be deemed as "abandoned." Plaintiff did not then nor does not the plaintiff now dispute that the application for a default judgment was untimely. CPLR §3215[c] clearly states as follows:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the

default, the court shall not enter judgment but ***shall dismiss the complaint as abandoned***, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

Further, the plaintiff never proffered"sufficient cause" as to why her complaint should not be dismissed against ESRC. Plaintiff claimed on it's underlying cross motion that the reason for her delay in seeking a default judgment was that she "had doubts as to whether in the required showing of merits, the element of constructive or actual notice could be established as against ESRC" (Cross Motion, ¶39). This is wholly insufficient. Although the merits of plaintiff's underlying claim against the defendant, is an element of a cause of action for a default judgment, it cannot form a "sufficient cause" for the plaintiff's delay in seeking a default judgment. Furthermore, plaintiff also failed to demonstrate the merits of her cause of action against ESRC because she failed to set forth sufficient evidentiary facts establishing (just as with OCC and Fridays) that the defendant ESRC had notice of the dangerous condition upon which she fell (*Mattera v. Capric*, 54 AD3d 827 [2nd Dept. 2008]). To avoid dismissal of the complaint as abandoned, a plaintiff must offer a reasonable excuse for the delay in moving for leave to enter a default judgment, and must also demonstrate that the complaint is meritorious (*County of Nassau v. Chmela*, 45 AD3d 722 [2nd Dept. 2007]). This, she failed to do.

Furthermore, upon the instant motion for reargument, counsel for the plaintiff attempts to advance a new and novel theory for it's reasonable excuse in not taking proceedings within one year after ESRC's purported default. That is, counsel for the plaintiff now argues that "[w]hile plaintiff has not claimed there were ongoing settlement negotiations with [ESRC], my Affirmation in Opposition and in Support of Cross Motion, at Paragraph 42, nonetheless showed the sort of ongoing contact with [ESRC] that evidenced an intent not to abandon the action" (Aff. In Supp., ¶31). Initially, it is noted that counsel for the plaintiff, at paragraph 42 in his underlying affirmation states that the defendant ESRC has been apprised of the ongoing litigation by the mailing of copies of motions and pleadings to ESRC's last known business address and therefore the defendant ESRC is not prejudiced by the delay in seeking a default judgment. Thus, there were no ongoing settlement negotiations nor were there any attempts at same; rather, ESRC was merely kept "apprised" of the litigation. Accordingly, the now new excuse offered for the plaintiff's failure to make a timely motion for leave to enter a default judgment, to wit, there was "ongoing contact" with the defendant that

evidenced an intent not to abandon this action, is unsubstantiated and the claims are insufficient to excuse the plaintiff's failure to seek a default judgment, beyond the expiration of the one-year period (*Mattera v. Capric*, supra; *County of Nassau v. Chmela*, supra).

Therefore, in the absence of any evidence by the plaintiff that this Court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (CPLR§ 2221[d][2]) with respect to it's underlying cross motion, it's instant motion for reargument of this Court's prior Decision and Order is also denied.

This constitutes the decision and order of this Court.

ENTER

DATED: June 22, 2012

HON. ARTHUR M. DIAMOND
J. S.C.

To:

Attorney for Plaintiff
DENNIS, MARK, REISMAN, ESQ.
98 Cutter Mill Road Suite 234
Great Neck, New York 11021

ENTERED
JUN 26 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorney for Defendant
CRUSER, MITCHELL & NOVITZ, LLP.
341 Conklin Street, 2nd Floor
Farmingdale, New York 11735

BOLAN, JAHNSE, DACEY
1400 Avenue Z, Suite 505
Brooklyn, New York 11235

Defendant Pro Se
ED-SAND REALTY CORP.
185 Great Neck Road
Great Neck, New York 11021

BOLAN, JAHNSE, DACEY
1400 Avenue Z, Suite 505
Brooklyn, New York 11235

Defendant Pro Se
ED-SAND REALTY CORP.
185 Great Neck Road
Great Neck, New York 11021