Amon v City of New York
2012 NY Slip Op 33294(U)
January 26, 2012
Sup Ct, Richmond County
Docket Number: 104786/08
Judge: Joseph J. Maltese

SUPREME COURT OF THE STATE OF NEW YORK **Index No. 104786/08**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 2**

BARBARA AMON

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

THE CITY OF NEW YORK;
ANGELO MESSANA; and
CONNIE MESSANA

Defendants

The following items were considered in the review of the following motion to reargue

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Angelo Messana and Connie Messana move to reargue their motion for summary judgment previously denied. The motion is denied.

Facts

This is an action alleging negligence in the maintenance of a public walkway. The plaintiff states she suffered an injury on June 12, 2008 resulting from a trip and a fall on a cracked and uneven sidewalk. A manhole is positioned within the sidewalk and abuts a portion of the sidewalk with a special use as a driveway to the location commonly known as 3998 Victory Boulevard, Staten Island, New York 10314. The manhole is circular with printing on the cover that states "SEWER B OF R." There are cracks in the sidewalk pavement flags surrounding the manhole cover. There is uncontested testimony that the specific crack causing the plaintiff to fall is located within one to four inches from the rim of the manhole cover.

The action was commenced in Supreme Court, Richmond County, City Part 2. Records show that the action against the City of New York was stipulated as having been dismissed. Thereafter, this action was ordered transferred to the Supreme Court, Richmond County, DCM Part 3 on December 15, 2010. The defendants moved for summary judgment on to dismiss this action which was denied in a decision dated July 26, 2011, which was mailed that date to each attorney. The Decision and Order was entered on August 2, 2011. The denial was based upon two issues of fact as to whether the crack within the pavement is on the defendants' property and whether the defendants are liable for the plaintiff's injuries. A notice of motion to reargue that decision and an affirmation in support was mailed on September 19, 2011, which was 48 days after the Decision and Order was mailed and entered by the Clerk of the Court on August 2, 2011. The date when the notice of entry of the Decision and Order was served has been presented to this court.

Discussion

"A motion for leave to reargue: ... 2. 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."[1] Except for motions to reargue a decision by the Appellate Division or the Court of Appeals, a motion to reargue may be "made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."[2] Granting leave to reargue lies within the discretion of the court.[3]

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[1]CPLR § 2221 (d) (2).

[2]CPLR § 2221 (d) (3).

[3]*Matter of American Alternative Ins. Corp. v. Pelszynski*, ___ AD 3d ___, 2011 NY Slip Op *1, *1-*2 [2d Dept 2011].

The Administrative Code of the City of New York generally imposes liability for injuries resulting from negligence in maintaining sidewalk on the abutting property owners.[4] However, a possible exception is made where an "abutting landowner 'derives a special benefit from that [public property] unrelated to public use,' the person obtaining the benefit is 'required to maintain' the used property in a reasonably safe condition to avoid injury to others."[5] A driveway constitutes a special use.[6] "A special use is characterized by 'the installation of some object in the sidewalk or street or some variance in the construction thereof.'"[7] Here, the manhole itself constitutes a special use of the sidewalk, and so does the driveway. It is alleged that the special use of the driveway to the subject property has caused cracks in the flag of the sidewalk in which the manhole is contained. The special use doctrine applies to an "adjoining landowner or occupier."[8] The obligation of this doctrine runs with the land.[9]

"The owners of covers or gratings ... shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."[10] Here, the definition of a street includes the sidewalk.[11] The Appellate Division, Second Department holds that the later Administrative Code of the City of New York § 7-210 does not supplant the earlier

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[4]Administrative Code of the City of New York § 7-210 (a).

[5]*Kaufman v. Silver*, 90 NY2d 204, 207 [1997]; *quoting Poirier v. City of Schenectedy*, 85 NY 2d 310, 315 [1995].

[6]*Katz v. City of New York*, 18 AD 3d 818, 819

[7]*Zarnoch v. Williams*, 83 AD 3d 1373, 1374 [4 th Dept 2011]; *quoting Weiskopf v. City of New York*, 5 AD 3d 202, 203 [1st Dept 2004]; *itself quoting Granville v. City of New York*, 211 AD 2d 195, 197 [1st Dept 1995].

[8]*Kaufman v. Silver*, 90 NY2d at 207.

[9]*Kaufman v. Silver*, 90 NY2d at 208.

[10]34 RNCY 2-07 (b) (2).

[11]34 RCNY 2-01.

Rules of the City of New York § 2-07 (b).[12] The City of New York is the owner of the manhole cover. Generally, the City of New York is liable for defects in the sidewalk within twelve inches of a manhole cover and consequently, the homeowner would not be liable. However, by using the driveway for their private use, the homeowner created a special use of that portion of the sidewalk and the area around the manhole cover. The photos attached to the motion clearly demonstrate that the manhole cover is located in the driveway portion of the sidewalk. The photos also demonstrate that vehicular tire marks are on the driveway leading to the defendants' home which also cross over the area around the manhole cover. Since the defendant homeowners have a special use of their driveway which includes the manhole cover and the area within twelve inches of it, they are liable for the maintenance of that driveway.

Accordingly it is hereby:

ORDERED, that the motion to reargue the motion for summary judgment dismissing the defendants, Angelo Messana and Connie Messana, is denied in its entirety; and it is further

ORDERED, that counsel for the parties shall appear in DCM 3 for a conference on **February 16, 2012 at 9:30 a.m.**

ENTER,

DATED: January 26, 2012

Joseph J. Maltese
Justice of the Supreme Court

[12] *Flynn v. City of New York*, 84 AD 3d 1018, 1019 [2d Dept 2011].