Harmitt v Riverstone Assoc.
2014 NY Slip Op 33480(U)
December 11, 2014
Supreme Court, Kings County
Docket Number: 21464/10
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 11th day of December, 2014.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

MARGARET HARMITT,

PLAINTIFF,

-VS-

RIVERSTONE ASSOCIATES a/k/a RIVERSTONE ASSOCIATES, LLC,

DEFENDANT.

Motion Sequence #3

INDEX No. 21464/10

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4

Upon the foregoing papers, plaintiff Margaret Harmitt ("plaintiff") moves for an order, pursuant to CPLR 2221(d), granting leave to reargue this Court's September 25, 2013 decision and order (the "prior order") granting defendant Riverstone Associates a/k/a Riverstone Associates, LLC's ("defendant") motion for summary judgment dismissing the complaint as asserted against it and, upon reargument, denying defendant's motion.

Notably, motions for reargument and renewal shall be identified specifically as such (*see* CPLR 2221 [d] [1], [e] [1]). Although plaintiff's counsel's affirmation submitted in support of the instant motion is termed as an "Affirmation in Support of Motion for Leave to Reargue/Renew a Prior Motion Pursuant to CPLR § 2221(d)", the Court deems the instant motion as one for reargument, as is noted on the Notice of Motion cover-page. Moreover, the arguments asserted therein pertain to reargument.

As an initial matter, the Court deems the instant motion timely as it was made (*see* CPLR 2211; *Rivera v Glen Oaks Village Owners, Inc.*, 29 AD3D 560, 561 [2d Dept 2006]), on November 25, 2013, within 30 days of service of the prior order with notice of entry on November 7, 2013 (*see* CPLR 2221 [d] [3]). However, plaintiff fails to annex the underlying papers submitted in support of and in opposition to the underlying motion (*see Cohen v Romanoff*, 27 Misc3d 1208[A], *6 [Sup Ct, Kings County 2010]; *see also Sheedy v Pataki*, 236 AD2d 92, 97 [3d Dept 1997]). Despite this procedural deficiency, the Court will entertain the instant motion and will address it on the merits.

It is well settled that a motion for reargument is addressed to the sound discretion of the trial Court (*see Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 180 [2d Dept 2012]) and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in determining the prior motion (CPLR 2221[d][2]; *McGill v Goldman*, 261 AD2d 593, 594 [1999] citing *Pahl Equip. Corp. v. Kassis,* 182 A.D.2d 22 [1992]). Nevertheless, a motion for reargument should not be used as a vehicle to permit an unsuccessful party to argue once again the very questions previously decided (*Foley v Roche*, 68 AD2d 558, 567 [1979]).

Based upon a review of the parties' contentions and the applicable law, the Court hereby grants plaintiff's motion to the extent of granting leave to reargue the prior order and, upon reargument, the Court adheres to its prior determination granting defendant's motion for summary judgment dismissing the complaint herein.

The Court notes that in its prior order, it inadvertently described three feet of snow as twenty-four inches rather than thirty-six inches. More specifically, in its prior order, the Court stated that, in opposition to the underlying motion, "[p]laintiff points to her deposition testimony that the [snow] embankment [,on the subject sidewalk where she fell,] was around 3 feet height (or twenty-four

inches [24"]) but only twenty inches (20") of snow fell according to the climatology report." This discrepancy does not preclude the granting of an award of judgment as a matter of law in defendant's favor under the storm in progress doctrine (*see Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 839-840 [2d Dep 2012]).

It is undisputed that, approximately just before 7:30 a.m. on February 27, 2010, plaintiff fell on the sidewalk abutting the premises located at 300 Riverdale Avenue in Brooklyn, New York. Defendant satisfied its initial burden of proof by its submission of a certified climatology report and pointing to the deposition testimony of Felipe Suarez, the superintendent of the subject premises, demonstrating that the storm in progress rule is applicable to the case at bar. Defendant also that it had no notice of the allegedly dangerous condition which caused plaintiff's accident. In opposition, plaintiff failed to submit sufficient evidence in admissible form to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Whether the snowfall ended the night before the subject accident, as was argued by plaintiff's counsel (Riso aff, ¶ 9, of the underlying motion), or at 3:00 a.m. in the morning on the date of plaintiff's accident, as was argued by defendant (Aronof aff, exhibit F of the underlying motion), the Court adheres to its prior determination holding that "[d]efendant did not have a sufficient period of time to ameliorate the alleged hazard under the 'storm in progress' rule." Notably, pursuant to Administrative Code §16-123(a), owners of abutting properties have four hours from the time the precipitation ceases, excluding the hours between 9:00 p.m. and 7:00 a.m. to clear ice and snow from the sidewalk" (*Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659 [2d Dept 2014], internal citation and quotation marks omitted). In this regard, plaintiff's contention that "the difference between the piled snow and the snow fall was not a mere 4 [four] inches which could have occurred naturally but 16 inches which could not have been caused naturally along the entire sidewalk ..." (Plaintiff's Affirmation in Support, ¶ 9) is entirely speculative

in nature (*see Dowden v Long Island Rail Rd.*, 305 AD2d 631 [2d Dept 2003]).

Accordingly, plaintiff's motion is granted to the extent that leave to reargue the Court's prior order is granted and, upon reargument, the Court adheres to its prior determination granting defendant's motion for summary judgment dismissing the complaint herein.

The foregoing constitutes the decision and order of the Court.

ENTER,

DEC 11 2014

HON. LARRY D. MARTIN
J.S.C.

For Clerks use only
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