Oquendo v Hughes Ave. Corp.
2015 NY Slip Op 31755(U)
August 14, 2015
Supreme Court, Bronx County
Docket Number: 21414/11
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MARIA OQUENDO,

Plaintiff(s),

- against -

HUGHES AVENUE CORP., LISSETTE ABREU, JOHNNY MOLINA AND CITY OF NEW YORK,

Defendant(s).

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DECISION AND ORDER

Index No: 21414/11

In this action for the negligent maintenance of the public sidewalk, defendant HUGHES AVENUE CORP. (Hughes) moves seeking an order granting renewal of this Court's decision dated January 30, 2015, which, *inter alia*, denied Hughes motion for summary judgment. Hughes avers that in denying its motion this Court misapprehended dispositive facts. Defendants LISSETTE ABREU (Abreu) and JOHNNY MOLINA (Molina), oppose the instant motion asserting that the Court's prior decision was, in all respects, proper.

For the reasons that follow hereinafter, Hughes' motion is denied.

The instant action is for personal injuries allegedly sustained by plaintiff on August 4, 2011 while traversing the public sidewalk. Plaintiff's amended complaint allege that on August 4, 2011, while traversing the sidewalk located in front of premises located at 2068 and 2082 Hughes Avenue, Bronx, NY, she

tripped and fell on a defect located thereat. It is alleged that Hughes owned 2082 Hughes Avenue (2082), that Abreu and Molina owned 2068 Hughes Avenue (2068), and that the City owned the sidewalk located thereat. It is further alleged that defendants had a duty to maintain the sidewalk, were negligent in failing to keep the aforementioned sidewalk in good repair, and that said negligence caused plaintiff's accident and the injuries resulting therefrom.

On January 30, 2015, this Court denied Hughes' motion for summary judgment finding that plaintiff's testimony, submitted by Hughes in support of its motion, raised questions of fact with respect to whether the sidewalk located in front Hughes' property caused plaintiff's accident. Notably, the Court stated that

> while Hughes' evidence establishes that the cracked portion of sidewalk upon which plaintiff alleges to have fallen abuts 2068, approximately .3 feet south of the portion of sidewalk abutting 2082's property, the same evidence establishes that plaintiff tripped when she came into contact with the raised portion of the sidewalk which falls within the boundaries of Hughes property. In fact, [] when plaintiff was asked to identify the exact situs of her accident within photographs, she identified the cracked portion of the sidewalk which, as per Gashi and Abreu was the result of the repair made by Molina, her testimony attributes her fall to the raised sidewalk flag, which is, even by O'Buckley's account, squarely within the boundaries of Hughes' property. In addition, while Gashi testified that the raised sidewalk was caused by the

> settling of the sidewalk abutting Abreu and Molina's property, Abreu testified that the sidewalk within the boundaries of Hughes' property had always been raised. Thus, since it is well settled that with the enactment of § 7-210, an owner of property abutting a public sidewalk is liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*Ortiz* at 25; *Martinez* at 515), here, one version of the very evidence submitted by Hughes' establishes that plaintiff fell as a result of an alleged defective condition - a raised sidewalk flag - located on the sidewalk within the boundaries of Hughes' premises. Accordingly, since liability under the statute, as in any case premised on the negligent maintenance of real property, requires a showing defendant occupied, owned, controlled or derived a special use (*Balsam* at 296-297; *Hilliard* at 693), Hughes' fails to establish - as it must - beyond a factual dispute - that the accident occurred outside the area it owned, controlled and maintained. Thus, failing to establish prima facie entitlement to summary judgment, Hughes' motion is denied.

Thus, it is clear that the basis for the Court's decision was plaintiff's testimony, which ascribed causative fault of her accident to, not only the cracked portion of sidewalk within the boundaries of Abreu and Molina's property, but also to the raised portion of sidewalk which was within the boundaries of Hughes' property. Because § 7-210 requires Hughes' to maintain the sidewalk abutting its property in a reasonably safe condition, should a jury conclude that plaintiff's accident was caused by the Hughes' failure to maintain the property at issue, then it could

find liability against Hughes. Thus, the Court denied Hughes' motion.

CPLR § 2221(d)(1), prescribes the reargument of a prior decision on the merits and states that such motion

> 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.

Accordingly,

> [a] motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also*, *Fosdick v Town of Hemstead*, 126 NY 651, 652 [1891]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 939 [2d Dept 2014]). Thus, because reargument is not a vehicle by which a party can get a second bite at the same apple, a motion for reargument preludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

A motion to reargue, must be made within 30 days after service of a copy of the underlying order with notice of entry (CPLR §

2221[d][3]; *Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004]; *Pearson v Goord*, 290 AD2d 910, 910 [3rd Dept 2002]).

Here, contrary to Hughes' assertion, this Court's prior decision was based on a careful reading of Hughes' evidentiary submissions, including the affidavit of its expert, a surveyor. While Hughes', as it did on its prior motion, once again argues that its expert affidavit is dispositive on Hughes' liability, such assertion is meritless. To be sure, the affidavit from Donal O'Buckley (O'Buckley), a licensed land surveyor, merely established that based on a review of records - including the photographs testified to by plaintiff at her deposition, plaintiff's fall occurred on the sidewalk abutting 2068, said property owned by Abreu and Molina. More specifically, that plaintiff tripped on the sidewalk located .3 feet - about 4 inches - feet south of the common property line separating 2068 and 2082.

Had this been the only evidence with respect to the situs of the instant accident, then, of course, judgment in favor of Hughes would have been warranted. However, with respect to the exact location of plaintiff's accident, Hughes' own witness - Esat Gashi, a managing agent - testified that on the date of plaintiff's accident, there existed a portion of raised sidewalk within the property line of Hughes' property, which flag, while level on the sidewalk abutting 2082's (Hughes') property, was nevertheless

immediately adjacent to 2068's property line. Furthermore, plaintiff testified - again, as per evidence proffered by Hughes' that her foot hit the foregoing flag, causing her fall. Accordingly, on this record, whether this accident occurred at the location alleged by O'Buckley or at the location alleged by plaintiff, which as per Gashi was at or immediately adjacent to Hughe's property remains a dispositive question of fact. The former would negate liability against Hughes, while the latter could impute liability against it.

On this record, cases like *Montalbano v 136 W. 80 St. CP* (84 AD3d 600 [1st Dept 2011]), relied upon by Hughes', simply do not avail it. Indeed, in *Montalbano*, the issue was not whether the situs of the accident was on property abutting the prevailing defendant's property, but whether said defendant had an obligation to maintain such sidewalk on grounds that it took actions assuming such responsibility (*id.* at 601-602 ["The motion court granted Callanan summary judgment based on the undisputed survey, which establishes that the defective area of the sidewalk which caused plaintiff's fall does not abut his property."]). Accordingly, in *Montalbano*, where defendant Callanan's surveyor established, beyond factual dispute, that the location of plaintiff's accident did not abut its property, the court, finding no other basis to impose a maintenance responsibility upon Callanan, granted summary judgment in its favor (*id.* at 602 [Neither plaintiff nor Owners Corp.

presented any evidence suggesting that any special use caused the sidewalk defect . . . Likewise, there is nothing to establish that Callanan assumed a duty to maintain and repair the sidewalk . . . Plaintiff did not fall on a portion of the sidewalk abutting Callanan's property."]).

Here, by contrast, and as noted above, the location of the instant accident is in dispute, one version of the facts putting the situs and cause of the accident squarely within the portion of sidewalk abutting Hughes' property.

Insofar as the Court did not misapprehend relevant facts nor misapplied controlling law, Hughes' motion for reargument is denied. It is hereby

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : August 14, 2015
Bronx, New York

Mitchell J. Danziger, ASCJ