Arasim v Residential Mgt. Group, LLC
2016 NY Slip Op 31445(U)
July 25, 2016
Supreme Court, New York County
Docket Number: 450863/15
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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KEVIN ARASIM and SANDRA ARASIM, Index No.: 450863/15

Plaintiffs,

-against-

RESIDENTIAL MANAGEMENT GROUP, LLC D/B/A DOUGLAS ELLIMAN PROPERTY MANAGEMENT and THE LAUREL CONDOMINIUM,

Defendants.

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RESIDENTIAL MANAGEMENT GROUP, LLC D/B/A DOUGLAS ELLIMAN PROPERTY MANAGEMENT and THE LAUREL CONDOMINIUM,

Third-party plaintiffs,

-against-

ST JOHN NEPOMUCENE CHURCH a/k/a THE CHURCH OF ST JOHN OF NEPOMUK, 1240 FIRST AVENUE, LLC AND MEMORIAL SLOAN KETTERING CANCER CENTER a/k/a MEMORIAL HOSPITAL FOR CANCER AND ALLIED ILLNESSES,

Third-party defendants.

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JOAN MADDEN, J.:

Defendants/third-party plaintiffs Residential Management Group LLC d/b/a Douglas Elliman Property Management and the Laurel Condominium (together "the Residential defendants") move for reargument of this court's decision and order dated October 14, 2015 ("the original decision"), to the extent that it dismissed the third-party complaint. Third-party defendants St John Nepomucene Church a/k/a Church of St John of Nepomuk (St John) and Memorial Hospital for Cancer and Allied Diseases s/h/a Memorial Sloan-Kettering Cancer Center a/k/a Memorial Hospital for Cancer and Allied Diseases (Memorial), and plaintiffs separately oppose the motion.

This action arises out of an incident that occurred on January 28, 2011, when plaintiff Kevin Arasim (Arasim), was struck by snow and ice, while he was standing on the sidewalk in front of the parking garage located at 400/404 East 67th Street, New York, New York ("the Building"), which is owned and managed by Residential defendants.[1] At the time of the accident, Arasim was on a break from his job overseeing a small construction project at Memorial.

Plaintiffs allege that the snow and ice fell from the eighth floor ledge of the Building, and that the Residential defendants were negligent in permitting snow and ice to accumulate on the Building. As result of the falling snow and ice, it is alleged that Arasim sustained personal injuries, including a concussive brain injury and damage to his cervical spine. St John owns a three story building at 406 East 67th Street, New York, New York, which is adjacent to the Building, and is used as a private school (hereinafter "the school"). Memorial owns and operates a hospital located across the street from the Building (hereinafter "the hospital"). The third-party complaint asserts causes of action for common law contribution and indemnification, and alleges that Arasim's injuries were caused in whole, or in part, by the negligence of the third-party defendants.[2]

St John moved for summary judgment dismissing the third-party claims against it, based

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[1]By decision and order dated March 9, 2015, this court transferred this action from the Supreme Court, Westchester Co., and consolidated it for joint trial and discovery with an action pending before it entitled Arasim v. 38 Company LLC, et al, Index No. 108427/10 (hereinafter Action One). As Action One involves a separate accident on a separate date, and the basis for consolidation is Arasim's overlapping injuries, Action One is not implicated on these motions.

[2]The Residential defendants discontinued the third-party action against third-party defendant 1240 First Avenue LLC, pursuant to stipulation filed on August 7, 2015.

on evidence that the accident occurred in front of the Building, and that the snow and ice which injured Arasim fell from the Building, and not the school. Memorial also moved for summary judgment arguing that it could not be held liable as undisputed evidence showed that the accident occurred across the street from Memorial and in front of the Building. The Residential defendants opposed the summary judgment motion and moved to dismiss the complaint.

In the original decision, the court granted summary judgment in favor of St John and Memorial, finding that the Residential defendants failed to submit evidence controverting the third-party defendants' showing that Arasim was not injured by snow and ice falling from their respective buildings. The court also denied the Residential defendants' motion for summary judgment.

The Residential defendants now move for reargument of that part of the original decision that dismissed the third party complaint, arguing that the court overlooked and misapprehended the triable issues of fact raised by the affidavit and deposition testimony of non-party, Christopher McKeon ("McKeon"), an employee of the hospital who was working across the street from the Building on the date of the accident. They also argue that the court misapplied the summary judgment standard which requires that "[w]hen there is any doubt as to the existence of a triable issue of fact, summary judgment should be denied," citing Avon Elec. Supplies, Inc. v. Baywood Electric Corp., 200 AD2d 697, 698 (2d Dept 2010). (Yagerman, Affirmation In Support of Motion to Reargue, ¶ 40).

St John opposes the motion, arguing that as the court properly found there is no evidence that would suggest that snow and ice fell from St John's building, and that the Residential defendants' argument that it is "entirely possible" that plaintiff was standing in front of the

school is mere speculation. Memorial also opposes the motion, asserting that there is no admissible evidence linking the snow and ice causing Arasim's injuries to the hospital. As for plaintiffs, they assert that the court correctly decided that there is no evidence that Arasim was injured by snow and/or ice that fell from either of the third-party defendants' buildings.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992) .

The Residential defendants' motion to reargue must be denied as the court did not overlook any facts or misapply the law. Specifically, contrary Residential defendants' position, the court correctly applied the shifting burden standard to decide the motion. See e.g. Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006), citing Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Moreover, under this standard, summary judgment in favor of the third-party defendants was warranted as they submitted proof that the accident did not happen in front of their buildings. In addition, the school submitted evidence that there was no snow and/or ice falling from its building. Once this prima facie showing was made, Residential defendants were required to come forth with evidence controverting this showing. See DeRosa v City of New York, 30 AD3d 323, 326 (1st Dept 2006)(holding that summary judgment was properly granted where moving parties met their burden that they were entitled to summary judgment as a matter of law, and the opposing parties "did not meet their burden of

establishing triable issue of fact from which the [moving parties'] negligence could be reasonable inferred").

Moreover, the Residential defendants' argument that the court failed to properly consider the testimony and statements from McKeon is unavailing. As noted in the original decision, while McKeon states in his affidavit that he did not see ice that hit plaintiff fall from the Building and that he saw Arasim in front of the school prior to the accident, such statements do not raise an issue of fact as to the third-party defendants liability. First, there is no dispute that McKeon did not see the accident, and therefore did not observe where Arasim was standing when he was hit with the ice. In addition, the court pointed out that at his deposition, McKeon testified that after the accident he saw Arasim lying "mostly in front of the [Building's] garage." In addition, while McKeon's testified that "[a]ll day long there was falling ice from that building and a lot of near misses with pedestrians." (Id, at 15). McKeon also testified that he had never seen snow and ice fall from the school (McKeon dep., at 20).

To the extent the Residential defendants rely on the deposition testimony of non-party Shawn Trent ("Trent"), to argue that there is an issue of fact as to where plaintiff was standing, the court notes that it specifically rejected this argument in the original decision. In this connection, the court found that Trent's testimony that he parked his car to the left of the garage (i.e. the side of the Building near the school) did not create factual questions as to whether Arasim was injured in front of the school when he was hit by snow and ice, since Trent described the accident location as "in front of the Building" (Trent Dep, at 19).

In addition, in the original decision, the court cited Trent's testimony that before the accident, he observed Arasim talking on the telephone in front of the Building, and that while he

did not see specifically where the snow/ice originated from, he observed that "it came straight down" from above him. (Id, at 54). The court also cited Trent's testimony that the incident happened "in front of the building with the parking garage" and that when Trent looked up, he "could see from off the building where some ice and wetness was hanging" (Id , at 39), and that, in contrast, he did not see any snow or wetness coming from the "smaller building," (referring the school owned by St John). Id, at 54, 57-59).

As for the Residential defendants' assertions that, in granting summary judgment to Memorial, the court did not consider McKeon's statements in his affidavit that snow and ice was falling from the hospital and that as a result, Memorial had to rope off the sidewalk in front of the hospital, such statements are insufficient to give rise to an issue of fact as to the hospital's liability, as the hospital was located across the street from the sidewalk where plaintiff was injured.

Conclusion

In view of the above, it is

ORDERED that motion by defendants Residential Management Group LLC d/b/a Douglas Elliman Property Management and the Laurel Condominium for reargument is denied.

DATED: July 25, 2016

HON. JOAN A. MADDEN
J.S.C.