SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 52

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KENTON ROJAS,

Plaintiff,

-against-

Index No. 150691/2013
Motion Seq. No. 009

THE CITY OF NEW YORK, RESTANI CONSTRUCTION CORPORATION, VALES CONSTRUCTION CORP., EMPIRE CITY SUBWAY COMPANY LTD., AND CONSOLIDATED EDISON CO. OF NEW YORK, INC.

DECISION & ORDER

Defendants,

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ALEXANDER M. TISCH, J.:

Plaintiff moves, pursuant to CPLR 2221, for an order granting it leave to reargue a portion of this court's April 3, 2018 decision, which granted motions by defendant The City of New York ("City") (motion sequence number 006) and co-defendant Empire City Subway Company Ltd. ("Empire") (motion sequence number 008) for summary dismissal of the complaint (NYSCEF Doc. No. 197 or the prior decision). Upon reargument, plaintiff seeks to have motion sequence number 008 denied and the action restored. Empire opposes the motion.

For the reasons stated below, plaintiff's motion (motion sequence number 009) is denied.

I. Legal Standard

A motion for leave to reargue will be granted upon a showing that the court overlooked or misapprehended relevant facts or misapplied the law (CPLR 2221 [d][2]). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted" (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept

2016], quoting *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]).

II. Contentions

In its motion papers, plaintiff argues that Section 2-07 (b) of Title 34 of the Rules and Regulations of the City of New York (34 RCNY § 2-07[b]), which sets forth, in relevant part, the Department of Transportation (DOT)'s Highway Rules as to maintenance requirements of underground street access covers, makes Empire liable for the pothole that caused Rojas's accident.

Plaintiff emphasizes that 34 RCNY § 2-07 (b) requires owners of manhole covers on a street to monitor not only their condition, but also the area extending 12 inches outward from the perimeter of the hardware. According to plaintiff, the foregoing area, which includes the street, also incorporates the sidewalk, pursuant to 34 RCNY § 2-07. In addition to monitoring, the owners of manhole covers must maintain and repair any defects in that area.

Plaintiff argues that Empire can be held liable, pursuant to 34 RCNY § 2-07 (b), in light of its monitoring and repair duties, since it has admitted that it owned the manhole cover involved in Rojas's accident and did not deny that Rojas fell because of a defect within 12 inches of the cover.

Plaintiff argues that the Court erred in concluding that the defect was located on a sidewalk curb and that curbs are not covered by 34 RCNY § 2-07 (b). In making this argument, plaintiff relies on the following language in the prior decision:

> "The court does not find that the cause of the accident extended to a defect in the sidewalk as raised *by the City* in its opposition papers. The record is contrary to this argument"

(Prior Decision at 27 [emphasis added]).

Plaintiff argues that the Court ostensibly based its prior decision on the City's arguments made in its opposition papers. However, plaintiff argues that the City did not make any substantive arguments. Rather, it made only a single, purely procedural argument.

Based on the foregoing, plaintiff argues that the Court's prior decision fails to state a valid basis for its implied ruling that 34 RCNY § 2-07 does not apply to the sidewalk defect that caused Rojas's accident, or explain why Empire was entitled to summary judgment.

Plaintiff assumes that the Court intended to cite and reject the arguments raised in plaintiff's opposition papers. Plaintiff refers the Court to the language in its prior decision, namely:

> "Empire also points out that the alleged defect existed on the curb and that the language of 34 RCNY § 2-01, which defines the terms roadway, street and sidewalk, does not include a curb as part of the roadway, street, or sidewalk."
>
> ***
>
> "Finally, Empire draws an analogy between this case and jurisprudence involving the responsibility of abutting property owners under the sidewalk law"

(Prior Decision at 23).

Plaintiff argues that the Court erred for at least three reasons: (1) unlike New York City Administrative Code § 7-201 (c) (2) (Administrative Code § 7-201 [c][2] or 7 NYCRR § 7-201 [c][2]), 34 RCNY § 2-07 covers defects on curbs; (2) even if 34 RCNY § 2-07 did not cover curbs, there was no curb where Rojas fell, but only a sidewalk; and (3) even if 34 RCNY § 2-07 did not cover curbs and the defects were on a curb, the defect in this case was not exclusively on the curb, but was in fact on both the curb and the sidewalk.

Finally, plaintiff argues that even if Empire did not have a duty to monitor and repair the walking surface within 12 inches of its manhole cover, it voluntarily assumed that duty.

In opposition, Empire argues that the Court did not overlook or misapprehend the facts or the law in arriving at its decision. Empire contends that plaintiff fails to meet its burden to set forth any grounds upon which this court should grant reargument. Rather, Empire argues that the instant motion contains the same arguments initially offered in opposition to the original motion for summary judgment. Therefore, based on the foregoing, the motion should be denied as a matter of law.

Even if, arguendo, the Court overlooked plaintiff's lack of basis for this motion, it should still be denied as the essential facts and law relied upon by the court in reaching its April 3, 2018 decision, remain unchanged. Plaintiff argues again that Empire is responsible for the curb where the alleged defect was located, or in the alternative, that the alleged defect was also located on the adjacent sidewalk. Both allegations were duly considered by the court and found to be unsupported by the evidence presented and the applicable law.

In connection with 34 RCNY § 2-07, Empire contends that if the City Council desired to impute liability for accidents arising from defective curb conditions, it needed to use specific and clear language to accomplish that goal.

According to Empire, plaintiff relies on the same arguments and case law already proffered in opposition to Empire's original motion for summary judgment. The case law plaintiff relies upon to make its arguments is inapplicable in the case at bar because it stands for the proposition that Administrative Code § 7-210 did not supplant 34 RCNY § 2-07 only with respect to liability for a defect located on the sidewalk within 12 inches of a utility cover.

In this matter, the issue is whether 34 RCNY § 2-07 imposes liability upon an owner of a utility cover for a defect located on a curb. Empire argues that the City's well-established liability for curbs that it owns, installs, and maintains is created not by a statute, but rather by the

common law liability for property owners. Empire points out that the court considered these same arguments and that plaintiff offers no new basis to disturb the court's finding that 34 RCNY § 2-07 cannot be interpreted to contradict this judicial precedent.

The plaintiff's contention that, in the alternative, Empire should be held liable because the alleged defect extended to the sidewalk adjacent to the curb is also without merit and previously considered by the Court in reaching its prior decision as plaintiff testified that he tripped on an alleged defect located on the curb (Plaintiff's Examination Before Trial [EBT] at 132; Prior Decision at 27). The Court based its prior decision on the evidence in the record, including plaintiff's unequivocal testimony, that the defect was on the curb. The Court's typographical error in referring to the City's opposition instead of plaintiff's opposition papers lacks merit in support of its motion for leave to reargue.

In reply, plaintiff argues that its motion to reargue is based on four arguments, but that Empire only addresses one in its opposition.

First, in connection with 34 RCNY § 2-07, plaintiff argues that defendant does not address plaintiff's argument that there is no logical reason to conclude that in enacting this rule mandating the repair of defects surrounding manhole covers, the New York City Council (the City Council) intended to regulate the condition of sidewalks and roadways, but not the condition of the sliver of concrete separating a sidewalk from a roadway. Neither is there a logical reason to assume that the City Council was concerned with defects on sidewalks and streets, but not defects on curbs.

Plaintiff avers that Empire concedes that the definition of "street" under 34 RCNY § 2-01 includes "sidewalk," which is defined as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians."

According to plaintiff, the foregoing definition divides a block into three segments: the roadway, the property abutting the sidewalk (including buildings and lots), and everything in between those two segments, which includes the sidewalk curb. Plaintiff contends that since the curb is not part of the roadway or the adjoining property, it has to be part of the sidewalk as that word is defined in 34 RCNY § 2-01.

Furthermore, plaintiff argues that the curb is part of the sidewalk and thus part of the street under 34 RCNY § 2-07 as confirmed by analyzing the different definitions of sidewalk that apply to Administrative Code § 7-210 (7 NYCRR § 7-210) and 34 RCNY § 2-01. Plaintiff points out that the Court relied on Administrative Code § 7-210 in concluding that a sidewalk does not include a curb under both Administrative Code § 7-210 and 34 RCNY § 2-07, but the definition of sidewalk under Administrative Code § 7-210 differs from the definition under 34 RCNY § 2-07. Plaintiff argues that Courts look to Administrative Code § 19-101 in determining what is a sidewalk under Administrative Code § 7-210.

To make its point, plaintiff compares and contrasts the different definitions of sidewalk discussed by the Court. Plaintiff argues that the definition of sidewalk in Administrative Code § 19-101 applies to 7 NYCRR § 7-210 and asserts that courts rely on 34 RCNY § 2-01's definition when determining what is a sidewalk in connection with 34 RCNY § 2-07. While the former definition explicitly excludes curbs from the definition of sidewalks while the former contains no such exception:

> "'Sidewalk' shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians"

(Administrative Code § 19-101 [d]).

> "Sidewalk. The term 'sidewalk' means that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians"

(34 RCNY § 2-01).

Based on the foregoing, plaintiff argues that the Court erred in its analysis of 34 RCNY § 2-07 and Administrative Code § 7-210, [which refers to Administrative Code § 7-201 as to the definition of the term street]:

> "(a) The term 'street' shall include the curbstone, an avenue, underpass, road, alley, lane, boulevard, concourse, parkway, road or path within a park, park approach, driveway, thoroughfare, public way, public square, public place, and public parking area"

(7 NYCRR 7-201 [c] [1] [a]).

A comparison of Administrative Code § 19-101 with 34 RCNY § 2-01 confirms that the City Council never intended to exclude sidewalk curbs from the coverage of 34 RCNY § 2-07.

Plaintiff argues that because 34 RCNY § 2-07 was enacted before 7 NYCRR § 7-210, it should not be assumed that the word "street" in 34 RCNY § 2-07 was intended to incorporate precisely the same areas as the word "sidewalk" in 7 NYCRR § 7-210. Moreover, 7 NYCRR § 7-210 applies only to sidewalks while 34 RCNY § 2-07 applies both to streets and sidewalks, pursuant to 34 RCNY § 2-01.

Second, plaintiff contends that Empire has chosen not to address in its opposition papers plaintiff's argument that the subject defect was on the sidewalk, in an area where there was no curb. As such, Empire concedes the merit of plaintiff's argument that even if 34 RCNY § 2-07 excluded defects on curbs, the rule would still apply in this case.

Third, plaintiff alleges that Empire also failed to address in opposition plaintiff's argument that the subject defect was on both the sidewalk and the curb, and thus, even if 34 RCNY § 2-07 excluded defects on curbs, the rule would still apply in this case.

Finally, plaintiff points out that Empire failed to also address in its opposition papers the argument that even if defendant did not have a duty to monitor or repair the walking surface within 12 inches of its manhole cove, it voluntarily assumed those duties.

III. Discussion

The Court acknowledges that it was plaintiff, not the City, that argued that the defect extended beyond the curb to the sidewalk. While the Court inaccurately attributed this argument to the City and did not refer to plaintiff by name on page 27 of the analysis section of its prior decision, plaintiff's arguments were duly taken into consideration as they are set forth in the contentions section of the prior decision:

> "Lastly, even if the court were to accept the curb exception argument, a portion of the defect where plaintiff fell is on the sidewalk, past the curb line, in the area Empire admits is their responsibility to repair and maintain"

(Prior Decision at 24).

> "Third, Empire asserts that plaintiff's argument that the defect extended to the sidewalk is without merit and unsupported by the record. Plaintiff testified that the accident occurred at the curb when he was about to step off from it into the street (Empire's motion, exhibit E at 27-29, 132, 133 and exhibit O). In addition, Empire refers the court to Aozate's description of the defect as a hole in the curb (*id.*, exhibit K at 30-31 and exhibit L at 1) and Quinn's expert opinion also places the defect on the curb (*id.*, exhibit M)"

(Prior Decision at 25).

Plaintiff does not adduce any facts supporting a different conclusion and this inadvertent erroneous reference does not in any way alter the facts. The outcome of the case remains unchanged. The accident did not occur on the sidewalk as depicted in the photographs

(NYSCEF Doc. No. 169) submitted for review and as set forth in plaintiff's EBT testimony transcript:

> "Q. Your accident occurred where the roadway meets the sidewalk; is that correct?
> A. Yes.
> Q. The curb?
> A. Yes.
> Q. And had you not fallen, you would have stepped onto the roadway; is that correct?
> A. Yes.
> Q. So you were about off of the curb when you fell?
> A. Yes.

(Plaintiff's EBT at 132).

> "A. Yes. There's a pothole right there.
> MR. MIRAGLIA: Which photograph are you looking at?
> THE WITNESS: Exhibit B.
> MR. YAGERMAN: When you say 'pothole,' is that like a portion of the curb?
> THE WITNESS: Yes.
> Q. So you see in that photograph, a portion of the curb is missing?
> A. Yes."

(*Id.* at 133).

Empire also submitted an expert affidavit prepared by James P. Quinn, a licensed submitted an affidavit stating that:

> "The defect marked by the plaintiff in **EXHIBIT A** [NYSCEF Doc. No. 169, Defendant's Exhibit B] is located in the curb, which is the 6 inch edge area that exists between the roadway and the walking area of the sidewalk"

(NYSCEF Doc. No. 167, ¶ 5).

Contrary to plaintiff's suggestion, plaintiff's attorney pointed to nothing in the record in support of reargument that was overlooked by the Court and thus fails to raise an issue of fact. The Court considered plaintiff's arguments. As such, plaintiff failed to establish that the court "overlooked or misapprehended the relevant facts" (*Kent v 534 E. 11th St.*, 80 AD3d 106, 116 [1st Dept 2010]; *see also Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]).

Neither did the Court misapply any controlling principle of law with respect to the interpretation of 34 RCNY § 2-07 (b) (1) and (2) (*id.*).

In the original motion, plaintiff argued in opposition to Empire's motion that owners are responsible for the repair and maintenance of the area 12 inches outward from the perimeter of covers or gratings and that curbs are not exempt by statute or according to case law from these areas that the aforementioned owners are responsible for repairing and maintaining (NYSCEF Doc. No. 179).

In support of reargument, plaintiff's attorney simply invites the Court to revisit the same or related jurisprudence by suggesting that the court misinterpreted the application of 34 RCNY § 2-07 to the facts of the case and misconstrued applicable case law.

In this Court's prior decision, Empire's summary judgment motion dismissing the complaint was granted by referring the parties to its findings in motion sequence number 006 (Prior Decision at 27). The analysis in motion sequence number 006 stated, in relevant part, that the City "has an absolute duty, dictated by precedent, to maintain the streets, including the curbs, in a reasonably safe condition" (Prior Decision at 12) and "is generally considered the owner of curbs and has a non delegable duty to maintain same" (*id.* at 14).

While acknowledging that Section 2-01 of the Highway Rules [Definitions] (34 RCNY § 2-01) is silent about curbs (*id.* at 12), this Court held that "if the [City's Department of Transportation] Commissioner had the authority and desire to shift liability for accidents involving curbs exclusively to the owners of covers or gratings on a street in derogation of the common law, he or she would have had to use specific and clear language to accomplish that goal" (*id.*).

The Court thus reconciled the City's legal obligation with Section 2-07 of the Highway Rules's purported conflicting mandate imposing a duty on Empire, as owner of the subject manhole cover, to monitor and repair any defective street condition within 12 inches from said cover, including the curb by stating that the aforementioned rule cannot be interpreted to contradict judicial precedent (34 RCNY § 2-07[b] [1] and [2]).

This Court also considered plaintiff's argument that Empire voluntarily assumed the duty to monitor and repair the walking surface within 12 inches of its manhole cover and thus should be held liable for the defect in the area. Admission of ownership of a manhole cover does not make an owner liable for an accident arising from a defective curb within 12 inches of the perimeter of the cover. This claim made in opposition to the motion was found to be unpersuasive and thus rejected. Plaintiff's cited jurisprudence actually bolsters that finding.

Upon a review of the motion papers, the court finds that it considered plaintiff's arguments and has already made a determination which did not misapprehend any facts or controlling principle of law. As such, the motion for leave to reargue is denied.

IV. Conclusion

Accordingly, it is

ORDERED that the motion of plaintiff Kenton Rojas for leave to reargue this court's decision and order dated April 3, 2018 is denied.

This constitutes the decision and order of the Court.

Dated: November 1, 2018

ENTER:

Alexander M. Tisch, A.J. S. C.

HON. ALEXANDER M. TISCH