

Roistacher v City of New York
2020 NY Slip Op 33966(U)
November 30, 2020
Supreme Court, New York County
Docket Number: 155315/2015
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 52

Justice

-----X

DENISE ROISTACHER,
Plaintiff,

- v -

THE CITY OF NEW YORK, PERFETTO CONTRACTING
CO. INC., BRIT CAB CORP., MAGDA SALAMA,
ABDERRAHMAN ELGOUASSI, THE HALCYON
CONSTRUCTION CORP.,

Defendant.

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INDEX NO. 155315/2015
MOTION DATE N/A
MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253

were read on this motion to/for DISMISSAL

Upon the foregoing documents, defendant's, The City of New York, motion to dismiss on the grounds of judicial estoppel is granted.

This action arises out of severe injuries sustained by plaintiff while she was a rear passenger in a taxi. The tires of the taxi were blown when they hit a defect in an arterial highway owned and maintained by the State of New York. Consequently, the plaintiff commenced an action against the State of New York in the Court of Claims. In the Court of Claims action, plaintiff argued, inter alia, that the State of New York was 100 percent liable as the owner of the roadway and notwithstanding any negligence on behalf of the City of New York, the State would be vicariously liable for any actions or inactions of the City.

In furtherance of the position that the State be apportioned 100 percent of the liability, the plaintiff submitted a motion in limine to preclude the State from arguing that any other party, including the City of New York, be apportioned liability.

In opposition to the City's motion, plaintiff argues that the Court of Claims is without jurisdiction to apportion liability to non-parties. In support of this argument, plaintiff erroneously relies on *Artibee v Home Place Corp.*, 28 NY3d 739 [2017]. However, the Court of Appeals in *Artibee* articulated that the **State Supreme Court** was without jurisdiction to apportion liability to the state as a non-party. *Id* at 744-745 (emphasis added). Specifically, the Court noted that the Court of Claims was in fact vested with ability to apportion fault to any non-party that could be sued in any court in the state. *Id* at 744.

Although plaintiff seeks to advance the argument that the Court of Claims specifically failed to apportion any liability to the City of New York because the Court was inherently without that power, that argument is contradicted by the analysis of the Court of Appeals. Thus, *Artibee* stands for the proposition that the Court of Claims was well within its statutory authority to apportion liability to a non-party.

It strains credulity that plaintiff would make every attempt to ensure that the City was not included on the verdict sheet if the Court of Claims had no authority to apportion damages as a matter of law. In fact, plaintiff's motion *in limine* does not address the issue of jurisdiction, solely the issue of liability. *See* Ex. I of the City's moving papers, plaintiff's motion *in limine*, NYSCEF Doc. No. 222.

"The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed" *Becerril v City of New York Dent. of Health & Mental Hygiene*, 110 AD3d 517 [1st Dept 2013]. Plaintiff argued in the Court of Claims in her motion *in limine*, that the State had a non-delegable duty to maintain Route 9A in a reasonably safe condition, a duty which could not be delegated to the City by agreement or

otherwise. *See* NYSCEF Doc. No. 222 at ¶ 4. Further, plaintiff argued that the State was vicariously responsible for any negligence by the City related to the condition encountered on Route 9A. *Id.* at ¶¶ 4 and 9. Plaintiff further argues that even if there was an agreement between the City and the State regarding the subject location, the agreement would not render the City liable to plaintiff for the injuries she sustained. *Id.* at ¶ 9.

Subsequently, the Court of Claims ruled that the roadway in question was owned by the State and that the State had a non-delegable duty to maintain and repair it. *See* Ex. K of the City's moving papers, Court of Claims decision, NYSCEF Doc. No. 224. The Court held that the State, not the City, was responsible for fully restoring the subject roadway and that the State could not transfer that responsibility to the City. *Id.* The Court of Claims specifically found “that the State effectively assumed responsibility for permanently repairing the subject roadway despite any prior agreement with the City saying otherwise. The State did so unambiguously after a meeting with the City on November 22, 2013.” *Id.*


The City contends that since plaintiff argued that the State is vicariously liable for any negligence by the City in maintaining the subject roadway, and the Court of Claims has ruled that the State was responsible on the date of the incident for the final restoration of the subject location, plaintiff is judicially estopped from offering any arguments that contradict her prior position. This Court agrees.

The Court finds plaintiff's arguments, that the Court of Claims made no determination as to the liability of the City or any other entity, inaccurate. The record establishes that plaintiff made every effort to ensure that the City could not be held liable, rather that the State be found solely liable. Plaintiff fails to reconcile how her position that the State would be vicariously liable for any misfeasance or nonfeasance by the City and now argues that the City can be held

liable, is not inconsistent. Plaintiff cites no case law to support her position that the Court of Claims cannot apportion liability to non-parties. Rather her affirmation in opposition goes on at length regarding the underlying defect and incident. Accordingly, it is hereby

ORDERED that the City of New York's motion is granted in its entirety and the complaint and any cross-claims are dismissed as to this defendant only, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed as the action is to continue as to the remaining defendants; and it is further.

11/30/2020 DATE	 LYLE E. FRANK, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
				<input type="checkbox"/>
				<input type="checkbox"/>

**HON. LYLE E. FRANK
J.S.C.**