SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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SALVATORE MARINO,

Plaintiff,

-against-

THE CITY OF NEW YORK
and FRANK CRANE,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 150041/2019
Motion No.: 002

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "4" were fully submitted on the 10th day of November 2021:

	Papers Numbered
Defendant CRANE's, Notice of Motion, Affirmation, Statement of Material Facts and Exhibits for Reargument of MS_001 (NYSCEF 61-68)	1, 2
MS_001 - NYSCEF 35-60	3
Plaintiff's Affirmation in Opposition and Statement of Material Facts (NYSCEF 71-72)	4

Upon the foregoing papers, defendant, FRANK CRANE's, motion for summary judgment is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on the sidewalk adjacent to the property located at 111 Walbrooke Avenue, Staten Island, New York. It is undisputed that the property is a one-family home owned by Frank Crane (hereinafter "Crane"). Mr. Crane purchased the home in 1995.

Crane initially served a motion for summary judgment (MS_001), which was denied by a short form Order dated August 13, 2021 for failure to include a Statement of Material Facts in

accordance with 22 NYCRR 202.8-g. Crane has now served a motion to reargue this denial of summary judgment. In support of Crane's request for leave to reargue the motion, it is brought to the attention of the Court that the Statement of Material Facts was, in fact, served but erroneously e-filed with the Notice of Motion rather than separately in NYSCEF. In opposition, plaintiff admits to having overlooked the Statement of Material Facts and did not initially serve a counter-statement of material facts.

In support of the underlying motion for summary judgment seeking dismissal of the complaint, together with all cross-claims based upon the New York City Administrative Code §7-210, Crane attested as follows: 1) the property has been continuously owner occupied for residential purposes; 2) the property has never been utilized for commercial purposes; 3) the property has never been rented to a tenant; and 4) he never made any repairs to the sidewalk adjacent to his home (*see* Crane Affidavit, NYSCEF 42).[1] In opposition, plaintiff submitted expert affidavits with respect to the tree roots depicted in the photographs marked at plaintiff's deposition, as well as the nature and age of the alleged repairs to the adjacent sidewalk. According to the experts, the tree roots were the cause of the defect and, any repairs depicted in photographs do not pre-date Crane's ownership in 1995. Thus, a question of fact exists that must be resolved by a jury. It is noted that the City submitted opposition to the underlying motion (NYSCEF 58) but does not take a position with respect to the request for reargument.

It is well established that a motion for leave to reargue is addressed to the sound discretion of the court and affords the moving party an opportunity to show that the court overlooked or misapprehended matters of fact or the law, or for some reason mistakenly arrived

[1] Plaintiff has included a complete copy of the underlying motion as Exhibit "A" which consists of 231 pages (NYSCEF 63). Therefore, Court has referenced the corresponding docket number in MS_001 for easier reference.

at its earlier decision (*see* CPLR 2221[d][2]; *JPMorgan Chase Bank, N.A. v. Novis*, 157 AD3d 776, 778 [2d Dept 2018]; *Cioffi v. S.M. Foods, Inc.*, 129 AD3d 888, 891 [2d Dept 2015]). It is not to be used, however, as a means by which an unsuccessful party is permitted to argue again the very issues previously decided, or to present new or different arguments, or matters of fact not originally tendered (*see Robinson v. Viani*, 140 AD3d 845, 847 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v. Ramirez,* 117 AD3d 674, 675 [2d Dept 2014]; *Nicolia v. Nicolia.*, 84 AD3d 1327, 1328 [2d Dept 2011]). Therefore, in the Court's discretion, leave for reargument is granted as neither defendant has objected to reargument based upon the foregoing technical discrepancy.

When deciding a summary judgment motion the Court's role is solely to identify the existence of triable issues, not to determine the merits of any such issues (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 505 [2012]) or the credibility of the movant's version of events (see *Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). The Court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Shop & Stop, Inc.*, 65 NY2d 625, 626 [1985]). The motion should be denied where the facts are in dispute, where different inferences may be drawn from the evidence or where the credibility of the witnesses is in question (*see Cameron v. City of Long Beach*, 297 AD2d 773, 748 [2d Dept. 2002]). If it is determined that material questions of fact exist, the motion must be denied.

Upon reargument, summary judgment is denied. It is a question of credibility for determination by a jury as to Crane's denial of repairs in light of the expert evidence submitted

by plaintiff (see *Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]).

Crane sustained its prima facie burden that the property is owner occupied, used exclusively for residential purposes and that he never repaired the sidewalk. However, plaintiff rebutted Crane's assertions that he never repaired the sidewalk since 1995 through expert evidence. The experts reviewed the photographs marked at plaintiff's deposition,[2] which are not in dispute (*see* Counter-Statement of Material Facts, NYSCEF 72, par.3). It is also noted that according to the photograph marked by plaintiff (NYSCEF 43, p.2), the tree in question appears to be on Crane's front lawn and not adjacent to the public street or curb. It is a question of credibility whether Crane applied for permission to repair and reconstruct the public sidewalk for the cutting or removal of tree roots on his property pursuant to New York City Administrative Code §§19-152 (*Gallis v. 23-21 33rd, LLC,* 198 AD3d 730 [2d Dept. 2021][3]; *see also,* New York City Administrative Code §§ 18-129 [a], 19-103, 19-141), irrespective of the fact that the property may have been used exclusively for residential purposes.

Accordingly, it is hereby

[2] It is noted that although Crane takes issue with the sufficiency of plaintiff's expert exchanges, neither exchange was annexed to the underlying motion or this current motion to reargue for this Court's review and determination. The marked photographs were embedded in the experts' affidavits (MS_001, NYSCEF 54 and 55). The Google photographs referred to in plaintiff's reply papers also were not annexed to either MS_001 or MS_002.

[3] After the service of plaintiff's motion to reargue, *Gallis* was decided on October 13, 2021.

ORDERED, that defendant, FRANK CRANE'S, motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: December 7 , 2021

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.