

Wilson v Phido Co Inc.
2022 NY Slip Op 33121(U)
September 19, 2022
Supreme Court, New York County
Docket Number: Index No. 150701/2019
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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WAYNE WILSON,

Plaintiff,

- v -

PHIDO CO INC., 1638-1640 YORK LLC, 1638-40 YORK
AVENUE, LLC,

Defendant.

INDEX NO. 150701/2019

MOTION DATE 07/27/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

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1638-40 YORK AVENUE, LLC

Plaintiff,

-against-

CARRERA RS LLC, 500A EAST 87TH STREET, LLC, PARK
87 CONDOMINIUM

Defendant.

Third-Party
Index No. 595967/2019

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 100, 101, 102, 103

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this premises liability action, defendant Phido Co Inc. (“Phido”) moves for an order pursuant to CPLR 2221(d) granting reargument of the Court’s Decision and Order of April 8, 2022, for reversal of the Court’s Decision and Order, and for issuance of an order granting Phido’s motion for summary judgment. Plaintiff Wayne Wilson (“Plaintiff”) opposes the motion.

The facts relevant to the present motion are as follows. Plaintiff, while working as a local manager for nonparty Verizon, was dispatched to oversee Verizon technicians who were

performing work on equipment behind a condemned building located next to Defendant's property.

The Verizon personnel obtained permission from Defendant's employee to use the rear of Defendant's building located at 1634-34 York Avenue, New York, New York ("the premises") after finding that they were unable to access the equipment through the condemned building. The back of the premises was separated from the yard in which the equipment was located by a 12- to 14-foot cinderblock wall. Defendant's employee told the Verizon personnel that the neighboring property could be accessed by using a fire escape ladder to climb over the wall. The dividing wall was covered with bird spikes that had been installed by Defendant's employees.

Plaintiff states that he arrived at the job site after the technicians and that they repeated the employee's instruction to access the job site by climbing over the dividing wall. Plaintiff successfully accessed the neighboring yard in this manner. However, Plaintiff's bootlace caught on one of the bird spikes as he climbed over the dividing wall to leave the site. This caused him to fall and suffer injuries.

Plaintiff commenced this action on January 23, 2019. Defendant moved for summary judgment dismissing Plaintiff's claims on December 17, 2021. In support of its summary judgment motion, Defendant argued, in relevant part, that the dividing wall was not intended as a public walkway and that it therefore owed no duty to persons injured while climbing over it. In a Decision and Order dated April 8, 2022, the Court denied Defendant's motion for summary judgment (NYSCEF Doc. No. 90). The Court found that Defendant owed a duty to Plaintiff to maintain its property in a reasonably safe condition, that this duty extended to the dividing wall because Defendant's employee had told the Verizon personnel that they could climb the wall to

access the neighboring yard, and that an injury such as Plaintiff's was a reasonably foreseeable risk.

Defendant now moves to reargue its motion for summary judgment under CPLR 2221(d). The CPLR provides that a "motion for leave to reargue . . . 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" (CPLR 2221[d][2]; *see also New Universe Inc. v Ito*, 190 AD3d 426 [1st Dept 2021]). Here, Defendant argues that the Court "has misapprehended both the law and the facts with respect to the issue of duty and foreseeability and the characterizing of the presence of the bird spikes on the parapet wall as a 'dangerous condition'" (NYSCEF Doc. No. 94, Defendant aff ¶ 11). Defendant maintains that the Court was incorrect in concluding that the bird spikes were a reasonably foreseeable risk because they had been installed on the wall for 20 to 30 years and nobody had been injured by or because of them. Defendant further argues that the Court improperly ignored its citations to two appellate cases, *Reed v 64 JWB, LLC*, 171 AD3d 1228 (2d Dept 2019) and *Moran v State Duct Corp.*, 41 AD3d 440 (2d Dept 2007).

In its prior decision, the Court found that Defendant failed to show a lack of dispute of material facts with respect to whether Plaintiff's injury was a reasonably foreseeable risk. In support of its finding, the Court noted that Defendants had previously allowed Verizon employees to use the premises to access the adjoining property and the alleged instruction by Defendant's employee for the Verizon technicians to climb over the dividing wall on the day of the accident. The Court rejected Defendant's argument that the accident was unforeseeable as a matter of law. Defendant merely restates this rejected argument in favor of its motion to reargue and the Court accordingly denies this branch of Defendant's motion.

The second prong of Defendant's motion is similarly unpersuasive. Defendant insists that *Reed* and *Moran*, two Second Department cases relating to the scope of a property owner's liability for unremoved snow, support its position that it had no duty of care to Plaintiff with respect to the dividing wall (*see Reed*, 171 AD3d at 1228 [holding that defendant owed no duty of care for injury caused by hole on snow-covered median because the hole was a latent defect and the median was not intended as a public walkway]; *Moran*, 41 AD3d 440 [defendant entitled to summary judgment because it "had no duty to maintain free of debris and snow an unpaved area that was not intended to be a public walkway"]).

These decisions are readily distinguishable from the present case. *Reed* and *Moran* concern the extent of a property owner's duty to remove snow from their property in order to maintain their premises in a reasonably safe condition. In this case, the bird spikes installed by Defendant on top of the parapet wall were the allegedly dangerous condition, not a transitory natural hazard such as snow. Furthermore, Plaintiff alleges that Defendant's employee told the Verizon personnel to climb over the wall to access the neighboring yard by climbing the dividing wall, a fact not presented in *Reed* and *Moran*.

The Court of Appeals has held that a property owner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014]) and that this duty applies "whether the property is open to the public or not" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Here, there is an issue of material fact with respect to whether Defendant maintained its property in a reasonably safe condition under the circumstances with respect to the presence of bird spikes on top of the wall that Defendant's employee told guests on the property to climb. Defendant fails to show that the

Court overlooked these issues of law on the prior motion and consequently declines to reverse its prior decision.

Accordingly, it is hereby:

ORDERED that defendant Phido, Inc.'s motion to reargue is denied.

9/19/2022

DATE



LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE