Torres v City of New York
2011 NY Slip Op 31458(U)
May 31, 2011
Supreme Court, New York County
Docket Number: 120577/03
Judge: Barbara Jaffe

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 120577/2003

TORRES, DIANA

vs

CITY OF NEW YORK

Sequence Number : 002

REARGUMENT/ RECONSIDERATION

CAL # 13

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JUN 03 2011

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

Dated: 5/31/11

MAY 3 1 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

DIANA TORRES and WILFRED TORRES,

Plaintiff,

-against-

CITY OF NEW YORK, 3280 BROADWAY COMPANY, INC., 3280 BROADWAY REALTY COMPANY, LLC, 3280 BROADWAY REALTY COMPANY, and JARLEX MANAGEMENT, INC.,

Defendants.

Index No. 120577/03

Argued: 3/22/11
Mot. Seq. No.: 002

DECISION AND ORDER

FILED

JUN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, J.:

For plaintiffs:
James W. Shuttleworth, III
Finkelstein & Partners, LLP
436 Robinson Ave.
Newburgh, NY 12550
845-562-0203

For defendants 3280 and Jarlex:
Gregory D.V. Holmes, Esq.
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One Battery Park Plaza, 30th Fl.
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By notice of motion dated October 14, 2010, defendants 3280 Broadway Company, Inc., 3280 Broadway Realty Company, LLC, and 3280 Broadway Realty Company (collectively, 3280 Realty) and Jarlex (collectively, defendants) move for leave to reargue my prior decision and order dated August 12, 2010 denying their motion for summary judgment. Plaintiffs oppose the motion.

In the August 2010 decision, I found that as defendants were out-of-possession landlords with a contractual duty to remove snow and ice from the sidewalk in front of their building, and absent evidence that their lessee had not requested them to do so before plaintiff's accident, they had not established, *prima facie*, that they had no duty to clear the sidewalk.

Defendants allege that I failed to apply the pertinent law in finding that they may have had a duty to remove the snow and ice, asserting that the only relevant issue is whether their snow removal efforts created a dangerous condition and that any contractual obligation to remove the snow and ice would be for the benefit of its lessee only, not plaintiff. (Affirmation of Gregory D. Holmes, Esq., dated Oct. 14, 2010).

In opposition, plaintiffs argue that defendants failed to establish any legal or factual grounds warranting reargument, and observe that, in any event, there is evidence that defendants created the dangerous snow condition. (Affirmation of James W. Shuttleworth, III, Esq., dated Oct. 26, 2010).

In reply, defendants deny that they had a duty to plaintiff to remove snow and ice from the sidewalk, and that any snow removal efforts undertaken by them aggravated the condition. (Reply Affirmation dated Nov. 3, 2010).

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]). Whether to grant re-argument is committed to the sound discretion of the court, and a motion to reargue may not "serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]). Nor may the movant advance new arguments not previously presented. (*Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]).

In their initial motion papers, defendants cite no authority to support their argument that I misapplied the law, nor do they distinguish any of the decisions that I cited. Rather, they reiterate their previous arguments, which were addressed, and improperly advance new arguments.

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Consequently, they have failed to establish any ground upon which to grant leave to reargue. (*See Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819 [2d Dept 2011] [movant made no effort to establish in what manner court overlooked or misapprehended controlling law]; *Mazinov*, 79 AD3d at 980 [trial court improvidently granted motion for leave to reargue as movant failed to show court overlooked or misapplied any applicable law and improperly advanced new arguments]).

In any event, the two decisions cited by defendants in their reply are inapposite as they do not address the duties of out-of-possession property owners like defendants. The owners in those decisions had no contractual obligation to remove the snow and ice, and the plaintiffs were strangers to both parties. (*See Ahmad v City of New York*, 298 AD2d 473 [2d Dept 2002] [observing that "[a]n out-of-possession owner or lessor is not liable for injuries that occur on the premises unless that entity retained control of the premises or is contractually obligated to repair the unsafe condition;" and finding that landlord not liable for icy condition on sidewalk adjacent to premises as it had no duty under lease to maintain or repair sidewalk]; *compare Scott v Bergstol*, 11 AD3d 525 [2d Dept 2004] [finding that out-of-possession landlord was not liable for injury caused by fall on ice on sidewalk as it had no duty under lease to remove snow and ice from sidewalk]; *Rodriguez v City of New York*, 269 AD2d 324 [1st Dept 2000] [plaintiff failed to establish liability of owner for fall on sidewalk due to snow and ice as lease required tenant to remove snow and ice]; *Festa v Waskawic*, 181 AD2d 758 [2d Dept 1992] [no basis to impose liability for icy condition on sidewalk on out-of-possession landlord as lease did not require landlord to maintain or repair premises and removal of ice and snow was tenant's sole responsibility]).

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Moreover, although I did not reach this issue in the prior decision, defendants submitted no evidence based on personal knowledge showing that they made no effort to remove the snow before plaintiff's accident or that their snow removal efforts were not negligent. (*Compare Bisontt v Rockaway One Co., LLC*, 47 AD3d 862 [2d Dept 2008] [owner made *prima facie* showing of entitlement to judgment by establishing that it did not render condition of sidewalk more dangerous through negligent snow removal]; *Feiler v Greystone Bldg. Co.*, 302 AD2d 221 [1st Dept 2003] [building owner's denial that he or any employees made any effort to remove snow from sidewalk and lease showing that tenant had responsibility to remove snow established *prima facie* that owner did not attempt to remove snow in area of plaintiff's fall and thus could not be held liable]; *Mourounas v Shahin*, 291 AD2d 537 [2d Dept 2002] [owner established it was not liable for plaintiff's fall due to ice and snow on sidewalk next to building by demonstrating that neither it nor its employees shoveled sidewalk and as lease required tenant to maintain sidewalk and remove snow]).

Accordingly, it is hereby

ORDERED, that the motion of defendants 3280 Broadway Company, Inc., 3280 Broadway Realty Company, LLC, 3280 Broadway Realty Company, and Jarlex for leave to re-argue is denied.

FILED

JUN 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 31, 2011
New York, New York

MAY 31 2011