Donald A. Powell, Esquire #014331977
POWELL, BIRCHMEIER & POWELL
Attorneys At Law
1891 State Highway 50, PO Box 582
Tuckahoe NJ 08250
(609) 628-3414

Attorneys for Defendant Township of Lower

CERTIFIED TO BE A TRUE COPY

FILED
MAR 25 2014
CIVIL DIVISION
SUPERIOR COURT-CAPE MAY COUNTY

Plaintiff LINDA WOEHLCKE and RICHARD WOEHLCKE (wife and husband) v. Defendants TOWNSHIP OF LOWER, CHARLES MARANDINO, LLC, GARDEN STATE GROUNDS and JOHN DOE RESPONSIBLE PARTY(S)	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-542-12 CIVIL ACTION ORDER

THIS MATTER having been brought before the Court by David I. Sinderbrand, Esquire, attorney for plaintiff;

AND THE COURT having considered the moving papers and opposition thereto;

IT IS on this 25th day of March, 2014, ORDERED that plaintiff's Notice of Motion for reconsideration be and is hereby denied.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within seven days of the receipt of this Order.

J. CHRISTOPHER GIBSON, J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: David I. Sinderbrand, Esquire
1001 Tilton Road, Suite 203
Northfield, NJ 08225

CASE: Linda Woehlcke et al v Township of Lower et als
DOCKET NO. CPM L 542-12

NATURE OF APPLICATION: PLAINTIFF'S MOTION FOR RECONSIDERATION

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The complaint in this matter was filed on November 1, 2012. The discovery end date was November 21, 2012. Discovery has been extended once before.

The instant personal injury matter arises from an accident that occurred on or about March 5, 2012. Plaintiff Linda Woehlcke claims she suffered injuries as a result of tripping and falling over a piece of twine located on a grassy area behind the municipal complex of defendant the Township of Lower.

Defendants Charles Marandino, LLC and Garden State Grounds are contractors involved in a construction project in 2011 alleged to have created the dangerous condition. The parties dispute whether the twine at issue was

from bales of hay as well as whether hay was used as part of site restoration after the project.

The contract between the Township of Lower and Charles Marandino, LLC called for the use of mulch containing hay as insulation for seeding laid down as part of site restoration. Instead, Charles Marandino, LLC provides it received approval for the use of hydro seeding from the township engineer. Charles Marandino, LLC directs that it contracted for site restoration services with Garden State Grounds. Both deny ever using any hay as part of the construction or site restoration projects.

Plaintiff moves for reconsideration of the previous order of the court granting summary judgment dismissing any and all claims against the Township of Lower, Charles Marandino, LLC, and Garden State Grounds.[1] The court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:49-2 provides, in pertinent part, that a motion for reconsideration seeking to alter or amend an order shall be served not later than 20 days after service of the order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the Court has overlooked or as to which it has erred.

[1] Plaintiff's motion does not specifically mention defendant Garden State Grounds.

The court may reconsider its interlocutory orders at any time, until final judgment, in its discretion and in the interests of justice. Comment to R. 4:49-2; Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250 (App. Div. 1987). However, it is "only for good cause shown and in the service of the ultimate goal of substantial justice that the court's discretion should be exercised." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 263-64 (App. Div. 1987). In exercising its discretion, the court is not constrained by the limitations of R. 4:49-2 (governing the reconsideration of final orders and judgments) or R. 4:50-1 (governing relief from a final order or judgment). See id. at 257-64.

"Reconsideration should be utilized only for those cases which fall into that narrow corridor in which (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must prove that the court acted in an arbitrary, capricious, or unreasonable manner. Id. Reconsideration "is a matter within the sound discretion of the court, to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990).

As such, the trial court must be "sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." Cummings v. Bahr, 295 N.J. Super. 374, 384, quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 402

(Ch. Div. 1990). A litigant should not be allowed repetitive bites at the apple in the absence of a showing that the court's previous decision was based on incorrect reasoning or that the court failed to consider all the evidence before it, either of which caused the litigant demonstrable prejudice. See comment to R. 4:49-2; see also D'Atria, supra, 242 N.J. Super. at 401-02; Cummings, supra, 295 N.J. Super. at 384-85.

MOVANT'S POSITION

Plaintiff moves for reconsideration of the previous order of the court granting summary judgment in favor of defendants and dismissing any and all claims against them with prejudice.

Plaintiff directs that Bernie Kirkland's testimony he did not recall any tan straw from his inspection after the completion of the site restoration is self-serving and suspect. See Testimony of Bernie Kirkland, 57. Plaintiff provides that Mr. Kirkland is the township inspector for the Township of Lower. Plaintiff asserts that Mr. Kirkland has an interest in not implicating the Township of Lower, his employer, or implicating Marandino, an entity that has a business relationship with his employer.

Plaintiff notes that Mr. Kirkland testified that the spread pattern of hay appeared to be shot out along with hydro seed rather than by hand. Id. at 49:22-50. Plaintiff argues that this testimony alone creates a genuine issue of material fact precluding summary judgment. Plaintiff adds that there is no evidence of any other contractor using a hydro seed spray gun in the time

after the work at issue here and her accident. And plaintiff provides that both she and her husband observed hay and twine some months before the accident. See Deposition of Linda Woehlcke, 67-68; Deposition of Richard Woehlcke, 9-10.

Plaintiff maintains that the fact Mr. Kirkland and Mitchell Plenn, both township employees, testified they did not notice any hay on the ground after the completion of site restoration in September of 2011 raises a genuine issue of material fact that only a jury may decide. Plaintiff states that the presence of twine in post-fall photographs creates a factual issue as to how the hay and twine got there.

As such, plaintiff requests that the court grant her motion for reconsideration.

CHARLES MARANDINO, LLC'S OPPOSITION

Charles Marandino, LLC (Marandino) opposes plaintiff's motion for reconsideration. Marandino provides that plaintiff has not stated with specificity the grounds upon which she is moving for reconsideration as required by R. 4:49-2. It directs that plaintiff merely cites to facts already in the record which were fully briefed in regard to the original motions for summary judgment. It asserts that litigants may not seek reconsideration merely because they are dissatisfied with the decision of the court. See D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). And it directs that, while there is testimony there was no twine, hay, or straw immediately

following the site restoration, there is no evidence demonstrating any of the defendants were responsible for the twine plaintiff tripped over.

GARDEN STATE GROUNDS'S OPPOSITION

Garden State Grounds notes that plaintiff's motion for reconsideration appears to pertain only to the Township of Lower and Marandino. However, Garden State Grounds opposes plaintiff's motion.

First, Garden State Grounds asserts that plaintiff has not stated the specific basis for her motion or annexed thereto a copy of the judgment or order sought to be reconsidered. As such, it provides that plaintiff's motion should be denied as procedurally deficient under R. 4:49-2.

Second, Garden State Grounds states that reconsideration is proper only in the narrow circumstances where: (1) a court's decision is based on palpably incorrect reasoning; (2) the court did not consider, or failed to appreciate the significance of, competent evidence; or (3) there is newly discovered evidence which could not have been provided to the court upon the first application. Cummings v. Bahr, 295 N.J. Super. 374, 384-85 (App. Div. 1996). It indicates that reconsideration should be denied where, as here, it is based on "unraised facts known to the movant prior to the entry of judgment." Del Vecchio v. Hemberger, 388 N.J. Super. 388 N.J. Super. 179, 188-89 (App. Div. 2006).

Garden State Grounds notes that plaintiff relies upon evidence already briefed and considered by the court in granting summary judgment in favor

of defendants. To the extent plaintiff's motion may be considered to be for reconsideration based on the court's failure to appreciate probative evidence, Garden State Grounds submits that plaintiff still has no evidence supporting the proposition the twine she tripped over was used in the bailing of hay.

As such, Garden State Grounds requests that the court deny plaintiff's motion for reconsideration.

TOWNSHIP OF LOWER'S OPPOSITION

The Township of Lower (Lower) opposes plaintiff's motion for reconsideration. Lower directs that plaintiff's motion fails to disclose any new facts or authority. Lower maintains that plaintiff's motion should be denied because it does not demonstrate either that the previous decision was based on a palpably incorrect or irrational basis or the court failed to consider or appreciate the significance of probative evidence. See Fusco v. Bd. of Educ. of the City of Newark, 349 N.J. Super. 445 (App. Div. 2002).

DISCUSSION

The court finds that plaintiff is not entitled to the relief requested pursuant to R. 4:49-2.

"Reconsideration should be utilized only for those cases which fall into that narrow corridor in which the Court has expressed its decision based upon a palpably incorrect or irrational basis, or it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings, supra, 295 N.J. Super. at 384. The moving

party must prove that the Court acted in an arbitrary, capricious, or unreasonable manner. Id. Reconsideration "is a matter within the sound discretion of the Court, to be exercised in the interest of justice." D'Atria v. D'Atria, 242 N.J. Super. 392 (Ch. Div. 1990).

Plaintiff argues that the court erred in granting summary judgment because the testimony of Bernie Kirkland and Mitchell Plenn is suspect as both are employees of the Township of Lower. Plaintiff submits that the presence of twine at the time of her accident creates a factual issue as to whether the defendants placed it there.

Plaintiff clearly disagrees with the previous decision of the court granting summary judgment in favor of defendants. But disagreement is not a basis for reconsideration under R. 4:49-2. Plaintiff's only evidence in this matter is her testimony she noticed the twine and hay several months before the accident and a photograph showing two pieces of twine on the ground. As noted in by the court before, "[a] few pieces of twine, which are not readily apparent from a distance, present on the ground for an undetermined period of time, are not a dangerous condition of such an obvious nature the Township of Lower should have discovered through the exercise of due care." See Memorandum of Decision dated January 17, 2014, at 13.

Plaintiff directs that Mr. Kirkland and Mr. Plenn's testimony is self-serving and should not have supported summary judgment. But plaintiff lacked any proofs that demonstrated Charles Marandino, LLC or Garden

State Grounds were responsible for the hay at issue. As the court previously reasoned "[a]t most, the proofs create a factual question as to whether there was any hay or twine in the area and whether it was spread by hand or machine... the court disagrees with the assertion this is sufficient to create a genuine issue of material fact as to whether defendants Charles Marandino, LLC or Garden State Grounds spread the hay or twine at issue." See Memorandum of Decision dated January 17, at 14-15.

The court has already considered the evidence raised by plaintiff in her motion for reconsideration. Accordingly, plaintiff has not met the high threshold for reconsideration under R. 4:49-2 and Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Plaintiff's motion for reconsideration is denied.

CONCLUSION

The motion for reconsideration is opposed. Plaintiff has not demonstrated she is entitled to the relief requested pursuant to R. 4:49-2 and Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Plaintiff's motion for reconsideration is denied.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

March 25, 2014

J. Christopher Gibson, J.S.C.