Vega v City of New York
2016 NY Slip Op 32580(U)
December 13, 2016
Supreme Court, New York County
Docket Number: 156116/13
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 5

LUIS VEGA

INDEX NO. 156116/13

MOT. DATE

- v -

MOT. SEQ. NO. 002

THE CITY OF NEW YORK et al.

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). 1
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). 2, 3
Replying Affidavits	No(s). 4

This personal injury action arises from a trip and fall. In this motion, defendants The City of New York, New York City Department of Transportation, New York City Department of Environmental Protection, New York City Department of Design & Construction (collectively the "City") move for summary judgment dismissing the complaint and all cross-claims against it. Plaintiff opposes the motion. None of the other parties, defendants Consolidated Edison Company of New York, Inc. ("ConEd") or Mount Sinai Hospital and Mount Sinai School of Medicine of the City University of New York (collectively "Mount Sinai"), have submitted opposition to the motion. In two letters filed 9/19/16 and 9/28/16, Mount Sinai takes issue with the City's request for summary judgment on its indemnification claims against Mount Sinai, because that request for relief was only made in the City's reply papers and was not otherwise properly noticed. Since the City's request for summary judgment against Mount Sinai was not properly noticed via its notice of motion, that request for relief is denied as procedurally improper.

Issue has been joined and plaintiff attempted to file note of issue on October 15, 2015. This motion was brought more than sixty days after October 15, 2015, and therefore would be untimely if plaintiff had successfully filed note of issue on October 15, 2015. However, according to the NYSCEF system, the "status" of the note of issue filing reads "Error" and document number 26, which should be plaintiff's note of issue, is inaccessible. This filing did, however, generate a receipt and confirmation notice. Further, this case was ultimately transferred to the City Waiting List.

The City argues that note of issue was not properly filed, as it does not show up on the NYSCEF system. Further, the City maintains that if the court finds that plaintiff's note of issue was properly filed, it has a good excuse for its late summary judgment motion. Specifically, the City maintains that it only received ConEd's reply to the notice to admit on December 1, 2015 which prompted the City's own inspection of the subject grate. Plaintiff does not oppose the late filing. The court finds that given the

Dated: 12/19/16

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

technical errors on the NYSCEF site, coupled with the City's representation that it needed to conduct a physical inspection of the grate in order to make its motion, the City has demonstrated good cause for the late motion. Therefore, summary judgment relief is available. The court's decision follows.

According to his notice of claim, on October 16, 2012, plaintiff tripped and fell due to an "uneven, raised, depressed, mis-leveled and otherwise defective sidewalk step down" on the Eastern sidewalk of Madison Avenue between East 98th and East 99th Streets. At his 50-h hearing, plaintiff testified as follows about the accident. Prior to the accident, plaintiff had just exited Mount Sinai Hospital at 1425 Madison Avenue. Plaintiff was walking on the sidewalk of Madison Avenue, approximately 3 to 4 feet from the curb, when he tripped over a metal grate. Plaintiff further described what caused him to fall:

> Q: Do you know what it was regarding the metal grate that caused you to trip?
>
> A: As I was walking, there was a space between the metal grate and the sidewalk, and when I proceeded to go to the street, I tripped over that.
>
> Q: How wide was that space? Can you estimate?
>
> A: I would say at least two inches from the sidewalk, the grate.

The City served a Notice to Admit on ConEd which demanded that ConEd admit or deny ownership of the grate. In its reply, ConEd denied ownership, maintenance, control and operation of the grate on the date of plaintiff's accident. The City, through DOT employee Victor Green, a Training Coordinator in the DOT's Highway Inspection and Quality Assurance Unit, thereafter conducted a physical inspection of the grate to determine ownership. Part of Mr. Green's duties as a DOT employee include conducting inspections of hardware on the sidewalks and roadways. In his affidavit, Mr. Green concluded as a result of his physical inspection of the grate and based upon his years of training and experience, that the grate "does not belong to the City... but that [it] is instead the responsibility of [ConEd]."

The City argues in support of its motion that liability for the alleged defective sidewalk condition shifts to the abutting property owner pursuant to Admin Code § 7-210, that the grate belongs to ConEd and therefore the City cannot be held liable pursuant to 34 RCNY 2-07, and that the City did not cause or create the defective condition.

Plaintiff, in turn, contends that summary judgment is premature pursuant to CPLR § 3212(f). Plaintiff has provided to the court a document entitled "Revocable Consent Agreement" (the "Agreement") was recorded/filed on December 16, 2009 with the Office of the City Register of the City of New York. The term of the Agreement is from July 1, 2009 through June 30, 2019. The Agreement, which is between Mount Sinai Medical Center ("MSMC") as "grantee" and the DOT as "grantor, states that MSMC "has petitioned for consent to continue to maintain and use a transformer vault ("Structure") under the east sidewalk of Madison Avenue, south of 99th Street, in the Borough of Manhattan." The Agreement further provides that the Structure "and any fixtures laid therein shall be constructed, maintained and operated subject to the supervision and control of the proper authorities of the City."

Plaintiff's counsel explains that the Agreement was not exchanged during discovery but was only uncovered through counsel's own ACRIS search. Plaintiff further contends that Mount Sinai's deposition remains outstanding, further necessitating denial of the motion.

The City, in turn, contends that plaintiff's opposition is late and should not be considered by this court. The City maintains that its motion should be granted on default. At the outset, this argument is re-

jected. In New York, public policy strongly favors a disposition on the merits. Given the drastic relief afforded by summary judgment, the court finds that plaintiff's opposition should be considered by this court. Further, the City was afforded an opportunity to submit a reply to plaintiff's opposition and that reply will be considered by the court. Therefore, there is no prejudice to the City in considering plaintiff's late opposition.

Substantively, the City argues that the Agreement does not raise a triable issue of fact as to whether the City owns the subject grate. The City has provided the affidavit of Affidavit of Edward Schnell, Director of the DOT's Consents and Security in the Franchise Concessions and Consents Unit. Mr Schnell states in pertinent part as follows:

> The ... Agreement between DOT and [MSMC] permits [MSMC] to maintain and use for its benefit, the [Structure]. The "Plan" referenced in paragraph 1 of the ... Agreement, which shows the location of the [S]tructure, also indicates that the [Structure] includes metal grating on the sidewalk. Pursuant to the ...Agreement, [MSMC] has an obligation to maintain and use the Structure that is the subject of the [Agreement]. The ...Agreement requires [MSMC] to insure the structure and to indemnify and hold harmless the City... from any claims related to the presence of the structure and the grantee's failure to maintain same.

The City argues that the Agreement does not establish the City's ownership of the subject grate, but rather merely reflects the City's ownership of the sidewalk. Under the agreement, the City as Grantor and owner of the sidewalk is permitting the abutting property owner, [MSMC], to maintain and derive a special use and benefit from the Structure. The City further contends that even if it owned the grate, it is entitled to indemnification from Mount Sinai.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Here, there is a clear issue of triable fact as to who owns the subject grate. While the City contends that it does not own the grate but rather, ConEd does, based upon the physical inspection conducted by its employee, Mr. Green, ConEd has denied ownership of the grate. Mr. Green's affidavit, standing alone, does not establish that the City did not own the grate on the date of plaintiff's accident. Mr. Green's affidavit is conclusory because it does not explain how his training and experience led him to the conclusion that the City does not own the grate nor does Mr. Green opine that the City did not own the grate on the date of plaintiff's accident which is a critical inquiry. As for the Agreement, the City is correct that the Agreement does not unequivocably demonstrate the City's ownership of the grate. It remains, however, a triable issue of fact as to who owned the grate on the date of plaintiff's accident. If the City owned the grate, it may be found liable for plaintiff's accident based upon 34 RCNY § 2-07.

Accordingly, the City's motion for summary judgment must be denied.

Further, the court will *sua sponte* strike plaintiff's note of issue, to the extent that the clerk has deemed plaintiff to have filed one. Plaintiff argues that discovery is incomplete. Indeed, plaintiff's counsel does not represent that plaintiff intended to file note of issue. Mount Sinai's deposition remains outstanding, and Mount Sinai represented to this court that it needed to withdraw its motion for summary judgment (motion sequence number 003) because it needed to conduct investigations as to the underlying facts concerning plaintiff's accident. In light of the foregoing, the court finds that discovery cannot reasonably be certified as complete and therefore, to the extent that the court's file reflects that plaintiff has filed note of issue, that marking is stricken.

The court further directs the parties to appear for a conference on February 16, 2017 at 2pm in Room 103 so that all outstanding discovery can be scheduled. Plaintiff is directed to file note of issue on or before February 19, 2017 but no sooner than upon the completion of all outstanding discovery.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the City's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's note of issue, to the extent that the court's file reflects that he has filed one, is stricken *sua sponte*; and it is further

ORDERED that the parties are directed to appear for a conference on February 16, 2017 so that all outstanding discovery can be scheduled; and it is further

ORDERED that plaintiff is directed to file note of issue on or before February 19, 2017 but no sooner than upon the completion of all outstanding discovery.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/29/16
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.