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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ERNEST F. HART IA Part 6
Justice

MANUEL SUAZO, x

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PEDUTO CONSTRUCTION CORP., ELECNOR HAWKEYE, LLC, TRI-MESSINE CONSTRUCTION COMPANY, INC. And MECC CONSTRUCTING, INC.,

Defendants.
x

Index Number 702028 2015

Motion Dates May 21, 2018

Motion Seq. Nos. 1-5

The following numbered papers read on these separate motions by defendant/third-party defendant Elecnor Hawkeye, LLC (Elecnor) pursuant to NY Court Rule §202.21(e), to vacate the Note of Issue on the grounds that discovery is not complete herein, and for a further Order pursuant to CPLR 3101, et seq., to compel the depositions of defendants/third-party defendants Perduto Construction Corp. (Perduto), Tri-Messine Construction Company, Inc. (Tri-Messine), and MECC Contracting, Inc. (MECC) and defendant The City of New York (City) to take place on or before a date certain, or, in the alternative, for an Order, pursuant to CPLR 3101, et seq., to compel defendants/third-party defendants Perduto, Tri-Messine, MECC and defendant City to produce witnesses for Examinations Before Trial on or before a date certain and for a further Order pursuant to CPLR 3212 (a), to extend the parties' time herein to file motions for summary judgment based on good cause shown; by defendant City pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross claims against defendant City; by defendant/third-party defendant Tri-Messine pursuant to CPLR 3212 for summary judgment in favor of Tri-Messine; by defendant/third-party defendant MECC pursuant to CPLR 3212 for summary judgment in MECC's favor dismissing all claims, cross claims and third-party claims against it; and by defendant/third-party defendant Elecnor pursuant to CPLR 3212 (a) for leave to file a

motion for summary judgment at this time on good cause shown and upon such leave, granting summary judgment to Elecnor dismissing plaintiff's complaint, the third-party complaint of defendant/third-party plaintiff Consolidated Edison Company of New York, Inc. (Con Ed) and all cross claims asserted against it on the grounds that there are no questions of fact as to the alleged liability of Elecnor in this matter, and on these cross motions by defendant/third-party defendant Tri-Messine pursuant to NY Court Rule §202.21(e), to vacate the Note of Issue on the grounds that discovery is not complete herein; pursuant to CPLR 3101, to compel a schedule for the remaining depositions to take place on or before a date certain; and pursuant to CPLR 3212 (a), to extend the time to file motions for summary judgment; by defendant/third-party defendant MECC pursuant to CPLR Rule 3402 and 22 NYCRR §202.21(e), to vacate plaintiff's Note of Issue and Certificate of Readiness on the ground that this action is not ready for trial; and/or pursuant to CPLR Rule 3124, to compel completion of all outstanding discovery; and to extend MECC's time to file a motion for summary judgment until after discovery is complete; and by defendant/third-party defendant Perduto pursuant to CPLR Rule 3402 and 22 NYCRR §202.21(e), to vacate plaintiff's Note of Issue and Certificate of Readiness due to outstanding depositions of certain defendants; pursuant to CPLR Rule 3124, to schedule the completion of the outstanding depositions; and pursuant to CPLR 3212(a) to extend Perduto's time to file a motion for summary judgment until 120 days after completion of discovery.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	63-85; 1-4;112-130; 135-164; 167-202
Notices of Cross Motion - Affidavits - Exhibits	86-90; 91-100;102-106
Answering Affidavits - Exhibits	101;134; 165-166; 203-210; 215-217
Reply Affidavits	107-111; 211-214; 218-220

Upon the foregoing papers it is ordered that the motions and cross motions are consolidated and determined as follows:

In this action, plaintiff seeks damages for personal injuries allegedly sustained on March 2, 2014, in a trip and fall in a hole next to a metal gas cap in the crosswalk at the intersection of 29th Street and Ditmars Boulevard in Astoria, Queens, New York.

In a so-ordered stipulation of the parties dated August 7, 2017, a stay in the matter pursuant to a post note of issue so-ordered stipulation of the parties dated October 17, 2016, was lifted, outstanding examinations before trial of the parties were scheduled and the parties agreed that motions for summary judgment shall be made returnable no later than December 19, 2017.

Inasmuch as the examinations before trial of all parties have been held and discovery is complete, the motion of defendant/third-party defendant Elecnor and the cross motions of defendants/third-party defendants Tri-Messine, MECC and Perduto to vacate the note of issue due to outstanding discovery; to compel outstanding examinations before trial of the parties; and to extend the time to move for summary judgment are denied.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.) However, if this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.)

Defendant City's motion for summary judgment made returnable on December 19, 2017, is timely. In seeking summary judgment, defendant City contends, among other things, that the maps filed with the New York City Department of Transportation (DOT) by the Big Apple Pothole and Sidewalk Protection Corporation (Big Apple) for the area where plaintiff fell did not provide it with prior written notice of the alleged defect that caused plaintiff to fall, as required by Administrative Code of the City of New York § 7-201 (c). In support of its motion, defendant City provides the affidavit of Larisa Dubina and the examination before trial testimony of Danny Garcia, both of whom are City employees from the DOT, as well as, copies of the two Big Apple Maps, labeled Volume 2, Pages 61 and 62, for the subject location, which were served on the DOT on May 30, 2003, at least 15 days prior to the date of the subject incident, and a legend or key for the maps.

Defendant City has not definitively demonstrated that the markings on the Big Apple Maps did not provide the required notice of the defect which plaintiff alleges caused his accident. The maps are of a reduced size, illegible and the area where plaintiff allegedly fell is not specifically marked on the maps. There are also some markings on the maps which are not listed in the legend or key, nor has defendant City offered an expert affidavit or other competent proof as to what those markings are. This court, therefore, cannot determine

whether there are relevant symbols at the exact location where plaintiff allegedly fell. Thus, a triable factual question exists concerning whether or not defendant City had prior written notice of the specific alleged defect. (*See Walker v Jenkins*, 137 AD3d 1014 [2016]; *see also Chia v City of New York*, 109 AD3d 865 [2013]; *Cassuto v City of New York*, 23 AD3d 423 [2005].) In light thereof, defendant City has failed to meet its initial burden of demonstrating its prima facie entitlement to judgment as a matter of law.

Accordingly, defendant City's motion for summary judgment is denied.

The motions of defendants/third-party defendants Tri-Messine and MECC for summary judgment which were not made returnable by December 19, 2017, as per the terms of the so-ordered stipulation, dated August 7, 2017, are untimely.

Defendants/third-party defendants Tri-Messine and MECC failed to demonstrate good cause for their delays in moving for summary judgment. (*See* CPLR 3212 [a]; *see also Brill v City of New York*, 2 NY3d 648 [2004]; *Hernandez v 35-55 73rd St.*, LLC, 90 AD3d 709 [2011]; *DiBenedetto v Lowe's Home Centers, Inc.*, 43 AD3d 853 [2007].) The initial excuses proffered by defendants/third-party defendants Tri-Messine and MECC are that they were not parties to the action at the time the note of issue was filed. Once Tri-Messine and MECC were named as parties in this action, however, the action was stayed for discovery and all parties, including Tri-Messine and MECC, agreed in the subsequent so-ordered stipulation dated August 7, 2017, to the lifting of the stay, the scheduling of outstanding examinations before trial and the deadline for the making of summary judgment motions.

Defendants/third-party defendants Tri-Messine and MECC next proffer as excuses for their delays, their earlier cross motions to vacate the note of issue due to their own outstanding examinations before trial, as well as, the outstanding examination before trial of defendant/third-party defendant Perduto. Since defendants/third-party defendants Tri-Messine and MECC could have submitted their own affidavits in support of timely motions for summary judgment and did not demonstrate how the missing examinations before trial testimony of defendant/third-party defendant Perduto and each other were essential to the making of their respective motions for summary judgment, these excuses also do not constitute "good cause" for their delays in making their respective motions for summary judgment. (*See Courtview Owners Corp. v Courtview Holding B.V.*, 113 AD3d 722 [2014]; *see also Greenpoint Properties, Inc. v Carter*, 82 AD3d 1157 [2011]; *Jackson v Jamaica First Parking, LLC*, 49 AD3d 501 [2008].)

Finally, contrary to contention of defendants/third-party defendants Tri-Messine and MECC, the issues raised in their respective motions for summary judgment are nowhere near identical to the issues raised in defendant City's timely motion for summary judgment. (*See*

Vasquez v C2 Dev. Corp., 105 AD3d 729 [2013]; *see also Teitelbaum v Crown Hgts. Assn. for the Betterment*, 84 AD3d 935 [2011]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2008].)

Accordingly, the motions of defendants/third-party defendants Tri-Messine and MECC for summary judgment are denied.

Defendant/third-party defendant Elecnor's motion seeking leave to move for summary judgment is also denied.

Defendant/third-party defendant Elecnor proffers the same excuses for its delay in timely moving for summary judgment, that is, that it was not a party at the time the note of issue was filed and that it previously moved to vacate the note of issue due to the then outstanding examinations before trial of defendants/third-party defendants Perduto, Tri-Messine and MECC, and further examination before trial of defendant City. These excuses do not constitute good cause in light of the earlier stay in the action to permit discovery which was lifted in the so-ordered stipulation of the parties dated August 7, 2017, and in light of defendant/third-party defendant Elecnor's failure to show how the missing examinations before trial testimony of defendants/third-party defendants Perduto, Tri-Messine and MECC, and further examination before trial testimony of defendant City were essential to the making of its motion for summary judgment. (*See Brill v City of New York*, *supra*; *see also Courtview Owners Corp. v Courtview Holding B.V.*, *supra*; *Greenpoint Properties, Inc. v Carter*, *supra*.)

Dated: September 28, 2018

ERNEST F. HART, J.S.C.