

<b>Diaz v Feldberg</b>
2020 NY Slip Op 32438(U)
July 17, 2020
Supreme Court, Kings County
Docket Number: 516016/2019
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 516016/2019

Motion Date: 7-13-20

Mot Seq Nos.: 35-57

-----X  
MANUEL DIAZ,

Plaintiff,

-against-

*Remote*  
**DECISION/ORDER**

HOWARD FELDBERG, ISAAC MARTIN FELDBERG  
TRUST, ADELPHI CONTRACTORS INC., ADELPHI  
CONSTRUCTION, INC. and A T CONCEPT, INC.,

Defendants.  
-----X

The following papers numbered 1 to 6 were read on these motions:

**Papers:**

**Numbered:**

Notice of Motion

Affidavits/Affirmations/Exhibits/Memo of Law.....1

Notice of Cross-Motion

Affidavits/Affirmations/Exhibits/Memo of Law.....2

Answering Affirmations/Affidavits/Exhibits/Memo of Law.....3-5

Reply Affirmations/Affidavits/Exhibits/Memo of Law.....6

Other.....

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, ADELPHI CONTRACTORS INC. ("Adelphi"), moves for an Order: (1) pursuant to CPLR § 3212, granting summary judgment in its favor dismissing plaintiff's Complaint insofar as asserted against it; (2) sanctioning counsel for the plaintiff, pursuant to 22 NYCRR § 130- 1.1, for willfully maintaining a frivolous action and failing to execute a Stipulation of Discontinuance despite requests for same and directing plaintiff's counsel to pay the costs and legal fees for having to defend this matter including the filing of the instant

*ms #02 -XMD*  
*ms #03 -GEXT*

motion; and (3) for such other and further relief as this Court deems just, necessary and proper. By Notice of Cross-Motion, the plaintiff moves for an order: (1) pursuant to CPLR Section 3124 compelling defendants to provide responses to plaintiff's outstanding discovery demands and (2) for such other and further relief as to this Court seems just and proper. The two motions are consolidated for disposition.

**I. ADELPHI CONTRACTORS INC.'S MOTION FOR SUMMARY JUDGMENT:**

The plaintiff, MANUEL DIAZ, commenced this action claiming that he suffered personal injuries on July 19, 2018, at approximately 1:50 p.m., at the premises located at 87 Smith Street, Apt. 12A, Brooklyn, New York. Plaintiff is claiming that at the time of the accident, he was working as a building superintendent and was helping to fix a leak in apartment Apt. 12A. Apparently, he claims that in order to perform his work, he climbed up and fell from an extension ladder which he claims was dangerous, defective, and improperly secured and installed. He maintains that in the months before and on the day of the accident, various renovations took place in apartment 12A, which was occupied by defendant Howard Feldberg and owned by defendant Isaac Martin Feldberg Trust.

In support of the motion, defendant Adelphi relies primarily on the affidavit of John Faillace, the President of Adelphi, who averred that Adelphi never performed work or services at the premises located at 87 Smith Street, Brooklyn, New York or in the Borough of Brooklyn. He averred that Adelphi never entered into any contracts or agreements with the defendants or any contractor to perform at the premises.

In opposition to the motion, plaintiff submitted, among other things, a response to plaintiff's Notice to Produce from defendants HOWARD FELDBERG and ISAAC

MARTIN FELDBERG TRUST in which they stated, upon information and belief, that Adelphi performed work at the subject location within the two-month period prior to the date of the accident.

Although Adelphi demonstrated its prima facie its entitlement to summary judgment dismissing the complaint insofar as asserted against it (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923), the Court views Adelphi's motion as premature (*see Ruiz v. Griffin*, 50 A.D.3d 1005, 1006, 856 N.Y.S.2d 641; *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183; *Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d 792, 792-793, 533 N.Y.S.2d 143). "CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated" (*Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d at 637, 815 N.Y.S.2d 183; *see Aurora Loan Servs., LLC v. LaMattina & Assocs., Inc.*, 59 A.D.3d 578, 872 N.Y.S.2d 724, 724-25; *Ruiz v. Griffin*, 50 A.D.3d at 1006, 856 N.Y.S.2d 641). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d at 793, 533 N.Y.S.2d 143). Here, the co-defendants maintain that Adelphi worked at the subject premises around the time of the accident and to date, depositions have not been held. Thus, the plaintiff raised issues warranting further discovery.

**The Cross-Motion:**

The defendants are directed to respond to plaintiff's discovery demands to the extent that they have not already done so within 45 days of the filing of this order.

Accordingly, it is hereby

**ORDRED** that defendant Adelphi's motion for summary judgment is **DENIED**, without prejudice with leave granted to renew upon the completion of discovery; and it is further

**ORDERED** that to the extent they have not already done so, defendants are directed to respond to plaintiff's discovery demands within 45 days of the filing of this order.

This constitutes the decision and order of the Court.

Dated: July 17, 2020

**PPS**

**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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KINGS COUNTY CLERK  
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