

Valdez v Gil
2021 NY Slip Op 31438(U)
April 28, 2021
Supreme Court, New York County
Docket Number: 158636/2020
Judge: J. Machelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62

Justice

-----X

DANIEL VALDEZ,

Plaintiff,

- v -

ERICKSON GIL, ROCIO SANTOS, THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Defendant.

-----X

INDEX NO. 158636/2020

MOTION DATE 03/08/2021,
04/08/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for JUDGMENT – SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Pending before the court are two motions:

Motion #001, filed by ERICKSON GIL (“Driver) and ROCIO SANTOS (“Owner”), seeks an order pursuant to CPLR § 3212, granting them summary judgment on the issue of liability, and dismissing any and all cross-claims and/or counterclaims asserted against them.

Motion #002, filed by defendant the City of New York (the “City”), seeks an order consolidating the present matter (“Action #1”) with the action entitled *Erickson Gil v. the City of New York and Consolidated Edison of New York, Inc.*, commenced in the Supreme Court, New York County under Index No.: 159300/2020, (“Action # 2”), for the purposes of joint trial and discovery, on the basis that both actions arise from the same incident, and involve common questions of law or fact.

Upon the forgoing documents, Motion #001 is DENIED as premature with leave to renew, and Motion #002 is GRANTED on consent.

In the underlying action, the Driver, ERICKSON GIL was operating a Nissan sedan registered to the Owner, ROCIO SANTOS. The Passenger, DANIEL VALDEZ (the "Passenger"), was seated in the front of the vehicle. The Driver and the Passenger are each suing for injuries allegedly sustained when they were traveling along Isham Street, and a New York City manhole cover suddenly, unexpectedly, and without warning, exploded open underneath the Sedan.

Motion #001

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

Here, the Driver and Owner (“Movants”) argue that they should be absolved from any liability for the accident, as a matter of law, based on the Driver’s affidavit, and a video of the accident, showing the manhole cover exploding beneath the sedan. The movants argue that there are no issues of fact to inculcate either of them as a responsible party for the Passenger’s alleged loss, as the Driver was “simply in the wrong place at the wrong time.”

Co-defendant Consolidated Con Edison of New York, Inc. (“Con Ed”) and the Passenger each argue in their opposition papers that the motion should be denied as premature. Con Ed argues that there has been no Preliminary Conference Order filed in this action, and there was also a related (Action #2) that had not been consolidated with Action #1 at the time Con Ed filed its papers. Further, Con Ed argues that the video, which was stored on an external website, has not been authenticated, and that depositions of all parties are necessary, if for nothing else, to authenticate the “surveillance videos” and photographs produced in this action.

In addition the Passenger argues that in the Driver’s sworn affidavit, as attached to the motion, the Driver stated that the manhole cover had “*expectedly* burst open [emphasis added].” The Passenger argues that if the Driver knew the manhole cover was going to burst, then the Driver had an obligation to avoid it, and that this failure to avoid the expected hazard constitutes negligence. The Passenger further argues that he is entitled to inquire about why the Driver expected the manhole cover to burst open; what the Driver may have done to avoid the resulting collision, given his expectation; where the Driver was looking before the collision; and what evasive steps the Driver took to avoid the collision.

Here, the affidavit of the Driver reads: “While at the scene, I learned that the cause of the impact to the underside of my sedan was that a manhole cover had *expectedly* burst open, without warning, just as I was driving over it [emphasis added].” It is likely that this is merely a clerical

error, but there was no amended affidavit submitted, and in the reply filing, the Driver did not clarify this discrepancy. Further, the only “authentication” provided for the video was in the driver;s affidavit in question, which was not subject to *voir dire* by any of the parties. Given the preliminary nature of this matter, the court DENIES this motion as premature and gives the Driver and the Owner leave to refile their motion within a timely manner after relevant discovery has been conducted.

See also Belziti v. Langford, 105 A.D.3d 649 (Sup. Ct. App. Div, 1st Dept. 2013) (“Green’s motion for summary judgment was properly denied as premature, since limited discovery has taken place and Green himself has not yet been deposed in this matter”); Weinstein v. WB/Stellar IP Owner, LLC, 125 A.D.3d 526 (Sup. Ct. App. Div, 1st Dept. 2015) (“Plaintiff opposed the motion on the ground that it was premature since ‘facts essential to justify opposition may exist but cannot then be stated’ [...] Stellar’s motion should have been denied as premature, since plaintiff had no opportunity to depose Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion”).

Motion #002

With respect to motion #002, a stipulation (NYCEF document #44) was filed on or about April 14, 2021, in which all counsel for all parties in Action #1 and Action #2 each consented to the consolidation.

Accordingly, IT IS HEREBY ORDERED that the motion is GRANTED on consent, and the above-captioned action shall be consolidated for joint trial and discovery with *Erickson Gil v. the City of New York and Consolidated Edison of New York, Inc.* (Index No.: 159300/2020); and

IT IS FURTHER HEREBY ORDERED that the Clerk of the Court is directed to amend the caption to reflect the substitution of the parties and consolidation as follows:

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

DANIEL VALDEZ,

x Action #1

Index No.: 158636/2020
File No.: 2020-038753

Plaintiffs,

-against-

ERICKSON GIL, ROCIO SANTOS, THE CITY OF NEW YORK,
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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

ERICKSON GIL,

x Action #2

Index No.: 159300/2020
File No.: 2020-042694

Plaintiffs,

-against-

THE CITY OF NEW YORK and CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,

Defendants.


and;

IT IS FURTHER HEREBY ORDERED that the City shall serve a copy of this order with Notice of Entry by regular mail on all parties and the persons entitled to notice.

Conclusion

IT IS HEREBY ORDERED that Motion #001 is DENIED as premature and the Driver and the Owner are hereby granted leave to refile their motion within a timely manner after relevant discovery has been conducted.

IT IS HEREBY ORDERED that Motion #002 is GRANTED on consent.

<u>4/28/2021</u> DATE		 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE