ORIGINAL

SHORT FORM ORDER

INDEX No. 614628/2019
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:
Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-15-19
SUBMIT DATE 12-10-2020
Mot. Seq. # 01 - Mot D

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JANICE MAYS-CARNEY,

Plaintiff,

-against-

COUNTY OF SUFFOLK, TOWN OF BABYLON, METROPOLITAN TRANSPORTATION AUTHORITY (MTA), LONG ISLAND RAILROAD d/b/a MTA LONG ISLAND RAILROAD (LIRR), STALCO CONSTRUCTION INC., and L.K. COMSTOCK & COMPANY, INC.,

Defendants.

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Upon the following papers numbered 1 - 63 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; ~~Notice of Cross Motion and supporting papers ____~~; Answering Affidavits and supporting papers 23 - 28, 29 - 36 & 37 - 55 ; Replying Affidavits and supporting papers 56 - 59 & 60 - 63 ; ~~Other ___; (and after hearing counsel in support and opposed to the motion) it is~~,

Defendant Stalco Construction, Inc., seeks an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any and all cross claims asserted against it. The plaintiff and co-defendants have filed opposition to the application arguing that discovery has not been completed.

The plaintiff seeks recovery of damages for personal injuries sustained as the result of a trip and fall accident that occurred at or near the Wyandanch train station, at the southeast corner of the intersection of Straight Path Road and Merritt Avenue, Wyandanch, New York at 9:20 pm on June 14, 2018. The plaintiff claims that "the defective conditions that caused her to trip and fall were as follows: construction debris and/or wooden blocks; a defective sidewalk that was elevated, uneven, un-level, broken, and/or dilapidated and/or inadequate or improper area lighting". Stalco claims that the plaintiff's accident occurred at or near the existing LIRR train station and that the allegations against it should be dismissed because it "was hired to construct the 'new' LIRR station 200 to 300 yards away from the accident site". The plaintiff and co-defendants argue that discovery has not been completed and there are triable issues of fact as to where the wood that the plaintiff tripped on came from, as well as questions about the location and method of construction debris removal that Stalco utilized while doing carpentry and construction work at the site. The plaintiff and co-defendants claim that the outstanding discovery and a needed examination before trial of someone from the Stalco entity require denial of this motion for summary judgment.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times Square Stores Corp.***, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light

most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In ***Colombini v Westchester County Healthcare Corp.***, 24 AD3d 712, 715 [2d Dept 2005], the Court held that

> Summary judgment should be denied as premature where, as here, the party opposing the motion has not had an adequate opportunity to conduct discovery (see CPLR 3212 [f]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 506, 618 NE2d 82, 601 NYS2d 49 [1993]; ***OK Petroleum Distrib. Corp. v Nassau/Suffolk Fuel Oil Corp.***, 17 AD3d 551, 793 NYS2d 152 [2005]; ***Mazzola v Kelly***, 291 AD2d 535, 738 NYS2d 246 [2002]).

The Court in ***Gardner v Cason, Inc.***, 82 AD3d 930, 931-932 [2d Dept 2011], held

> It was premature to award summary judgment at this stage of the case. "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 AD2d 792, 793, 533 NYS2d 143 [1988]). The plaintiff and the defendant Grumbly submitted, among other things, affidavits containing discrepancies pertaining to the circumstances of the accident, including as to the decedent's culpability. Furthermore, no depositions have been conducted, including any depositions of key eyewitnesses identified in the police accident report. Accordingly, the Supreme Court should have denied the plaintiff's motion for summary judgment on the issue of liability with leave to renew after the completion of discovery (see ***Gruenfeld v City of New Rochelle***, 72 AD3d 1025, 900 NYS2d 144 [2010]; ***Aurora Loan Servs., LLC v LaMattina & Assoc., Inc.***, 59 AD3d 578, 872 NYS2d 724 [2009]; ***Martinez v Ashley Apts. Co., LLC***, 44 AD3d 830, 842 NYS2d 918 [2007]; ***Tyme v City of New York***, 22 AD3d 571, 801 NYS2d 744 [2005]; see generally CPLR 3212 [f]).

Based upon a review of the motion papers the Court concludes that the plaintiff and co-defendants have not had an adequate opportunity to conduct discovery into issues within the knowledge of defendant Stalco as to the whether the wood that the plaintiff tripped on was part of the construction debris left behind by Stalco or part of a ramp for its work. Thus the motion for summary judgment on the issue of liability is denied with leave to renew after the completion of discovery; and it is further

ORDERED that a compliance conference is scheduled for March 18, 2021. All attorneys shall appear on **March 18, 2021 at 10:30 a.m.** via Microsoft Teams in Courtroom A361 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York, as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in the matter being dismissed or a default being granted.

The foregoing constitutes the decision and Order of the Court.

Dated: January 22, 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**