

Schweitzer v City of New York

2007 NY Slip Op 30075(U)

February 27, 2007

Supreme Court, New York County

Docket Number: 0121690

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____ J.S.C.

Justice

PART Part 5

Schweitzer, Dawn

INDEX NO. 121690/03

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

City of New York, et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2, 3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECISION AND ORDER
ACCOMPANYING DECISION / ORDER

FILED

MAR 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/07/07



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
DAWN SCHWEITZER,

Plaintiff,

Index No.
121690-03

- against -

Decision and Order

THE CITY OF NEW YORK, HILTON HOTELS CORP.,
d/b/a THE WALDORF ASTORIA HOTEL

Mot. Seq. 002

Defendants.

-----X
HILTON HOTELS CORP.

Third Party Plaintiff,

-against-

KILVINE CONSTRUCTION CO., INC.

Third Party Defendant.

-----X
HON. EILEEN A. RAKOWER

Plaintiff commenced this action for personal injuries allegedly received when she tripped and fell on the sidewalk in front of the Waldorf- Astoria Hotel, at 301 Park Avenue, New York, New York. The building is owned by the Hilton Hotels Corporation (Hilton) and the sidewalk was repaired at some time prior to the incident by Kilvine Construction Co., Inc. (Kilvine). The injuries occurred on June 28, 2003. Plaintiff alleges that defendants disregarded their duty to properly care for and maintain the sidewalk in that it was improperly lit, uneven, broken, missing and/or deteriorated.

Defendant Kilvine moves to strike the note of issue filed by plaintiff on September 22, 2006, because discovery remains outstanding between Kilvine and Hilton. Additionally, Kilvine requests that the Court strike Hilton's pleadings for failure to respond to its discovery and inspection demand and its failure to produce a particular witness for a deposition. In the alternative, Kilvine urges the Court to compel Hilton to produce the witness for deposition. Further, Kilvine seeks an extension of time to file a dispositive motion because it claims that it never received notice of plaintiff's note of issue and only learned of it during a routine "e-law" review of their file.

Hilton files opposition, but states that it does not object to Kilvine's motion to strike the note of issue or to extend the time for dispositive motions. Hilton, too, claims that it was never served with the note of issue. Hilton, however, does oppose striking its pleadings, and claims that it is now "ready, willing and able" to produce the witness Kilvine needs to depose, and it is "putting forth their best efforts" to furnish Kilvine with the discovery it requests.

Plaintiff opposes the motion to strike her note of issue stating that she has complied with all discovery sought from her. Plaintiff argues that defendants' failure to move to strike its note of issue within twenty days of service means that defendants waived their right to further discovery. Further, plaintiff asserts that defendants' failure to move constitutes an assent to the statements contained in plaintiff's note of issue that discovery is complete and that "nothing in the movant's papers explains why it took over 2 months to make this motion." City does not respond to the motion.

Discovery revealed that sidewalk repair work was done for Hilton in front of 301 Park Avenue by entities other than Kilvine. Pursuant to a compliance conference stipulation dated March 2, 2006, Hilton agreed to provide Kilvine with the names, addresses and work records of any other entity that performed sidewalk repair for Hilton at the subject location. After a May, 2006 deposition of one Hilton employee, it became clear that Hilton's "Director of the Property Operations Team" would have the information required by Kilvine to determine who else did sidewalk work for Hilton at the subject site. This revelation was followed by Kilvine's May 30, 2006, Notice for Discovery and Inspection seeking the aforementioned information.

A July 11, 2006 compliance conference resulted in a stipulation between the parties that Hilton would produce the Director of the Property Operations Team on September 20, 2006 for deposition but Hilton failed to do so. The same stipulation included a Court Order vacating plaintiff's note of issue "so that all outstanding discovery will be completed." Thereafter, Plaintiff re-filed her note of issue on September 22, 2006.

Plaintiff acknowledges the discovery orders above, but adds that as of the date of her affirmation, Hilton had not produced a witness for deposition. Additionally, plaintiff provides an affidavit of service of the note of issue even though both defendants aver that their motion to strike was belatedly filed because they never received the note of issue.

Kilvine, after the September 20, 2006 failure of Hilton to comply with the so ordered stipulation dated July 11, 2006, moves to compel or strike Hilton's pleadings. Hilton repeatedly ignored its obligations, prejudicing Kilvine's ability to defend against the third party claims and cross claims. While Hilton postures that it is now ready to respond to discovery requests and provide a witness for deposition, such discovery remains forthcoming.

Plaintiff's affidavit of service demonstrates that it served both Kilvine and Hilton with the note of issue and Certificate of Readiness. Kilvine, in the face of the affidavit of service, fails to controvert such service, and thus, offers no reason for its failure to move to strike the note of issue as required within twenty days. Therefore, as Kilvine has failed to show "good cause" as to why it did not file a timely motion to strike, its motion must be denied. (*Cromer v. Yellen*, 268 A.D. 2d 381 [1st Dept. 2000]).

Wherefore, it is hereby

ORDERED that the motion to strike the note of issue is denied; and it is further

ORDERED that Kilvine's motion to strike Hilton's pleadings is granted unless Hilton produces its Director of the Property Operations Group for deposition on or before March 22, 2007; and it is further

ORDERED that Kilvine's motion to strike Hilton's pleadings is granted unless Hilton responds to Kilvine's May 30, 2006 Demand for Discovery and Inspection by March 15, 2007.

All other relief requested is denied.

This constitutes the decision and order of the Court.

DATED: February 27, 2007


EILEEN A. RAKOWER, J.S.C.

FILED
MAR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

PRESENT: Rakower
Justice

PART 5

Ross, Frances

INDEX NO. 103785/p

- v -

City of New York

MOTION DATE _____

MOTION SEQ. NO. 85

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Compel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion.

Motion to file a supplemental verified bill of particulars is granted. The injuries alleged originally included permanent injury to the knee. Knee ~~recovery~~ treatment and surgery contained within the supplemental B/P were contemplated. The ~~bill~~ Defendant is entitled to an additional independent medical exam and further authorization, all to take place and be exchanged within 45 days of this order. The stay of the trial of this matter shall continue for 60 days from the date of this order.

FILED
MAR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/27/07

[Signature]
HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

[* 5]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE