

Bonsignore v 3770 82nd St. LLC

2007 NY Slip Op 30110(U)

February 13, 2007

Supreme Court, Queens County

Docket Number: 0004504

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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JANET BONSIGNORE,

Plaintiff(s),

- against -

Index
Number: 4504/05

Motion
Date: 01/30/05

Motion
Cal. Number: 3

3770 82ND STREET LLC, NEW YORK CITY
TRANSIT AUTHORITY, NYC DEPARTMENT OF
TRANSPORTATION and THE CITY OF NEW YORK,

Defendant(s).

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The following papers numbered 1 to 20 read on this motion by defendant New York City Transit Authority to dismiss the complaint and for summary judgment, cross-motion by defendant 3770 82nd Street LLC to dismiss the complaint and any cross-claims and for summary judgment, and cross-motion by plaintiff to amend the caption.

	<u>Papers Numbered</u>
Notice of Motion-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Affirmation in Opposition.....	8-9
Reply Affirmation.....	10-11
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Notice of Cross-Motion-Exhibits.....	16-20

Upon the foregoing papers it is ordered that the motion and cross-motions are decided as follows:

Motion by defendant New York City Transit Authority (the TA) to dismiss, pursuant to CPLR 3211(a)(1)and/or 3211(a)(7)and for

summary judgment pursuant to CPLR 3212 dismissing the complaint and any cross-claims against it is denied.

The TA appears to be moving both under 3211(a)(1) and/or 3211(a)(7) to the extent that it is being brought under CPLR 3211(a)(1), the motion must be denied, since a motion to dismiss pursuant to CPLR 3211(a)(1) may not be made after the answer has been interposed (see CPLR 3211[e]).

To the extent that the motion is deemed a summary judgment motion pursuant to CPLR 3212, the motion is untimely.

Pursuant to CPLR 3212(a), unless a different deadline is set by the Court, a summary judgment motion shall not be made later than 120 days after the filing of the note of issue, except by leave of Court upon good cause shown. The note of issue herein was filed on July 14, 2006. The instant motion was filed on November 21, 2006, 10 days past the deadline. The Court has not fixed a different date by which a motion must be made. There is no order of the Court extending the time for making a summary judgment motion.

The TA has not sought prior leave of the Court to move for summary judgment at this late juncture but, instead, has improperly moved for summary judgment, merely asserting, in passing, in its affirmation in support of the motion, that it has shown good cause for making the late motion.

Even were the instant motion for summary judgment deemed a motion for leave to file a late motion for summary judgment, movant has failed to demonstrate good cause, on this record (see Miceli v. State Farm Mut. Auto Ins. Co., 3 NY 3d 725 [2004]; Brill v. City of New York, 2 NY 3d 648 [2004]).

The TA contends that since it has not yet been provided with a copy of its engineer's deposition transcript regarding his testimony that the sidewalk grating upon which plaintiff allegedly fell after alighting from the bus was not owned by the TA, it has shown good cause to request an extension of time to file its summary judgment motion. In the first instance, the motion is supported by an affidavit from the engineer averring that the grate in question is neither "owned, controlled, maintained or managed by defendant New York City Transit Authority." The TA fails to explain why its motion for summary judgment must also be supported by the deposition testimony of this expert. But moreover, since the deposition of the engineer was taken in September 2006, plaintiff offers no explanation for its failure to move for an extension of time to file its summary judgment motion prior to the expiration of the 120-day period (see Mizell v. Eastman & Bixby Redevelopment Co., 34 AD 3d 770 [2

nd Dept 2006])).

It does not avail the TA that it is also apparently moving to dismiss the complaint pursuant to CPLR 3211(a)(7). The Court notes that a motion to dismiss under 3211(a)(7) for failure to state a cause of action may be made at any time (see CPLR 3211[e]), and, thus, is not limited by the 120-day rule governing summary judgment motions. However, a dilatory defendant seeking, in essence, summary judgment, may not evade the time limitation imposed by CPLR 3212(a) merely by labeling the motion as also one pursuant to 3211(a)(7), since the two motions are not interchangeable.

A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) addresses merely the sufficiency of the pleadings. A motion for summary judgment under CPLR 3212 searches the record and examines the sufficiency of the underlying evidence (see Del Castillo v. Bayley Seton Hosp., 232 AD 2d 602 [2nd Dept 1996]; Friedman v. Connecticut General Life Ins. Co., 30 AD 3d 349 [1st Dept 2006]). Unless a 3211(a)(7) motion is converted into a motion for summary judgment, pursuant to CPLR 3211[c], affidavits submitted in support of the motion are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (see Rovello v. Orofino Realty Co., 40 NY 2d 633 [1976]; Hornstein v. Wolf, 109 AD 2d 129 [2nd Dept 1985]), but may be received only for the limited purpose of remedying defects in the complaint, unless the affidavits conclusively establish that plaintiff has no cause of action (see Rovello v. Orofino Realty Co., supra). There is no issue regarding whether the motion may be converted into one for summary judgment, since the TA has, in fact, also moved for summary judgment. There is also no issue in the instant matter of defective pleadings. Moreover, the affidavits do not conclusively establish that plaintiff has no cause of action.

In any event, even though the TA is moving for dismissal of the complaint pursuant to both CPLR 3211(a)(7) and 3212, this Court considers the instant motion as one for summary judgment only, since the TA moved for summary judgment and clearly charted a summary judgment course (see Nesenoff v. Dinerstein & Lesser, P.C., 5 AD 3d 746 [2nd Dept 2004]). Since the motion is untimely, it must be denied.

Cross-motion by defendant 3770 82nd Street LLC (3770) to dismiss the complaint and any cross-claims against it pursuant to CPLR 3211(a)(7) and for summary judgment pursuant to CPLR 3212 is also denied, for the same reasons. The Cross-motion is untimely.

Cross-motion by plaintiff to amend the caption to add Consolidated Edison, Inc. and Keyspan Corporation as party defendants is granted, there appearing no opposition. Pursuant to CPLR 3025(b) and 1003, plaintiff is granted leave to serve and file a supplemental summons and amended complaint, with amended caption within twenty (20) days of entry of this order. Pursuant to CPLR 3402(b), plaintiff shall, within five (5) days after joinder of Consolidated Edison, Inc. and Keyspan Corporation, serve these new parties with the note of issue and certificate of readiness, serve upon 3770, the TA, the NYC Department of Transportation and the City a statement advising of the addition of the new parties and the change in the caption of the action, and file said statement with the County Clerk, together with proof of service of the note of issue and certificate of readiness upon the new parties and proof of service of the statement upon the aforesaid defendants who have appeared in this action.

Accordingly, the motion by the TA and cross-motion by 3770 are denied and the cross-motion by plaintiff is granted.

Dated: February 13, 2007

KEVIN J. KERRIGAN, J.S.C

