

Rozenberg v City of New York
2007 NY Slip Op 30596(U)
April 9, 2007
Supreme Court, Queens County
Docket Number: 0013031/2004
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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SVETLANA ROZENBERG,

Plaintiff,

- against -

THE CITY OF NEW YORK, GROSVENOR MANOR
OWNERS CORP., WELSBACH ELECTRICAL CORP.
and JOE L. CONSTRUCTION CORP.,

Defendant(s).

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Number: 13031/04

Motion
Date: 03/27/07

Motion
Cal. Number: 18

Motion Seq. No. 1

The following papers numbered 1 to 17 read on this motion by defendant Welsbach Electrical Corp. for an order, pursuant to CPLR 3212, extending its time to move for summary judgment and for summary judgment dismissing the complaint and any cross-claims as against said defendant.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
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Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendant Welsbach for an order, pursuant to CPLR 3212, extending its time to move for summary judgment and for summary judgment dismissing the complaint and any cross-claims as against said defendant is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a cracked, broken and/or uneven section

of the sidewalk located on the corner of 108th Street and 62nd Drive in Queens County.

This action was commenced against The City and Grosvenor on May 7, 2004. Pursuant to the compliance conference order issued by Justice Martin E. Ritholtz on October 17, 2005, plaintiff was directed to serve and file a note of issue and certificate of readiness on or before April 21, 2006. On March 28, 2006, an amended summons and complaint adding Welsbach as a defendant was served upon all defendants, pursuant to the terms of a stipulation dated February 10, 2006, so-ordered by Justice Ritholtz. A note of issue and certificate of readiness were served upon defendants, including Welsbach, on April 18, 2006. Welsbach interposed an answer with discovery demands on May 11, 2006. The instant summary judgment motion was served on December 20, 2006.

Counsel for Welsbach contends that the instant summary judgment motion is timely because its office was not served with the note of issue and that plaintiff's counsel never apprised Welsbach's attorney that a note of issue had been filed. In addition, Counsel contends that they did not receive the deposition transcripts of the parties taken before Welsbach was added as a party, as demanded, until October 30, 2006. Counsel contends that Welsbach could not move for summary judgment because it did not know the exact location of the alleged trip and fall until it had the opportunity to review plaintiff's deposition transcript. Therefore, argues counsel, Welsbach has shown good cause for not moving for summary judgment within the 120-day period.

Pursuant to CPLR 3212(a), a motion for summary judgment must be made within 120 days after the note of issue is filed, unless a different date is set by the Court, "except with leave of court on good cause shown." "Good cause" means a satisfactory explanation for the delay in making the motion, rather than a showing of merit and lack of prejudice (see Brill v. City of New York, 2 NY 3d 648 [2004]).

Since the note of issue was filed on April 18, 2006, a summary judgment motion would have had to be made no later than August 16, 2006. The instant motion was made on December 20, 2006, 126 days past the deadline. Welsbach has failed to demonstrate good cause for its untimely motion.

Plaintiff served the note of issue and certificate of readiness on Welsbach on April 18, 2006 and Welsbach does not deny that it was so served. Counsel does not state that they were not made aware of the note of issue by Welsbach. If counsel was not aware of the filing of the note of issue, no explanation is

proffered as to why they were not apprised of the note of issue by their client. Counsel for Welsbach merely states that they were not served with the note of issue and were not advised by plaintiff's counsel that such had been filed and that they have now obtained a copy of the note of issue.

Counsel's contention that they were unable to make a motion for summary judgment until they had reviewed plaintiff's deposition transcript because they did not know the exact location of the alleged accident is disingenuous. Counsel for Welsbach annexes to its motion a copy of plaintiff's bill of particulars in response to Welsbach's demand therefor. It is dated June 28, 2006 and indicates that it was sent to counsel for Welsbach. Although there is no affidavit of service thereof, it is Welsbach's attorney who annexes the bill of particulars to its motion papers and there is no statement that same was not, in fact, served upon counsel's office as indicated. The bill of particulars states the exact date and location of the alleged occurrence, to wit: at 8:05 P.M. on October 16, 2003 at the sidewalk on the corner of 108th Street and 62nd Drive, adjacent to 105-55 62nd Drive, Forest Hills, County of Queens. Indeed, Welsbach's motion for summary judgment is based precisely upon this information and is supported by the affidavits of its project manager, who stated categorically that Welsbach performed work only to traffic signals and did not do any work on the sidewalk at the corner of 108th Street and 62nd Drive adjacent to 105-55 62nd Drive. Therefore, since Welsbach knew of the exact location of the occurrence since at least early July 2006, no good cause is proffered as to why it waited until December 20, 2006 to move for summary judgment.

Accordingly, Welsbach's motion must be denied.

Dated: April 9, 2007

KEVIN J. KERRIGAN, J.S.C.