

Samuels v Consolidated Edison Co. of N.Y., Inc.

2010 NY Slip Op 30468(U)

March 5, 2010

Supreme Court, New York County

Docket Number: 107142/04

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. *in etia*

PART 10

Index Number : 107142/2004

SAMUELS, WILLIAM C.

vs

CONSOLIDATED EDISON COMPANY

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

the following papers, _____ in this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED
MAR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 05 2010

HON. JUDITH J. GISCHE J.S.C.
JSG

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 10

-----X

William C. Samuels,

Plaintiff,

-against-

Consolidated Edison Company of New York,
Inc.,

Defendant.

-----X

Consolidated Edison Company of New York,
Inc.,

Third-Party Plaintiff,

-against-

Roadway Contracting, Inc.,

Third-Party Defendant.

-----X

Consolidated Edison Company of New York,
Inc.,

Second Third-Party Plaintiff,

-against-

Alex R. Fradkoff, individually, Alex R. Fradkoff, Inc.,
Howard R. Goldin, individually, Howard R. Goldin
Architect, P.C., Leithlong Construction Corporation
and Theodore Wagner Plumbing & Heating,

Second Third-Party Defendants.

-----X

DECISION/ORDER

Index No.: 107142/04

Seq. No.: 004

Present:

Hon. Judith J. Gische

J.S.C.

Third-Party Index No.:

590831/04

Second Third-Party Index No.:

590089/08

FILED
MAR 09 2010
NEW YORK
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Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
2 nd Third-Party plttf Wagner's n/m (3212) w/ CK affirm, exhs	1
2 nd Third-Party def opp to Wagner's motion w/ WTaffirm, exhs	2
Wagner reply w/ CK affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for property damage that plaintiff, William C. Samuels, claims to have sustained as a result of defendants' negligence. Second Third-Party Defendant, Theodore Wagner Plumbing & Heating ("Wagner"), moves, pursuant to CPLR § 3212, for summary judgment against Second Third-Party Plaintiff, Consolidated Edison Company of New York, Inc. ("Con Ed") dismissing the Second Third-Party complaint against it.

Plaintiff filed its Note of Issue on July 17, 2009. Thereafter, Con Ed moved to vacate the Note of Issue and to extend Con Ed's time to make a dispositive motion. This court denied that motion for reasons set forth in its decision/order dated December 3, 2009. Wagner submitted an affirmation in partial opposition to Con Ed's motion, in which Wagner joined in Con Ed's request to extend the time to file dispositive motions. However, Wagner did not itself cross-move or make its own motion.

Wagner argues that although more than 120 days have passed since the note of issue was filed, it has shown good cause for why it did not bring this motion in compliance with the time requirements of CPLR § 3212. In the alternative, Wagner seeks an order severing the Second Third-Party action.

Con Ed opposes Wagner's motion as being untimely. None of the other parties

have taken a position with respect to Wagner's motion, although due proof of service on them has been provided to the court.

Arguments

Wagner does not dispute that it brought this motion well after the time limitations set forth in CPLR § 3212 had passed (i.e. in excess of 120 days after the filing of the note of issue). Wagner nonetheless contends that the instant motion for summary judgment should be decided because Wagner has shown good cause and its motion for summary judgment is meritorious and should, therefore, be granted. Wagner argues that its delay and lateness in filing the instant motion was a result of Con Ed's motion to vacate the note of issue and stay the time to file dispositive motions. Wagner claims it refrained from making this motion because Wagner was waiting for the court to render a decision on Con Ed's motion. Wagner contends that the numerous adjournments and this court's denial of Con Ed's motion, delayed in Wagner's ability to bring a timely motion for summary judgment. In the alternative, Wagner contends that the Second Third-Party action, which is also a cause of action for negligence, should be severed. Wagner does not present any arguments to support its request for severance.

Con Ed argues, in its opposition, that allowing Wagner to file a dispositive motion after the 120 day period had expired, when it did not allow Con Ed to do so after timely making its own motion for more time, would be unfair, if not prejudicial to Con Ed. Con Ed further contends that Wagner has not shown good cause for why it could not file in the 120 day period. Con Ed is also opposed to having the Second Third-Party action severed.

Discussion

The arguments Wagner has made are indistinguishable from those made before, and decided by, the Court of Appeals in Brill v. City of New York, 2 NY3d 648 (2004) and other courts in the First Department following the decision in Brill. (Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 (2004); Perini v. City of New York, 16 AD3d 37 (1st Dept 2005); Brown v. City of New York, 6 Misc3d 1017(a) (Sup Ct 2005)).

The deadlines set forth in section 3212 of the CPLR are not discretionary, but are clear cut mandates enacted by the legislature: "such motion *shall* be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown . . ." (emphasis added). Good cause requires a "satisfactory explanation for untimeliness -- rather than permitting simply meritorious, nonprejudicial filings, however tardy . . . -- no excuse at all, or a perfunctory excuse, cannot be 'good cause.'" Brill, 2 NY3d 648 (2004), *supra*.

Wagner could have moved for summary judgment after Con Ed brought its motion to vacate the note of issue and extend the time to make dispositive motions. Wagner, however, made a tactical decision not to do so, instead opting to wait for this Court's decision on Con Ed's motion. The fact that this court denied Con Ed's motion to vacate and extend is not "good cause" for the court to consider Wagner's late motion. This court cannot, nor will it, disregard the precatory language of CPLR § 3212, or the significant body of law that has developed since Brill.

Wagner's arguments do not satisfy the requirement of having to show "good cause." Brill v. City of New York, 2 NY3d at 653. Rather, the "good cause" component of this statute requires an explanation for why the motion was not made timely. Brill, 2

NY3d 648 (2004), *supra*.

Therefore, the court will not consider Wagner's motion for summary judgment because it was brought more than 120 days after the Note of Issue was filed and Wagner has not set forth good cause why it did not move timely.

In the alternative, Wagner requests an order severing the Second Third-Party action. Wagner has set forth no basis for this request and the facts do not support severance.

Conclusion

Second Third-Party Defendant's, Theodore Wagner Plumbing & Heating, motion for summary judgment and for severing the Second Third-Party Action is denied for the reasons stated above. Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 5, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
MAR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE