

Soto v Port Auth. of N.Y. & N.J.
2014 NY Slip Op 30134(U)
January 17, 2014
Supreme Court, New York County
Docket Number: 103690/2011
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUDGE DORIS LING-COHAN
Justice

PART 36

Index Number : 103690/2011
SOTO, ANGELO
vs.
PORT AUTHORITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is *by defendant Port Authority of New York and New Jersey for Summary judgment is denied, in accordance with the attached memorandum decision.*

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

FILED
JAN 22 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/17/14

, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

JUDGE DORIS LING-COHAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
ANGELO SOTO,

Plaintiff,

-against-

Index No. 103690/11

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, METROPOLITAN TRANSPORTATION
AUTHORITY, MTA CAPITAL CONSTRUCTION
COMPANY, J.F. SHEA CONSTRUCTION, INC.,
SKANSKA USA CIVIL INC., SKANSKA USA CIVIL
NORTHEAST INC., SCHIAVONE CONSTRUCTION CO.
LLC and S3-II TUNNEL CONSTRUCTORS, J.V.,

Defendants.

-----X

METROPOLITAN TRANSPORTATION AUTHORITY, MTA
CAPITAL CONSTRUCTION COMPANY, J.F. SHEA
CONSTRUCTION, INC., SKANSKA USA CIVIL
INC., SKANSKA USA CIVIL NORTHEAST INC.,
SCHIAVONE CONSTRUCTION CO. LLC and S3-II
TUNNEL CONTRACTORS, J.V.,

Third-Party Plaintiffs,

Third-Party Index
No. 590738/11

-against-

TOTAL ELECTRICAL CONSTRUCTION CO., INC.,

Third-Party Defendant.

-----X

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,

Third-Party Plaintiff,

Third-Party Index
No. 590431/12

-against-

THE CITY OF NEW YORK, INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA, and ASPEN
INSURANCE UK LIMITED,

Third-Party Defendants.

-----X

Doris Ling-Cohan, J. :

In this action for money damages for bodily injuries suffered by plaintiff, defendant The Port Authority of New York and New Jersey (PA) moves: (1) for leave to make a summary judgment motion, within 120 days of plaintiff's filing of his note of issue, and (2) for summary judgment dismissing the complaint.

THE ISSUE OF PA'S MOTION'S TIMELINESS

PA contends that this court should grant it leave to make an untimely summary judgment motion because (1) the note of issue was not served on defendants prior to being filed with the court; (2) defendants and PA are prejudiced in their ability to file a timely motion to strike the note of issue and a timely summary judgment motion; and (3) this motion should be considered because it is made within 120 days of the filing of the note of issue.

The note of issue in this case was filed on December 13, 2012. The affidavit of service of the note of issue indicates that it was served on defendants on December 12, 2012. However, PA asserts that it was served later, that the envelope within which the note of issue was sent to defendants' counsel is

postmarked December 27, 2012, approximately two weeks after the note of issue was filed.

Without citing any statute or case law for its position, PA insists that this irregularity makes the note of issue a nullity, and that PA and defendants are prejudiced in their ability to file a timely motion to strike the note of issue and a timely motion for summary judgment.

PA is mistaken. Assuming that the note of issue was in fact served on defendants on December 27, 2012, such date would not impair PA's time to file a motion to vacate the note of issue. The Uniform Rules of the Trial Courts state that:

"Within 20 days after service of a note of issue and certificate of readiness, any party to the action ... may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect... . [emphasis added]"

(Uniform Rules of Trial Courts § 202.21 [e]). Thus, if PA had chosen to make a motion to vacate the note of issue, it had more time, not less, to do so. Nevertheless, it did not file such a motion.

According to the rules of this Part, dispositive motions must be made within 60 days of the filing of the note of issue. There is no question that the date the note of issue was

filed with the court, was December 13, 2012. PA gives no reason for its failure to make a timely summary judgment motion.

In 2004, the Court of Appeals decided the case of *Brill v City of New York* (2 NY3d 648, 652 [2004]), which held that

"[w]e conclude that 'good cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the [summary judgment] motion -- a satisfactory explanation for the untimeliness -- rather than simply permitting meritorious, nonprejudicial filings, however tardy. ... No excuse at all, or a perfunctory excuse, cannot be 'good cause'."

The Court of Appeals has also directed that "statutory time frames ... are not options, they are requirements, to be taken seriously by the parties" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004], citing *Brill*). Moreover, "[i]n the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment [internal quotation marks and citations omitted]" (*Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796, 796 [2d Dept 2011]).

PA has failed to make a timely motion for summary judgment, and has given no excuse for its delay. The court must decline to consider PA's motion.

Lastly, PA's contention that this motion should be considered because it is made within 120 days of the filing of the note of issue (actually, it is made on the 124th day) is

without merit. CPLR 3212 (a) provides that the court may set a date after which no summary judgment motion may be made, and only if no such date is set by the court, is it possible to make the motion no later than 120 days after the filing of the note of issue. This Part has set 60 days as the time within which a summary judgment motion may be made. The 120-day option does not apply in this matter.

THE SUMMARY JUDGMENT MOTION

In light of the discussion above, the court need not consider the part of PA's motion which seeks summary judgment dismissing the complaint.

Nevertheless, even if this court were to consider PA's untimely motion for summary judgment, the motion would be denied as PA failed to conclusively establish that it did not own the area where the subject accident occurred, or supervise the activities where the accident occurred.

It is well settled that 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 demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Failure to make such prima facie showing requires a denial of the motion, regardless of the

sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Center, supra*, at p 853.

Here, without supporting documentation, Paul Gembara, the Principal Property Specialist in the Property Records/ Legal Graphics Group of the Law Department of PA, and the Custodian of the Real Property Maps maintained by PA, concluded that "[b]ased upon the testimony of the parties, the photographs used as deposition exhibits and the pleadings in this action ... [and] [b]ased upon [his] review of Port Authority records, ... [PA] did not own, operate, maintain, manage, design or repair the Tunnel Box where plaintiff's alleged incident took place." Frowley Affirmation in Opposition, Exh. Y, Gembara Affidavit, ¶¶4-5. Moreover, the easement agreement between PA and the City, as well as the entry agreement between PA and the MTA, specifically refers to work being done in some of PA's subsurface property. Thus, even if the court were to consider PA's late motion for summary judgment, PA has failed to establish entitlement to such judgment as a matter of law, as issues of fact exist as to ownership and supervision of the area where the accident occurred.


CONCLUSION

Accordingly, it is

ORDERED that the motion of The Port Authority of New York and New Jersey is denied; and it is further

ORDERED that within 30 days of entry of this order,
plaintiff shall serve a copy upon all parties, with notice of
entry.

Dated: 1/17/14



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Soto.port authority kathleen bunyar.wpd

FILED

JAN 22 2014

NEW YORK
COUNTY CLERK'S OFFICE