

Benedict v City of New York

2014 NY Slip Op 30653(U)

March 17, 2014

Sup Ct, New York County

Docket Number: 107332/07

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE
Justice

PART 12

Index Number : 107332/2007
BENEDICT, DIANE
vs.
CONSOLIDATED EDISON
SEQUENCE NUMBER : 008
RENEWAL

INDEX NO. 107332/07
MOTION DATE _____
MOTION SEQ. NO. 008

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____

Answering Affidavits — Exhibits _____ | No(s) _____

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

FILED

MAR 18 2014

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NEW YORK

**MOTION ~~IS~~ DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

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

Dated: 3/17/14

BA
BARBARA JAFFE
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
DIANE BENEDICT,

Plaintiff,

- against -

THE CITY OF NEW YORK, *et al.*,

Defendants.

-----X
CONSOLIDATED EDISON COMPANY, INC.,

Third-Party Plaintiff

-against-

NICO ASPHALT, INC.,

Third-Party Defendant

-----X
BARBARA JAFFE, J.:

For plaintiff:

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Corporation Counsel
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Plaintiff moves for leave to renew her opposition to defendants motions for summary judgment. Defendants oppose.

FILED

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I. BACKGROUND

On June 14, 2006, plaintiff was injured when she allegedly tripped on a utility cover located at the intersection of East 46th Street and Madison Avenue in Manhattan. She thereafter commenced this action against defendants, Consolidated Edison Company of New York (Con Ed), and others. Metro North moved, without opposition, for summary judgment, offering the

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NEW YORK

examination before trial (EBT) testimony and affidavit of its employee and the affidavit of its general superintendent who denied that Con Ed had installed, owned, operated, repaired, maintained, or used the cover or vaults beneath the cover. By decision and order dated March 19, 2009, another justice of this court held that Metro North had established its *prima facie* entitlement to summary judgment and granted the motion. (Salk Aff., Exh. E).

Some time later, City moved for summary judgment, submitting the affidavit of its employee, Victor Green, who, following a December 1, 2011 on-site inspection, concluded that the cover was neither owned nor maintained by City, but by Con Ed. (Wenchell Aff., Exh. F). It also offered the EBT testimony of the employee of third-party defendant Nico Asphalt, Inc. (Nico) who identified the cover as one used by the Metropolitan Transportation Authority (MTA). By decision and order dated September 20, 2012, I held that City had demonstrated, *prima facie*, that it did not own the cover, and while triable issues existed as to whether Con Ed or MTA was its owner, plaintiff had submitted no evidence that it was City, nor had it identified what discovery remained that would raise an issue as to City's liability. (Nacchio Aff., Exh. A).

At an EBT conducted on April 20, 2012, a Con Ed employee admitted that Con Ed owns the gas lines below the cover. (Wenchell Aff., Exh. G).

At an EBT conducted on February 11, 2013, Green was shown a photograph of the cover taken during his inspection, and indicated that the cover "belongs to the MTA, this has something to do with Metro North Transit." (Salk, Exh. I).

II. CONTENTIONS

Plaintiff argues that Green's more recent contradiction of the facts he swore to in his earlier affidavit would have warranted the denial of City's motion for summary judgment both by

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Aff., Sak Reply Aff.). City contends that the discrepancy has no impact on its *prima facie* case. (Nacchio Aff.). Metro North maintains that Green's deposition, taken years after his inspection, is unreliable and is otherwise contradicted by overwhelming evidence, that there is no reasonable justification for plaintiff's failure to depose Green earlier, and that, in any event, Metro North and MTA are separate entities. (Wenchell Aff.).

Metro North relies on the deposition of the Con Ed employee admitting ownership of the cover, and offers the affidavit dated May 21, 2013 of its engineer who had visited the site and, upon his review of piping plans and footprint maps, concludes that Metro North does not maintain the cover or utilities running below, nor does it have access to the area from any of its nearby facilities. (*Id.*, Exh. H). The cover bears a Con Ed logo. (*Id.*, Exh. 3).

III. ANALYSIS

Although the 2009 decision was rendered on default, as defendants do not object to plaintiff's failure to move for an order vacating the default, I will address the merits of the motion to renew. (*See in re Gavrin*, 294 AD2d 185 [1st Dept 2002] [motion to renew or reargue unopposed order should be deemed motion to vacate default]).

Pursuant to CPLR 2221(e), a motion for leave to renew shall be based on new facts not offered in the prior motion that would change the prior determination, and must contain a reasonable justification for failure to present such facts. Whether to grant leave to renew a prior motion rest within the sound discretion of the trial justice. (*Hines v New York City Tr. Auth.*, 112 AD3d 528 [1st Dept 2013]).

Green's affidavit was obtained after the decision was rendered on Metro North's motion, and plaintiff could not have anticipated that Green would later contradict the statements he made

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therein. Thus, plaintiff cannot be faulted for failing to depose Green. I thus grant plaintiff leave to renew opposition to both decisions. (*See Metcalfe v City of New York*, 223 AD2d 410 [1st Dept 1996] [renewal proper when evidence unknown at time of original summary judgment motion later obtained during other defendants' depositions])). However, I adhere to the prior determinations for the following reasons.

Green's 2013 testimony may not be viewed without also considering Green's earlier affidavit wherein he concluded that the cover was Con Ed's. The testimony of the Con Ed witness supports Green's first conclusion as does Metro North's engineer. Accordingly, Metro North is entitled to summary judgment. (*See Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57 [1st Dept 2006] [defendant entitled to summary judgment upon establishing it did not occupy, control, or make special use of premises])). Green's testimony suggesting that Metro North may be liable is too vague to raise a triable issue. (*See Richards v Kahn's Realty Corp.*, 114 AD3d 475 [1st Dept 2014] [opponent's vague, conclusory testimony fails to raise triable issue]; *Amini v Arena Const. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013] [rejecting expert affidavit submitted in opposition to motion as vague, not supported by evidence])).

In granting City's motion for summary judgment, I relied not only on Green's affidavit but also on the deposition of Nico's witness. Thus, Green's 2013 testimony would not have changed my decision. (*See Jackson, supra*).

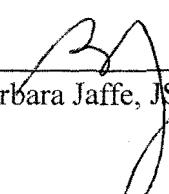
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to renew opposition to defendant Metro North Commuter Railroad, d/b/a Metro North Railroad's and defendant City of New York's

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motions for summary judgment is granted, and upon renewal, I adhere to the prior determinations.

ENTER:



Barbara Jaffe, JSC

DATED: March 17, 2014
New York, New York

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