

Samuels v Consolidated Edison Co. of N.Y.
2014 NY Slip Op 33645(U)
December 23, 2014
Supreme Court, New York County
Docket Number: 107142-2004
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

GEORGE J. SILVER

PRESENT: _____
Justice

PART 10

Index Number : 107142/2004
SAMUELS, WILLIAM C.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

vs
CONSOLIDATED EDISON COMPANY

Sequence Number : 008

REARGUMENT/RECONSIDERATION

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

FILED
DEC 24 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

RECEIVED
AUG 05 2014

RECEIVED
DEC 23 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

DEC 23 2014

Dated: _____

George J. Silver

J.S.C.

GEORGE J. SILVER

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE Silver
FOR THE FOLLOWING REASON(S): Motion to require his 4/14 decision.
HON. ARTHUR F. ENGORON 8/4/14

GEORGE J. BEEVER

THE ABOVE NAMED PERSONS ARE BEING
RETURNED TO THE U.S. IN ACCORDANCE WITH

APPROVED FOR RELEASE

FILED

RECEIVED THROUGH

DEC 28 1964

GEORGE J. BEEVER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
WILLIAM C. SAMUELS,

Plaintiff,

Index No. 107142-2004

-against-

DECISION/ORDER

Motion Sequence 008

CONSOLIDATED EDISON COMPANY OF
NEW YORK,

Defendant.

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause, Affidavits & Exhibits Annexed.....	<u>1, 2, 3</u>
Answering Affirmation, Exhibits & Memorandum of Law.....	<u>3, 4</u>
Replying Affirmation & Exhibits.....	<u>5</u>

In this property damage action, defendant Consolidated Edison Company of New York, Inc. (Con Ed) moves pursuant to CPLR § 2221 for an order granting it leave to reargue this court's decision and order dated April 11, 2014 and, upon reargument, dismissing plaintiff William Samuels' (plaintiff) complaint. In the alternative, Con Ed moves for an order granting it leave to move for summary judgment more than 120 days after the filing of note of issue and upon the granting of such leave dismissing plaintiff's complaint on the ground that there are no triable issues of fact. Plaintiff opposes the motion.

Plaintiff brought this action against Con Ed on May 7, 2004, alleging negligent excavation of a sidewalk outside of plaintiff's town home, located at 139 East 19th Street, New York, New York. As a result of the allegedly negligent excavation, plaintiff alleges the premises was damaged due to flooding and water infiltration. In 2008, after plaintiff testified at his deposition that he sued certain third-parties for damage to his property in a separate action, Con Ed commenced a third-party actions against Roadway Contracting, Inc. ("Roadway") and a second third-party action against Alex Fradkoff ("Fradkoff"), Howard Goldin ("Goldin"), Leithlong Construction Corporation ("Leithlong"), and Wagner Plumbing & Heating ("Wagner"). Con Ed was unable to serve Fradkoff, Wagner answered, and Goldin and Leithlong moved to dismiss the third-party complaint pre-answer based upon a release given to them by plaintiff in the separate litigation wherein plaintiff was paid a settlement of \$1.3 million. The

court granted Goldin and Leithlong's motion to dismiss in an order dated October 14, 2008 wherein the court found that the plaintiff had unequivocally released those parties from any and all claims for damages arising out of the flooding and resulting damages to plaintiff's basement. Plaintiff thereafter filed note of issue pursuant to a directive from the court. Con Ed moved to vacate the note of issue and to extend its time to make a summary judgment motion. In an order dated December 3, 2009, the court declined to strike the note of issue or extend the time to make a dispositive summary judgment motion. The action was then scheduled for jury selection. Prior to jury selection Con Ed made a pre-trial oral application to dismiss plaintiff's complaint which was granted. The Appellate Division, First Department reversed in an order dated June 28, 2012 wherein it held that the court improperly heard Con Ed's oral application which was in substance a motion for summary judgment and was untimely (*Samuels v Consolidated Edison Co. of N.Y., Inc.*, 96 AD3d 685 [1st Dept 2012]).

Con Ed then moved pursuant to CPLR § 3025 [b] to amend its answer to assert certain affirmative defenses and to dismiss plaintiff complaint pursuant to CPLR § 3211 [a] [1], [5] and [7]. In an order dated April 11, 2014 this court granted Con Ed's motion to amend but denied its motion to dismiss on the ground that the motion to dismiss, like Con Ed's previous oral application to dismiss, was in actuality a motion for summary judgment and as such was untimely pursuant to the June 28, 2012 order of the Appellate Division. In moving to reargue, Con Ed contends that its motion was not one for summary judgment but was a motion to dismiss pursuant to CPLR § 3211 [a] [5] predicated upon the release provided by plaintiff in the separate litigation and failure to state a cause action based upon General Obligations Law § 15-108 and, therefore, the court should have resolved the motion on its merits and dismissed plaintiff's complaint.

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). The court deemed Con Ed's motion to dismiss as one for summary judgment since it sought precisely the same relief as Con Ed's previous oral application to dismiss, which the Appellate Division held was an untimely summary judgment motion. Because the motion to dismiss sought the same relief on the same grounds as Con Ed's previous untimely oral application for summary judgment, the court was not required to give the parties notice that it was treating the motion to dismiss as one for summary judgment. Where, as here, Con Ed deliberately charted a summary judgment course by laying bare its proof, submitting extrinsic documentary evidence and evidentiary affidavits setting forth the entire chronology and course of events leading up to the action, notice is not strictly required (*O'Dette v Guzzardi*, 204 AD2d 291 [2d Dept 1994; *Wiesen v N.Y. Univ.*, 304 AD2d 459 [1st Dept 2003]). Because Con Ed had previously moved for summary judgment on the same grounds upon which it predicated its motion to dismiss, it cannot claim to be prejudiced or surprised by the fact that the court treated the motion to dismiss as a summary judgment motion. Since the court did not misapprehend the law in treating Con Ed's motion to dismiss as an untimely motion for summary judgment, Con Ed's motion to reargue is denied.

Con Ed's motion for leave to make a summary judgment motion more than 120 days after the filing of note of issue is also denied. Con Ed previously moved for an extension of time to

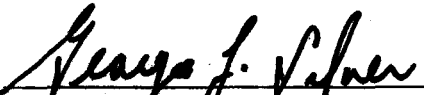
move for summary judgment which was denied and there is no basis for disturbing that prior ruling. In accordance with the foregoing, it is hereby

ORDERED that defendant Consolidated Edison Company of New York's motion is denied in its entirety; and it is further

ORDERED that the parties are to appear in Part 40 for a pre-trial conference on February 4, 2015 at 9:30 a.m. in room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that movant is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

Dated: **DEC 23 2014**
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER

FILED
DEC 24 2014
NEW YORK
COUNTY CLERKS OFFICE