

Fennel v City of New York

2016 NY Slip Op 30546(U)

April 4, 2016

Supreme Court, New York County

Docket Number: 153196/14

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 5

JENNIFER FENNEL

INDEX NO. 153196/14

MOT. DATE

- v -

MOT. SEQ. NO. 002, 003

THE CITY OF NEW YORK et al.

The following papers, numbered 1 to 13 were read on this motion to/for SJ (002) and strike/compel (003)
Notice of Motion/Petition/O.S.C. - Affidavits - Exhibits No(s) 1, 8
Notice of Cross-Motion/Answering Affidavits - Exhibits No(s) 2, 3, 4, 9, 10, 11, 12
Replying Affidavits No(s) 5, 6, 7, 13

This personal injury action arises from plaintiff's trip and fall. In motion sequence number 002, defendant Skyline Scaffolding Group ("Skyline") moves for summary judgment in its favor. Defendants Lexington Towers Company, LP., Lexington Towers GP Co, LLC (collectively "Lexington"), Schneider & Schneider, Inc. and Schneider & Schneider Management, LLC (collectively "Schneider"), DF Restoration, Inc. ("DF Resto") and plaintiff oppose the motion. In motion sequence number 003, plaintiff moves to strike Lexington and defendant The City of New York's (the "City") answers, compelling the remaining defendants to appear on a date certain for deposition and extending her time to file note of issue. DF Resto opposes plaintiff's motion to the extent that she seeks sanctions against it and Lexington, Skyline, the City and defendant Total Safety Consulting ("TSC") also oppose plaintiff's motion. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined but note of issue has not yet been filed; therefore summary judgment relief is available (CPLR 3212[a]; Brill v. City of New York, 2 NY3d 348 [2005]). The court's decision follows.

Plaintiff claims that on August 21, 2013, she tripped and fell in front of the building located at 160 East 88th Street due to a raised/broken portion of the sidewalk. Plaintiff further claims that due to construction and/or renovation work at the subject location, the sidewalk narrowed, "thereby enhancing and magnifying the dangers of the tripping hazard caused by the raised/broken portion of sidewalk in issue." Since the motions were orally argued, plaintiff has discontinued her claims against the City.

The subject premises was owned by Lexington and managed by Schneider. The remaining defendants were contractors and/or sub-contractors retained to perform work at the subject location. In connection with its motion for summary judgment, Skyline claims that it was hired by DF Resto to erect a sidewalk shed at 160 East 88th Street, and that it removed same on May 13, 2013. Skyline further claims that it cannot be liable for plaintiff's accident because the sidewalk shed was removed well before

Dated: April 4, 2016

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

plaintiff's accident and otherwise did not cause or create the two inch elevation which plaintiff's allegedly tripped upon. In turn, plaintiff argues that since none of the defendants, except for the City, have been deposed yet, she is unable to oppose the motion. Specifically, plaintiff argues that further discovery may lead to evidence on the issue of what each defendants' relation to the subject premises was, the work each defendant performed, and their relation in connection with the defective condition.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court finds that Skyline has not met its burden on this motion. Skyline has presented the affidavit of Sal Rexha, its Director of Operations, who claims, in pertinent part, that Skyline "did not create or worsen the conditions shown" in photographs of the defective condition. Mr. Rexha further claims that "[t]he sidewalk shed installation did not cause any dangerous, hazardous or perilous condition on the [subject] sidewalk[,]... did not cause the sidewalk to become depressed, broke, uneven dangerous or hazardous[and] ... did not cause, create or worsen the two-inch elevated condition that plaintiff claims she tripped on." Mr. Rexha's factual averments do not demonstrate entitlement to judgment in Skyline's favor as a matter of law because his affidavit is based upon his "familiar[ity]" with Skyline's operations and review of plaintiff's complaint, bill of particulars and deposition testimony and his claims are self-serving and unsubstantiated. Moreover, plaintiff is entitled to depose a Skyline witness with personal knowledge of the scope of Skyline's work to determine what work, if any, Skyline performed which may have caused, created and/or contributed to the allegedly defective condition. Accordingly, motion sequence number 002 is denied.

The court now turns to motion sequence number 003. At the outset, as for plaintiff's request for relief concerning the City, since plaintiff has discontinued her claims against the City, those claims for relief are denied as moot insofar as plaintiff seeks discovery directly from the City.

In December 2014, plaintiff served upon all defendants a Combined Demand for Discovery and Inspection and a Notice to Produce. Plaintiff served another Notice to Produce addressed to Lexington and Schneider (collectively "Lexington/Schneider") on October 26, 2015. Lexington/Schneider served a "Response to the Combined Demands of the Plaintiff" dated January 19, 2015, but did not respond to plaintiff's first Notice to Produce. Further, a Case Scheduling Order dated May 28, 2015 ("CSO") required Lexington/Schneider to provide "... copies of maintenance and repair records for 2 years prior to and including the date of the occurrence." A compliance conference order dated August 11, 2015 ("8/11/15 Order") required Lexington/Schneider to respond to plaintiff's first Notice to Produce within thirty days. Lexington/Schneider provided a "Response to Scheduling Order" dated August 21, 2015 wherein they stated that they "have complied with all outstanding discovery demands of the parties." Meanwhile, plaintiff maintains that Lexington/Schneider "ha[s] not provided a single item of documentary discovery..." In a response dated November 6, 2015, Lexington/Schneider indicated that they are "presently conducting a search to determine the name and/or addresses" of the superintendent and porters at the building.

The CSO directed that depositions take place on July 9, 2015. Only plaintiff's deposition took place that day. The CSO further directed that any party deposition not held on July 9, 2015 was to be rescheduled for a date within four weeks. Plaintiff has provided a copy of a letter dated July 14, 2015 wherein plaintiff's counsel attempted to schedule defendants' deposition. The 8/11/15 Order directed that the City's deposition take place on October 15, 2015, Lexington/Schneider on October 21, 2015, Skyline and DF Resto on November 12 2015 and TSC and third-party defendant Vesta Consulting Group ("Vesta") on November 19, 2015. While the City appeared for the deposition, none of the other depositions went forward. Plaintiff's counsel sent a letter to all parties, wherein he "confirm[ed] that the court ordered depositions of [Lexington/Schneider] that were to take place on Wednesday, October 21, 2015, have been adjourned by counsel for said parties due to the reported inability to produce witnesses, and will not take place on Thursday, November 12, 2015 thereof. " In that letter, plaintiff's counsel suggested that the remaining defendants' depositions take place 1-2 weeks later than originally scheduled.

Plaintiff's counsel contacted Lexington/Schneider's counsel on November 11, 2015 to confirm the next day's deposition of their witnesses. Plaintiff's counsel, Jeffrey I. Schwimmer, Esq., states as follows: At that time, an "Elena" from that firm ultimately advised that she was 'told by her attorney that they do not have any witnesses to produce'. And while plaintiff in no way considers it to be a valid posture to take, all other counsel consequently took the position that they would not produce their clients until the party(ies) preceding theirs in the caption have been deposed first."

Plaintiff argues that it is entitled to an order striking Lexington/Schneider's answer and compelling all outstanding depositions. Lexington/Schneider contends that plaintiff has failed to demonstrate willful and contumacious conduct on their part. Lexington/Schneider's counsel, Jordan Masiakos, Esq., claims that in the first instance, Lexington/Schneider has responded to plaintiff's discovery requests. Further, Attorney Masiakos claims that "[s]oon after serving the [November 6, 2015] response, your affirmant's office learned that the Defendant Schneider was no longer in business and had in fact sold off all of its holdings and interests in the subject premises a little over a year ago." Attorney Masiakos further claims that Attorney Schwimmer did not attempt to contact his office prior to filing the instant motion. Attorney Masiakos further claims that had he been contacted, he would have informed Attorney Schwimmer "that we were having a difficult time trying to locate a knowledgeable witness to produce and in obtaining the requested records." Attorney Masiakos further claims that although an investigator was hired to "track down a witness with knowledge of the subject premises and who was employed at the time of the plaintiff's alleged accident[]", "at this point in time contact has not been made with any of the former employees of the defendant Schneider."

"Although actions should be resolved on the merits whenever possible, a court may strike a pleading as a sanction against a party who refuses to obey an order for disclosure" (*Rodriguez v. United Bronx Parents, Inc.*, 70 AD3d 492 [1st Dept 2010] [internal citations omitted]; see also CPLR 3126[3]). A court may strike an answer only when the moving party establishes "a clear showing that the failure to comply is willful, contumacious or in bad faith" (*id.* quoting *Palmenta v. Columbia Univ.*, 266 AD2d 90 [1st Dept 1999]).

Here, the court finds that Lexington/Schneider has wholly failed to respond to outstanding discovery and appear for a deposition, and that this failure was willful and contumacious. There can be no dispute that Lexington/Schneider has not responded to the Notice to Produce. Indeed, Attorney Masiakos' claim that he only learned shortly after his clients' deposition was supposed to go forward on November 12, 2015 that Schneider "sold off all its holdings and interest in the subject premises a little over a year ago[]" poses several problems. First, Attorney Masiakos represents Schneider and Lexington, which in turn comprise four separate entities. Merely claiming in an affidavit that Schnieder is no longer in business does not address Lexington and Lexington's separate and distinct failure to provide discovery and appear for a deposition.

Moreover, Attorney Masiakos does not provide any facts or proof to substantiate the claims he's made. There is no proof that Schneider is defunct. Indeed, Attorney Schwimmer has come forward with proof that all four Lexington/Schneider entities are still "active" business entities according to the New York State Department of State. Further, the only affidavit provided by Lexington/Schneider in support of their opposition to plaintiff's motion is by Elena Georgotas, a paralegal for Attorney Masiakos' firm. In that affidavit, Elena makes an assertion similar to that made by Attorney Masiakos, to wit, "... our office learned that Schneider no longer was the property manager for the subject premises and held no interest in the building for approximately 1 year." These claims highlight the problem with lumping Schneider and Lexington together; the former was a property manager and the latter was the owner at the time of plaintiff's accident. It's unclear to the court if and when Schneider stopped managing the subject premises or if and when Lexington sold the building.

Here, plaintiff has established that the defendant's failure to meaningfully respond to the Notice to Produce or appear for a deposition was willful and contumacious given the length of time that has passed since the Notice to Produce was served, the CSO and the 8/11/15 Order were entered, and the second Notice to Produce was served. Attorney Masiakos' vague claims about an investigation targeting Lexington and/or Schneider's former employees are wholly unsubstantiated and therefore are insufficient to rebut plaintiff's showing.

Accordingly, the court will grant plaintiff's motion to the following extent. First, Lexington/Schneider will be given one final opportunity to either [1] respond meaningfully to plaintiff's Notice to Produce and produce a witness with personal knowledge within 60 days from the date of notice of entry of this decision/order; or [2] within 60 days from the date of notice of entry of this decision/order, Lexington/Schneider's counsel is directed to provide [a] proof that Lexington sold the building; [b] proof that Schneider is no longer the managing agent; [c] proof that both Lexington and Schneider are no longer in business; and [d] an affidavit from the investigator detailing the investigator's efforts to locate Lexington and Schneider's former employees, including any attempts made at contacting said former employees, and any other information which plaintiff could use to formulate a non-party subpoena(s). If Lexington/Schneider fails to comply with this order, plaintiff may file an affirmation of non-compliance with the court on notice, and the court will strike Schneider/Lexington's answer.

The court further grants plaintiff's motion to the extent that the remaining parties are directed to appear for depositions as follows: Skyline and DF Resto are to appear for deposition on May 11, 2016 and TSC and Vesta on May 18, 2016. Note of issue will be extended accordingly. Plaintiff's motion is otherwise denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 002 is denied without prejudice to renew upon the completion of depositions; and it is further

ORDERED that motion sequence number 003 is granted to the following extent:

Lexington/Schneider will be given one final opportunity to either [1] respond meaningfully to plaintiff's Notice to Produce and produce a witness with personal knowledge within 60 days from the date of notice of entry of this decision/order; or [2] within 60 days from the date of notice of entry of this decision/order, Lexington/Schneider's counsel is directed to provide [a] proof that Lexington sold the building; [b] proof that Schneider is no longer the managing agent; [c] proof that

both Lexington and Schneider are no longer in business; and [d] an affidavit from the investigator detailing the investigator's efforts to locate Lexington and Schneider's former employees, including any attempts made at contacting said former employees, and any other information which plaintiff could use to formulate a non-party subpoena(s). If Lexington/Schneider fails to comply with this order, plaintiff may file an affirmation of non-compliance with the court on notice, and the court will strike Schneider/Lexington's answer.

The remaining parties are directed to appear for depositions as follows: Skyline and DF Resto are to appear for deposition on May 11 2016 and TSC and Vesta on May 18, 2016.


And it is further . . .

ORDERED that the parties are directed to appear for a compliance conference on June 28, 2016 at 2:00 pm and plaintiff's time to file note of issue is extended to July 1, 2016.

ORDERED that motion sequence number 003 is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: April 4, 2016
New York, New York

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.