

Rodriguez v Consolidated Edison Co. of N.Y.

2020 NY Slip Op 33813(U)

November 17, 2020

Supreme Court, New York County

Docket Number: 109051/2010

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. W. FRANC PERRY **PART** **IAS MOTION 23EFM**

Justice

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ANGELA RODRIGUEZ,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., CONSOLIDATED EDISON, INC., NICO ASPHALT
PAVING, INC., TRIUMPH CONSTRUCTION CORP.

Defendant.

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INDEX NO. 109051/2010

MOTION DATE October 30,
2020

MOTION SEQ. NO. 010 011 012

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 010) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 41, 42, 43, 56, 57, 61

were read on this motion to/for RENEWAL.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 34, 35, 36, 37, 38, 39, 40, 44, 50, 51, 52, 53, 54, 55

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 45, 46, 47, 48, 49, 58, 59, 60, 62

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this personal injury action, in motion sequence number 010, plaintiff seeks to renew this court's prior decision and order, granting summary judgment to defendant Nico Asphalt Paving, Inc., ("Nico") and defendant Triumph Construction Corp. ("Triumph"). In motion sequence number 011, defendant Consolidated Edison Company of New York Inc. ("Con Ed"), seeks leave to renew its opposition to Triumph and Nico's motions for summary judgment and upon renewal to vacate this court's prior orders, which granted Nico and Triumph summary judgment and upon reargument dismissed Con Ed's third-party complaint and all cross claims.

In motion sequence number 012, defendant Con Ed seeks an order pursuant to CPLR §5015, vacating the Judgment and Decision of this Court dated September 23, 2019. The motions are consolidated for disposition.

The court presumes familiarity with the underlying facts and motion arguments. A motion to renew under CPLR 2221, is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention. (*Matter of Weinberg*, 132 AD2d 190, 209-210, 522 NYS2d 511 [1st Dept 1987], lv dismissed 71 NY2d 994, 524 NE2d 879, 529 NYS2d 277 [1988]). Movant must provide reasonable justification for the failure to present such facts on the prior motion. (CPLR 2221[e] [3]). "Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." (*Foley v Roche*, 68 AD2d 558, 568 418 N.Y.S.2d 588 [1st Dept 1979] [citations omitted]); (see also, *Farahmand v Dalhousie Univ.*, 96 AD3d 618, 619-620, 947 N.Y.S.2d 459 [1st Dept 2012]).

"[A] motion to renew is not a second chance freely given to parties *who have not exercised due diligence in making their first factual presentation*" (*Jovanovic v Jovanovic*, 96 AD3d 1019, 1020, 947 NYS2d 554 [2d Dept 2012] emphasis added); see also, *Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 891, 10 NYS3d 620 [2d Dept 2015]). " '[T]he Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion' " (*Cioffi v S.M. Foods, Inc.*, 129 AD3d at 891, quoting *Jovanovic v Jovanovic*, 96 AD3d 1019, 1020, 947 NYS2d 554 [2d Dept 2012]; see *Hlenski v City of New York*, 51 AD3d 974, 974-975, 858 NYS2d 789 [2d Dept 2008]).

Judged by these standards, plaintiff and Con Ed have failed to meet their heavy burden of proof in demonstrating a reasonable justification for their collective failure to present the new or additional facts they now claim warrants renewal of Nico's and Triumph's motions for summary judgement.

As the voluminous record before the court amply demonstrates, this case, involving an accident that occurred on July 13, 2009, has been pending for nearly a decade. The note of issue was filed on January 29, 2018, not November 22, 2017, as plaintiff states in the procedural history, wherein the plaintiff certified that all discovery had been completed and that the case was ready for trial. (NYSCEF Doc # 8; Doc # 9, Ex. Q). Thereafter, defendants/third-party defendants Nico and Triumph, moved for summary judgment, which motion was argued before this court on December 6, 2018, after the court granted plaintiff and Con Ed multiple extensions. The court granted summary judgment finding that defendants did not perform any work for Con Ed at the accident location identified by plaintiff. (NYSCEF Doc #24). Specifically, the court found that the evidence, consisting of extensive testimony of Con Ed and defendants' witnesses, taken over multiple days, and document discovery, clearly established that defendants performed certain construction work, at the direction of Con Ed, approximately 70 feet away from the location where plaintiff claimed to have fallen.

Nico and Triumph moved to reargue this court's December 6, 2018 decision, seeking dismissal of Con Ed's third-party complaint and cross claims for contribution and indemnity, as the discovery showed that defendants did not perform any work at plaintiff's accident site. Nico and Triumph's motions to reargue were granted on September 17, 2019. (NYSCEF Doc # 25).

Here, neither plaintiff nor Con Ed have provided a reasonable justification for their failure to present the "new" document at the time the earlier motions were made (see *Kio Seob*

Kim v Malwon, LLC, 155 AD3d 1017, 1018, 66 NYS3d 318 [2017]). To the extent plaintiff and Con Ed seek to assert such as "facts or materials in existence at the time of the original motion but not known or otherwise unavailable to the party seeking renewal" (see *Nesterenko v Starrett City Assoc., L.P.*, 123 A.D.3d 1099, 997 N.Y.S.2d 636 [2d Dept 2016]), they have utterly failed to provide a reasonable justification for omitting to present such facts on the original motion or even in opposition to Nico and Triumph's motions to reargue. In fact, Con Ed admits that the purported "new evidence" existed as early as April 23, 2008 and was exchanged prior to the deposition of Con Ed's record searcher, George Canzaniello, held on December 13, 2012. (NYSCEF Doc #61, ¶ 4). This admission amplifies the failure of Con Ed and plaintiff to explain why the document now sought to be presented on renewal, was not presented in opposition to the original motions for summary judgment and in opposition to the motions to reargue, even after being granted multiple extensions of time to oppose (see *Amtrust-NP SFR Venture, LLC v Vazquez*, 140 AD3d 541, 32 NYS3d 497 [1st Dept 2016], lv dismissed 28 NY3d 1102, 45 NYS3d 363, 68 NE3d 90 [2016]). As a result, the court lacks discretion to grant renewal (see *DLJ Mtge. Capital, Inc. v David*, 147 Ad3d 1024, 48 NYS3d 234 [2d Dept 2017]; *Central Mtge. Co. v Resheff*, 136 AD3d 962, 26 NYS3d 323 [2d Dept 2016]; (see *Wells Fargo Bank, N.A. v Rooney*, 132 AD3d 980, 19 NYS3d 543 [2d Dept 2015]; *Wells Fargo Bank v Allen*, 130 AD3d 717, 11 NYS3d 876 [2d Dept 2016]).

Indeed, movants have not established any justification whatsoever as to why they did not present the "new" evidence, which Con Ed boldly claims existed as early as April 23, 2008, in opposition to Nico and Triumph's original motions, and did not assert that they made any effort, let alone a diligent effort, to obtain this new evidence, which was readily available (see *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 441, 22 NYS3d 427 [1st Dept 2016];

Queens Unit Venture, LLC v Tyson Ct. Owners Corp., 111 AD3d 552, 975 NYS2d 57 [1st Dept 2013]; compare *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 720 NYS2d 487 [1st Dept 2001]).

Furthermore, the submissions in support of renewal would not have changed the court's prior determination granting summary judgment to defendants Nico and Triumph. The document does not alter the fact that the work conducted by Nico and Triumph was done with Con Ed's equipment at Con Edison's request and that Con Edison inspected and signed off on the work and never asked any contractor to return to redo any of the work. Accordingly, the document as presented does not raise an issue of fact in opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law. (see *Renna v Gullo*, 19 AD3d 472, 797 NYS2d 115 [2d Dept 2005]).


Accordingly, it is hereby,

ORDERED that motion sequence number 010, plaintiff's motion to renew this court's prior decision and order, granting summary judgment to defendant Nico Asphalt Paving, Inc., and defendant Triumph Construction Corp. is denied; and it is further

ORDERED that motion sequence number 011, defendant Consolidated Edison Company of New York Inc.'s motion to renew its opposition to Nico Asphalt Paving, Inc. and Triumph Construction Corp.'s motions for summary judgment and upon renewal to vacate this court's prior orders, is denied; and it is further

ORDERED that motion sequence number 012, defendant Consolidated Edison Company of New York Inc.'s motion pursuant to CPLR §5015, vacating the Judgment and Decision of this Court dated September 23, 2019, is denied.

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

11/17/2020			
DATE			W. FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE