

Gondres v City of New York
2021 NY Slip Op 30723(U)
March 8, 2021
Supreme Court, New York County
Docket Number: 152829/2019
Judge: J. Machelie Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62

Justice

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INDEX NO. 152829/2019

MIREYA ACOSTA GONDRES,

Plaintiff,

MOTION DATE 01/22/2021

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, NEW YORK CITY
TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, MTA BUS COMPANY,
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY, 324 WEST 125TH STREET
LLC, WHARTON PROPERTIES LLC, THE ABECO
ORGANIZATION, ABECO CONSTRUCTION LLC, ABECO
1288 LLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for JUDGMENT - SUMMARY.

Pending before the court is a motion wherein defendant WHARTON PROPERTIES LLC (“Wharton”) seeks an order pursuant to CPLR §3212 granting Wharton summary judgment and dismissing the complaint and all cross claims and counterclaims asserted against Wharton. Upon the foregoing documents, this motion is DENIED as premature, with leave to re-file.

In the underlying action, plaintiff alleges to have sustained injuries on December 26, 2017 when she slipped and fell in the roadway and/or street area situated in front of MTA bus shelter #MN01671 on West 125th Street, between Frederick Douglass Boulevard and St. Nicholas Avenue, adjacent to the premises with an address commonly known as 288 St. Nicholas Avenue, in the County, City and State of New York.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

In this motion, Wharton argues that it did not own the premises located at 288 St. Nicholas Avenue; that Wharton merely performed “minor administrative tasks” on behalf of the property owner, 324 WEST 125TH STREET LLC; that Wharton did not lease or occupy the premises or operate, manage, maintain, supervise, control, make repairs or perform ice and snow removal thereat or to the adjacent sidewalk/curb, public roadway or bus stop; and that Wharton was not a party to any agreements relating to the premises or the adjacent sidewalk/curb, public roadway or bus stop, including snow remediation agreements.

In opposition, co-defendants THE ABECO ORGANIZATION ABECO CONSTRUCTION LLC and ABECO 1288 LLC (collectively, “Abeco”) argue that this motion is premature, as Wharton has not yet been deposed or provided any documentary discovery. Abeco

argues that the scope of Wharton's services for the site owner is in Wharton's possession and otherwise unavailable to Abeco. Co-defendants THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION (collectively, the "City") also submitted opposition papers, and also argued that the motion should be denied as premature, as there have been no depositions conducted by any party to date. The City further argues that the affidavit submitted in support of the underlying motion fails to set forth the nature of the "minor administrative tasks" performed by Wharton.

Wharton does not dispute the arguments made by Abeco or the City regarding the status of discovery, but argues that they are nevertheless entitled to summary judgment because the tasks performed by Wharton "do not relate to the subject premises and are merely administrative in nature - such as serving as an address for the receipt of the recorded copy of the deed - and that this agreement was oral." Here, there is an issue of fact as to the nature of the tasks performed, or not performed, by Wharton with respect to the subject site and whether Wharton owes a duty of care to the plaintiff. These issues can, and should, be properly explored in depositions. Accordingly, this court DENIES this motion as pre-mature.

See also Belziti v. Langford, 105 A.D.3d 649 (Sup. Ct. App. Div, 1st Dept. 2013) ("Green's motion for summary judgment was properly denied as premature, since limited discovery has taken place and Green himself has not yet been deposed in this matter"); Weinstein v. WB/Stellar IP Owner, LLC, 125 A.D.3d 526 (Sup. Ct. App. Div, 1st Dept. 2015) ("Plaintiff opposed the motion on the ground that it was premature since 'facts essential to justify opposition may exist but cannot then be stated' [...] Stellar's motion should have been denied as premature, since plaintiff had no opportunity to depose Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion").

As stated above, this motion is DENIED as premature. Leave of court is granted for Wharton to file, at its election, another motion seeking summary judgment within a reasonable time after the relevant depositions have taken place.

3/8/2021
DATE


J. MACHELLE SWEETING, 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	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE