

Echevarria v City of New York
2021 NY Slip Op 30987(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 150193/2017
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. 150193/2017

HERMIS ECHEVARRIA,

MOTION DATE 04/07/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, TRANSIT WIRELESS, LLC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22

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

In the underlying action, plaintiff seeks to recover money damages for personal injuries allegedly sustained on October 29, 2015 when she tripped and fell at the corner of Broadway and Exchange Alley at or near 61 Broadway.

Pending before the court is a motion filed by defendant Transit Wireless, LLC (“Transit”) seeking Summary Judgment and an order dismissing the complaint and any and all cross claims against it. Upon the foregoing documents, it is ORDERED that the motion is DENIED with leave to re-file after further discovery.

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]).

Here, the complaint¹ against Transit Wireless alleges that the Plaintiff tripped and fell violently to the ground on October 29, 2015 at the corner of Broadway and Exchange Alley (the “Accident Location”). Plaintiff alleged that at all relevant times with respect to the Accident Location, defendant Transit Wireless had a permit to perform work; defendant caused, allowed and permitted the existence of an uneven, depressed, cracked and/or broken roadway to exist; defendant had actual and/or constructive notice of the dangerous and defective conditions of the aforesaid roadway; that the occurrence was caused by the negligence, carelessness and recklessness of the defendants, its respective servants, agents, employees and contractors, in that the above-described roadway was negligently maintained, constructed, operated and controlled.

Defendant Transit Wireless concedes that it was indeed issued a permit (Number M01-2015278-B99) on October 5, 2015 for conduit construction on Broadway, and that at the time the incident occurred, such permit was in effect. However, Transit Wireless submitted a sworn affidavit from Arash Hashemkhani, a Senior Project Engineer at Transit Wireless, during the years of 2015 and 2016. In the affidavit, Mr. Hashemkhani states that the permit in question expired on

¹ The complaint against Transit Wireless was initially commenced by the filing of a Summons and Complaint in Bronx County. Plaintiff had also commenced an action against the City of New York in New York County. These actions were consolidated, per an order issued on June 4, 2019, into the instant action here.

November 3, 2015, without Transit Wireless having performed any work under said permit. Mr. Hashemkhani further averred that Transit Wireless did not commence work at or near the Accident Location until 2016 (after it obtained new permits), which was months after the incident occurred.


In opposition, plaintiff argues that this motion is premature, as relevant discovery has not yet been completed. Most importantly, plaintiff argues that he has not yet had the opportunity to conduct the deposition of Mr. Hashemkhani. Plaintiff argues that Mr. Hashemkhani does not explicitly state in his affidavit when he performed a search of documents or records; what documents and records he searched for other than the permits he attaches; what documents Mr. Hashemkhani relies on to say that no work was performed by Transit at the relevant location, or if Mr. Hashemkhani's assertion is solely premised on his own purported independent recollection. Plaintiff argues that these are issues he would address if afforded an opportunity to conduct a deposition of Mr. Hashemkhani or another employee of Transit with knowledge of the pertinent facts.

Here, this court finds that plaintiff should be afforded an opportunity to explore, through discovery, facts material to this motion, including, but not limited to, whether Transit performed any work at the Accident Location. *See also* Figueroa v. City of New York, 126 A.D.3d 438 (Sup. Ct. App. Div. 1st Dept. 2015) (“[...] this Court has held that a motion for summary judgment should be denied as premature where the movant has yet to be deposed [...]”) and Cannon v. New York City Police Dep’t, 104 A.D.3d 454 (Sup. Ct. App. Div. 1st Dept. 2013) (“It was premature to consider defendants’ cross motion for summary judgment before plaintiff deposed [defendants]”).

Accordingly, this motion is DENIED with leave to re-file after further discovery is completed.

Finally, to the extent that Transit argues that there is no outstanding discovery relevant to this motion and plaintiff argues that there is, such a dispute only further supports this court's determination that summary judgment is not appropriate at this time.

This is the order of the court.

<u>3/29/2021</u> DATE					 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE