

Deoleo v City of New York
2021 NY Slip Op 31332(U)
April 20, 2021
Supreme Court, New York County
Docket Number: 151158/2019
Judge: J. Machelie Sweeting
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X

ANGIE DEOLEO,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., 4650 TIC LLC, PARK IT MANAGEMENT CORP.,

Defendant.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

4650 BROADWAY HOLDINGS, LLC

Defendant.

-----X

INDEX NO. 151158/2019

MOTION DATE 07/17/2020, 09/07/2020, 09/25/2020

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

Third-Party Index No. 595914/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Pending before the court are three different motions, each seeking summary judgment.

First is Motion #002 filed by 4650 TIC LLC (“4650 TIC”) seeking an order, pursuant to CPLR § 3212, granting summary judgment to 4650 TIC and dismissing the complaint and all cross-claims as against it. The second is Motion #003 filed by the New York City Transit Authority (“NYCTA”) seeking an order granting it summary judgment on liability, pursuant to CPLR 3212. The third is Motion #004 filed by Park It Management Corp. (“Park It”) seeking an order, pursuant to CPLR §3212, granting summary judgment to Park It, and dismissing plaintiff’s Complaint and any and all cross-claims asserted against Park It. Also pending on Motion #004 is a cross-motion, discussed further below.

Upon the forgoing documents, Motion #002 and Motion #003 are GRANTED without opposition; Motion #004 by Park It is DENIED as premature, with leave to re-file; and the cross-motion filed by plaintiff under Motion #004 is GRANTED to the extent that the matters therein are to be scheduled for a conference with the court.

Motions #002 and #003

With respect to Motions #002 and Motion #003 only, the court received a written communication on March 5, 2021 from plaintiff’s counsel stating that plaintiff did not oppose either motion. On the same day, counsel for 4650 TIC (the movant on Motion #002) informed the court in writing that 4650 TIC did not oppose Motion #003. Counsel for Park It (the movant on Motion #004) informed the court in writing that Park It did not intend to oppose Motion #002 or Motion #003. Counsel for Consolidated Edison Company of New York, Inc. (“Con Edison”) also informed the court that Con Edison did not intend to oppose either motion. Counsel for NYCTA (the movant on Motion #003) informed the court that NYCTA did not oppose Motion

#002. Furthermore, counsel for the City of New York (the “City”) informed the court that the City did not oppose Motions #002 or #003. Accordingly, Motions #002 and #003 are GRANTED without opposition.

Motion #004 Filed by Park It

In the underlying action, plaintiff seeks to recover for personal injuries sustained on June 16, 2018 when plaintiff was allegedly caused to fall upon a sidewalk and grating in front of 4650 Broadway, New York, New York. Taking into account the motions decided above, the remaining defendants here are the City, Con Ed and Park It (the movant). Con Ed owns the metal sidewalk grating upon which plaintiff allegedly fell, and Park It is the tenant at the premises abutting the patch of sidewalk where the incident occurred.

Now, as stated above, Park It seeks an order pursuant to CPLR 3212, granting summary judgment to Park It, and dismissing plaintiff’s complaint and any and all cross-claims asserted against Park It.

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 the motion, Park It argues that in 2003, the “Sidewalk Law” (New York City Administrative Code §7-210(a)) shifted the maintenance of the sidewalks abutting real property from the City to the owner of the property, and that at the time of the plaintiff’s accident, Park It was the tenant, and not the owner of the property, and is not therefore, subject to liability. Park It also argues that per the terms of its lease agreement, as a tenant, Park It, was not responsible for structural repairs to the subject sidewalk. Rather, its responsibilities as a tenant were limited to removing rubbish, debris, snow and ice. Park It further argues that when a plaintiff falls next to a metal grating on the sidewalk, 34 RCNY §2-07(b)(1) requires the owner of the sidewalk grating to inspect and repair the grating, and that here, Con Edison, as the owner of the grate, was solely responsible to inspect and repair the area up to 12 inches around the sidewalk grating.

Con Edison, plaintiff and 4650 Broadway Holdings LLC (the “Owner” of the premises) all filed opposition papers arguing that Park It’s motion for summary judgment is premature, as no one from Park It has yet been deposed.

Specifically, Con Edison argues, *inter alia*, that the plaintiff testified that the day following the accident she spoke with an attendant at Park It who admitted that they were aware of the “hole” and noted “there were multiple complaints about the hole, but nothing had been done about it.” Con Edison argues that given this testimony, it is obvious that Park It was aware of the defect in question, but that further discovery is needed to determine key issues in this matter including; whether Park It caused or created the defect, what steps if any it took to repair the sidewalk;

whether these complaints were conveyed to the Owner or the City; and whether Park It observed any work being done in response to those complaints. Con Edison argues that these facts are essential to oppose the motion and are exclusively within the control of Park It.

Plaintiff argues, *inter alia*, that photographs marked at plaintiff's deposition show vehicles parking in front of Park It's garage on the sidewalk where plaintiff's incident. Moreover, plaintiff argues that in May of 2018, one month before the incident occurred, Park It was using the sidewalk space for parking vehicles. Plaintiff further argues that given these alleged facts, it is possible that Park It caused and created the dangerous condition and that information in this regard would be in Park It's exclusive possession. Therefore, additional discovery is warranted.

The Owner argues, *inter alia*, that Park It failed to explain how it removed garbage or trash from the subject sidewalk prior to the accident, or how Park It removed snow and de-iced the sidewalk. Therefore, the Owner contends, Park It has failed to establish that its actions did not affect the condition of the sidewalk where the accident occurred. Additionally, the Owner argues that although Park It claims that it was not responsible for the maintenance and repair of the subject sidewalk, there has been no actual testimony from Park It, or an affidavit from a representative from Park It, stating that no such maintenance or repairs were actually performed on the subject sidewalk or grate.

Here, as correctly argued in the opposition papers, there are numerous questions that can only be answered by Park It and, yet, Park It has not been deposed. Questions include, but are not limited to, whether Park It had actual knowledge of the defect; whether Park It caused or created the defect; whether Park It conveyed complaints, if any, to the Owner or the City; whether Park It observed any work being done in response to those complaints, if such existed; whether Park It was using the sidewalk space for parking vehicles; how Park It removed garbage or trash from the

subject sidewalk prior to the accident; how Park It removed snow and de-iced the sidewalk; or whether Park It conducted maintenance or repairs on the subject sidewalk. Given the number of outstanding questions of fact that remain, this court DENIES the motion at this time, as premature.

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”).

Leave of court is hereby granted for Park It to file another motion seeking summary judgment within 60 days of the deposition(s) of Park It having taken place.

Cross-motion on Motion Sequence #004

Plaintiff filed a cross-motion on Motion Sequence #004, pursuant to CPLR 3126 and 3124 to either strike defendant Con Edison’s Answer for failure to provide discovery or to compel Con Edison to provide discovery by a date certain. Plaintiff argues that Con Edison failed to provide any discovery in this matter, although plaintiff served discovery demands on or about July 16, 2019 and made further good faith efforts to obtain the same.

In response, Con Edison argues that their conduct has not been willful or contumacious, and that, in fact, “Con Edison has fully complied with Plaintiff’s discovery demands and Court Orders.”

The cross-motion is granted to the extent that the matters therein are to be conferenced with Mr. Sam Wilkenfeld, who will contact counsel directly about scheduling.

Conclusion and Order

IT IS HEREBY ORDERED that Motions #002 and #003 are GRANTED without opposition.

IT IS FURTHER HEREBY ORDERED that Motion #004 by Park It is DENIED as premature, with leave to re-file.

IT IS FURTHER HEREBY ORDERD that the cross-motion filed by plaintiff under Motion Sequence #004 is GRANTED to the extent that counsel shall appear before Mr. Sam Wilkenfeld, for a conference on the matters therein, on a date and time set by Mr. Sam Wilkenfeld, who will contact counsel directly about scheduling.

4/20/2021
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 type="checkbox"/>	DENIED	<input checked="" 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