

Hines v 150 Broadway N.Y. Assoc., L.P.

2022 NY Slip Op 31569(U)

May 12, 2022

Supreme Court, New York County

Docket Number: Index No. 160171/2017

Judge: Frank Nervo

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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. FRANK NERVO PART 04

Justice

-----X

AKEEM HINES,

Plaintiff,

- v -

150 BROADWAY N.Y. ASSOCIATES, L.P., MOBILITY
ELEVATOR & LIFT CO., INC.,

Defendant.

-----X

150 BROADWAY N.Y. ASSOCIATES, L.P.

Plaintiff,

-against-

MODELL'S SPORTING GOODS, INC.

Defendant.

-----X

INDEX NO. 160171/2017

MOTION DATE 05/24/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596015/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75 were read on this motion to/for SUMMARY JUDGMENT.

Mobility Elevator & Lift Co., Inc. (hereinafter "Mobility") seeks summary judgment dismissing plaintiff's complaint. Plaintiff opposes contending that the motion is untimely, issues of fact preclude summary judgment, and Mobility's motion otherwise relies on speculation.

The Court first addresses the timeliness of Mobility's motion. CPLR § 3212 provides that summary judgment motions must be filed no later than 120 days following the filing of the note of issue; however, it also provides that the Court may direct summary judgment motions be filed in a shorter period – provided that the time to file summary judgment motions shall not be less than 30 days. The Court's preliminary conference order directed the parties to file summary judgment motions within 60 days of the note of issue (NYSCEF Doc. No. 14).

Here, the note of issue was filed March 19, 2020. The 60-day deadline to file summary judgment motions would ordinarily begin once the note of issue was filed; however, here, the deadline was stayed by operation of Executive Order 202.8 until November 3, 2020,¹ and by 11 USC § 362 until the resolution of defendant Modell's bankruptcy proceedings. It is well established that upon commencement of bankruptcy proceedings, all then-filed nonbankruptcy actions against the debtor are stayed (11 USC § 362[a]; *see e.g. W. Rogowski Farm, LLC v. County of Orange*, 171 AD3d 79 [2d Dept 2019]). While defendant 150 Broadway filed a letter on March 20, 2020, advising that

¹ Executive Order 202.8 tolled filing deadlines for 242 days (*Brash v. Richards*, 195 AD3d 582 [2d Dept 2021]; *see also Taylor v. State*, 154 NYS3d 409 [Ct. Cl. 2021]; *Executive Law* § 29-a).

defendant Modell's had entered bankruptcy proceedings, and defendant Mobility contends that the bankruptcy matter was resolved in or about February 2021, conspicuously absent from this record are any of the bankruptcy filings or orders. Consequently, the record here is, at best, unclear as to when the bankruptcy proceedings were resolved and thus when the bankruptcy stay expired.² The Court notes that Mobility implicitly concedes the motion is untimely, arguing, in reply, that good cause exists for "Mobility's delay in making this summary judgment motion" (NYSCEF Doc. No. 73 ¶ 7). It is beyond cavil that Mobility, as movant, bears the burden of establishing its entitlement to summary judgment, including that the instant motion is timely (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). The failure to file a copy of the bankruptcy order resolving that matter prohibits the Court from finding the instant motion timely.

Mobility's argument that good cause exists for a late summary judgment motion is predicated upon its own deposition, which was completed nearly a month after the note of issue was filed. The Uniform Rules expressly prohibit post-note discovery absent unusual or unanticipated circumstances, and the

² To the extent that Mobility contends the Court granted a stay via off-the-record telephone communication on or about April 23, 2020, the Court's records do not reflect that this matter was listed as stayed at any time, and the record does not include an order staying this matter.

parties did not seek permission for same here (22 NYCRR 202.21[d]; *see Singh v. Finneran*, 100 AD3d 735 [2d Dept 2012]). The bankruptcy proceedings were known to the parties for more than a year prior to filing the note of issue, and Mobility's deposition was scheduled to occur prior to the note of issue filing, but was adjourned on Mobility's request after it informed the parties it would fail to produce a witness as scheduled. These are not unusual or unanticipated circumstances. Furthermore, Mobility did not move to vacate the note of issue. Under these circumstances, Mobility has not established good cause or a satisfactory explanation for its delay in bringing this motion (*Brill v. City of New York*, 2 NY3d 678 [2004]). Furthermore, good cause must be addressed in the initial moving papers (*O'Neil v. Env. Prods. Corp.*, 187 AD3d 771 [2d Dept 2020]); and Mobility failed to address good cause in its initial papers (*see* NYSCEF Doc. Nos. 46-48), addressing same only in reply (*see* NYSCEF Doc. No. 73).

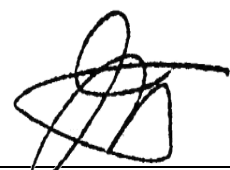
Finally, the Court notes defendant 150 Broadway's affirmation in support (NYSCEF Doc. Nos. 77-91) were filed May 3, 2022, a year after the notice of this motion and well after this motion was marked submitted by the Court, and are inarguably untimely. The Court has not considered same. Were the Court to consider these further untimely papers, its decision would be unaffected.

Having determined that movant has failed to establish the instant motion is timely and failed to make a showing of good cause for its delay, the Court need not address the remainder of Mobility's motion.

Accordingly, it is

ORDERED that the motion is denied for movant's failure to establish the instant motion is timely.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

<u>5/12/2022</u> DATE			 FRANK NERVO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE