

Johnsen v City of New York
2022 NY Slip Op 31755(U)
May 24, 2022
Supreme Court, Kings County
Docket Number: Index No. 9465/2013
Judge: Francois A. Rivera
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At a Motion Part, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of May 2022

P R E S E N T:

HON. FRANCOIS A. RIVERA,
Justice.

-----X

CHERYL JOHNSEN,

Plaintiff,

**THE CITY OF NEW YORK,
JD AUTO TRANSPORT, INC.,
JAVIER RESTREPO,
DEFEO CORP., and
B&H ENGINEERING, P.C.**

Defendants.

-----X

ORDER

Index No.: 9465/2013

Mot. Seqs. No. 14, 15, 16 & 17

The following e-filed papers read herein:

NYSCEF Doc No.:

(Mot. Seq. 14, 16)

Notice of Motion, Affirmation, Statement of Material Facts, Memorandum of Law, Amended Affirmation, Amended Statement of Facts, Amended Memorandum of Law with Exhibits Annexed _____

37-79, 82-128

Notice of Cross-Motion, Affirmation In Opposition and in Support of Cross-Motion with Exhibits Annexed _____

152-156

Affirmation in Opposition, and Response to Statement of Material Facts with Exhibits _____

157-162

Affirmation In Opposition with Exhibit _____

163-164

Affirmation in Opposition _____

167

Reply Affirmation _____

179

Affirmation in Opposition to Cross-Motion and Counter-Statement _____

181-182

Reply Affirmation _____

183

Affirmation in Opposition _____

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Reply Affirmation with Exhibits _____

199-206

Mot. Seq. 15

Notice of Motion, Affirmation In Support, Memorandum of Law with Exhibit_____	<u>129-145</u>
Affirmation in Opposition with Exhibit_____	<u>165-166</u>
Reply Affirmation_____	<u>180</u>

Mot. Seq. 17

Notice of Motion, Affirmation in Support, Statement of Material Facts, Memorandum of Law with Exhibits_____	<u>168-178</u>
Affirmation In Opposition, Statement of Material Facts with Exhibits_____	<u>186-189</u>
Affirmation In Opposition, Statement of Material Facts with Exhibits_____	<u>190-191</u>

In this action to recover damages for personal injuries, defendants The City of New York and Defoe Corp. (collectively, defendants) move, by notice of motion dated July 23, 2021 (NYSCEF Doc No. 37) for an Order: (1) extending defendants' time in which to file a motion for summary judgment alleging the City of New York and Defoe Corp. have "good cause" for the extension under *Brill v. City of New York*, 2 N.Y. 3d 648 (2004); (2) pursuant to CPLR §§ 3211 and 3212, dismissing plaintiff's second amended verified complaint as to the defendants City an Defoe and any and all cross-claims asserted against them; (3) upon granting the motion to the City, transferring the remaining claims in this case, if any, to the Supreme Court, Westchester County, pursuant to CPLR §§§ 503(a), 510 and 511 as this venue would no longer be proper venue without the City as a party.

Defendants, the City of New York and Defoe Corp. also move by Notice of Motion dated September 24, 2021 (NYSCEF Doc No. 129) for an Order amending its verified answer to plaintiff's second amended verified complaint pursuant to CPLR § 3025 to include a Workers' Compensation affirmative defense.

Plaintiff moves by Notice of Cross Motion dated January 24, 2022 for an order pursuant to CPLR § 3212 for summary judgment relief pursuant to defendants' violations of Labor Law §§ 240(1), 241(6) (NYSCEF Doc 152).

And finally, defendants B&H Engineering, P.C. move by Notice of Motion dated February 2, 2022 for an order: (1) extending the time in which to file a motion for summary judgment on the grounds that B&H Engineering, P.C. has "good cause" for the extension under *Brill v. City of New York*, 2 N.Y. 3d 648 (2004); (2) pursuant to CPLR § 2221, renewing that branch of B&H's motion made by Notice of cross-motion dated January 28, 2020, which sought an extension of time to move for summary judgment and (3) upon renewal and/or the good cause extension, pursuant to CPLR §§ 3211 and 3212, for summary judgment dismissing plaintiff's second amended verified complaint as to the B&H and all cross-claims asserted against it (NYSCEF Doc 168).

Plaintiff commenced this action to recover damages for personal injuries she sustained on June 23, 2012, in a work-related accident. Issue was joined and discovery was conducted including the taking of party and non-party depositions. Plaintiff filed a note of issue on December 20, 2019 (NYSCEF Doc No. 115). Prior to the filing of the note of issue, and on November 20, 2019, plaintiff provided a copy of the Affidavit of Bruce Fisher to the defendants (NYSCEF Doc No. 117). Defendants now seek leave to extend the time to file a motion for summary judgment, more than two years after the filing of a Note of Issue, based upon the contention that the Fisher affidavit and Subpoena to take a Nonparty Deposition of Fischer (which was never served) (NYSCEF Doc No. 120), constitute good cause to file the late motion pursuant to *Brill v. City of New York*, 2 N.Y. 3d 648 (2004). It is undisputed that the defendants had the Fisher affidavit prior to the filing of the note of issue. Defendants waited two years to

move to seek an extension of time to file a motion for summary judgment. The defendants failed to show good cause how the Fisher affidavit or Subpoena to take his nonparty deposition would have changed the outcome or prevented the timely filing a motion for summary judgment. Accordingly, defendant City of New York and Defoe Corp.'s motion extending defendants' time in which to file a motion for summary judgment is denied as untimely, without good cause, pursuant to *Brill v. City of New York*, 2 N.Y. 3d 648 (2004).

Defendant City of New York and Defoe Corp. also seek to change venue of this action to Supreme Court, Westchester County, upon the granting of the City's motion for summary judgment, pursuant to CPLR §§§ 503(a), 501 and 511. For the reasons stated herein in denying the defendant City of New York and Defoe Corp.'s motion to extend the time to move for summary judgment as untimely, without good cause, pursuant to *Brill v. City of New York*, 2 N.Y. 3d 648 (2004), this motion is also denied.

Defendants City of New York and Defoe Corp. also seek an Order amending its verified answer to plaintiff's Second Amended Verified Complaint (NYSCEF Doc No. 44) pursuant to CPLR § 3025 to include a Workers' Compensation affirmative defense alleging (a) the proposed amendment is meritorious and (b) plaintiff will not suffer any prejudice by the amended pleadings and (c) Defoe Corp. has not waived this affirmative defense. It is admitted that neither the City of New York nor Defoe Corp. included an Affirmative Defense that the plaintiff's claims are barred by Workers' Compensation law in its Verified Answer to the Second Amended Complaint (NYSCEF Doc No. 48). It is also admitted that no timely motion was previously made to amend their verified answer to assert this defense. No reasonable explanation has been offered to the satisfaction of the court in the defendants' delay in seeking to assert this affirmative defense as more than nine years have elapsed since the

commencement of this action. Moreover, the court has determined the existence of palpable prejudice to the plaintiff who was caught by surprise by the request to assert this affirmative defense after discovery has long since been completed. Accordingly, defendant City of New York and Defoe Corp.'s motion for an Order amending its verified answer to plaintiff's second amended verified complaint pursuant to CPLR § 3025 to include a Workers' Compensation affirmative defense is denied.

Defendants the City of New York and Defoe also moved, by oral argument, for an order amending its verified answer to plaintiff's second amended verified complaint pursuant to CPLR § 3211(a)(5) to assert collateral estoppel as an affirmative defense. For the reasons stated herein in denying the defendant City of New York and Defoe Corp.'s motion to amend its verified answer to plaintiff's second amended verified complaint to include a Workers' Compensation affirmative defense, the oral application to assert collateral estoppel as an affirmative defense pursuant to CPLR § 3211(a)(5) is denied.

Plaintiff moves by notice of cross-motion and affirmation in opposition for summary judgment against the City of New York and Defoe Corp. pursuant to violations of Labor Law Plaintiff §§ 240(1) and 241(6). For the reasons set forth herein in denying the application to extend the time to move for summary judgment, plaintiff's cross-motion is also denied as untimely pursuant to *Brill v. City of New York*, 2 N.Y. 3d 648 (2004).

Defendant B&H Engineering P.C. moves to extend the time to file a motion for summary judgment for good cause and pursuant to CPLR § 2221, renew that branch of B&H's prior notice of cross-motion dated January 28, 2020, Complaint (NYSCEF Doc No. 171- 173), which sought an extension of time to move for summary judgment and upon renewal and good cause seeks to dismiss the plaintiff's Complaint. For those reasons set forth herein, the motion is untimely and

defendant B&H Engineering, P.C. failed to show good cause to support its application to file a late motion for summary judgment. In B&H's request for renewal of its prior motion, it failed to show that the newly proffered evidence would change the prior outcome, therefore this motion is denied.

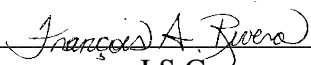
Accordingly, it is

ORDERED, that defendant City of New York and Defoe Corp.'s motion seeking an extension of time to file a late motion for summary judgment is denied and defendants' motion to change venue to Westchester is denied and the defendants' motion seeking to amend its answer to assert Workers' Compensation and Collateral Estoppel affirmative defenses are denied and the plaintiff's cross-motion seeking for summary judgment is denied and defendant B&H Engineering P.C.'s motion seeking leave to file a late motion for summary judgment and/or renew its prior motion to extend the time to file a late motion for summary judgment are denied.

Plaintiff's counsel is directed to electronically serve a copy of the Decision and Order with Notice of Entry on the other parties respective counsel and to electronically file an Affidavit of Service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER:



J.S.C.