

<b>Polsinelli v Riverside Ctr. Parcel 2 Bit Assoc., LLC</b>
2022 NY Slip Op 31803(U)
June 8, 2022
Supreme Court, New York County
Docket Number: Index No. 155689/2017
Judge: Frank P. Nervo
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. FRANK NERVO PART 04

*Justice*

-----X

JOHN POLSINELLI,

Plaintiff,

- v -

RIVERSIDE CENTER PARCEL 2 BIT ASSOCIATES,  
LLC, TISHMAN CONSTRUCTION CORPORATION, THE  
DERMOT COMPANY INC., SOULCYCLE INC.,

Defendant.

-----X

INDEX NO. 155689/2017

MOTION DATE 01/14/2021

MOTION SEQ. NO. 004

**AMENDED DECISION +  
ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 218

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

The Court erroneously marked this motion academic. Upon consideration of the motion and cross-motion papers, the Court issues the below decision on the merits.

Defendant Tishman Construction Corporation (hereinafter “Tishman”) moves for summary judgment dismissing the complaint against it and for costs and fees. Third-party JKT Construction (hereinafter “JKT”) opposes, contending summary judgment is premature given substantial outstanding discovery. JKT cross-moves to strike Tishman’s answer for withholding discovery or alternatively to compel Tishman respond to its demands.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer Lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Generally, parties should be “afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary

judgment” (*Amico v. Melville Vol. Fire Co., Inc.*, 39 AD3d 784 [2d Dept 2007]);

CPLR § 3212[f]). CPLR § 3212(f) provides,

[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

However, the mere hope that additional discovery will uncover evidence in opposition to summary judgment is insufficient to deny summary judgment as premature (*see Kent v. 534 E. 11th St.*, 80 AD3d 106, 114 [1st Dept 2010]).

Notwithstanding, where admissible evidence has been submitted on a pre-discovery motion for summary judgment, and such evidence establishes a party’s entitlement to judgment as a matter of law, summary judgment is appropriate (*Griffin v. Pennoyer*, 49 AD3d 341 [1st Dept 2008]).

As relevant here, plaintiff, a construction manager, alleges he was caused to fall while using a ladder at a construction project. The large project comprises approximately threequarters of a million square feet, although plaintiff was performing his construction related work in a smaller retail space at the time of his alleged accident.

It is beyond cavil that the instant summary judgment motion is premature, and bringing such a patently premature motion may well be sanctionable. Depositions of defendant Soulcycle, and Third Parties JKT, and IMP Plumbing & Heating (hereinafter “IMP”) have not been held. Furthermore, following the impleader of JKT, JKT is entitled to take depositions of plaintiff, Tishman, and Riverside Center, and JKT has not been provided an opportunity to conduct same. Given the significant scope of the construction project and contemporaneous work by various contractors and subcontractors, these depositions are indispensable to the issues raised in this matter. Put simply, at this stage, necessary facts regarding the ladder and plaintiff’s activities at the time of the alleged accident are not known. The Court further notes that Tishman filed the instant summary judgment motion mere days before the scheduled depositions of JKT and IMP by plaintiff.

Turning to JKT’s cross-motion, to the extent same seeks to compel outstanding discovery, it is referred to a discovery referee of the parties own choosing. The referee shall hear and report on the issue of all known outstanding discovery and the costs for such referee shall be borne equally by the parties, subject to any application for reallocation following confirmation of the report. Should the parties failure to timely select a discovery referee, the

Court shall appoint a referee sua sponte, and the parties' failure shall constitute waiver as to the Court's appointment.

Accordingly, it is

ORDERED that Tishman's motion for summary judgment is denied in its entirety; and it is further

ORDERED that JKT's cross-motion is referred to a discovery Referee to hear and report on the issue of all known outstanding discovery; and it is further

ORDERED that the matter shall not be submitted to the Court's Special Referee Part; and it is further

ORDERED that the parties shall confer and select a Referee at their expense no later than June 24, 2022; and it is further

ORDERED that a stipulation appointing the referee, and agreeing to the Referee's rate of compensation, shall be filed to NYSCEF no later than 5:00pm on June 24, 2022 with courtesy copy to chambers; and it is further

ORDERED that should the parties fail to timely select a Referee, the Court shall appoint a Referee of its own choosing and the parties shall be deemed to have waived any objection to the Court's appointment; and it is further

ORDERED that the powers of the Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that the Referee shall schedule appearances, including pre-hearing conferences, in the Referee's discretion and the Referee shall fix the date for a reference hearing; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, as directed by the Referee, subject only to any adjournment that may be authorized by the Referee; and it is further

ORDERED that, except as otherwise directed by the Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that the parties shall file the Referee’s Report, via NYSCEF with courtesy copy via first-class mail to chambers, by September 2, 2022; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further  
[continued on following page]

ORDERED that, unless otherwise directed by this court in any Order, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the Referee and the determination of this court thereon.

THIS CONSTITUTES THE ORDER OF THE COURT.

6/8/2022  
DATE

  
HON. FRANK P. NERVO  
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE