

Gardner v City of New York

2022 NY Slip Op 33374(U)

October 5, 2022

Supreme Court, New York County

Docket Number: Index No. 157085/2020

Judge: J. Machelle Sweeting

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

KEVIN GARDNER,

Plaintiff,

- v -

THE CITY OF NEW YORK, HW LIC ONE LLC,HW
MANHATTAN ONE LLC,MFM CONTRACTING CORP.,
BASIN HAULAGE INC.,EMPIRE CITY SUBWAY COMPANY
(LIMITED), E-J ELECTRIC INSTALLATION CO., E-J
COMMUNICATION SYSTEMS, PERCIBALLI INDUSTRIES
INC.

Defendants.

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INDEX NO. 157085/2020
MOTION DATE 08/25/2022
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140

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

Pending before the court is a motion wherein defendant EMPIRE CITY SUBWAY COMPANY (LIMITED) ("ECS") seeks an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, granting summary judgment to, and dismissing all claims and cross-claims against, movant, upon the grounds that the cause of action is without merit.

Standard for Summary Judgment

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 [Sup. Ct. App. Div. 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 [Sup. Ct. App. Div. 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]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form;

mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments Made by the Parties

ECS argues that it did not owe a duty to plaintiff as a matter of law, as ECS has no facilities located at or near the subject accident location; it did not perform any jobs; and no jobs were performed at ECS's direction in the subject accident location. ECS also argues that it did not perform any installation, construction, excavation, paving, and/or work of any kind in the subject accident location prior to plaintiff's alleged fall. In addition, ECS argues that it did not have actual or constructive notice of the condition; and that it did not create the allegedly dangerous, defective and/or unsafe condition at the subject accident location. Finally, ECS argues that for the same reason that plaintiff cannot maintain a cause of action against ECS, co-defendants cannot establish their cross-claims for common law contribution and indemnification against ECS. Therefore, those cross-claims must be dismissed.

In support of its arguments, ECS submits, *inter alia*, the sworn Affidavit of Daniel Tergesen, (NYSCEF Document #116), which reads in substantive part:

1. I am currently employed as a Construction Manager Consultant for EMPIRE CITY SUBWAY COMPANY (LIMITED) ("ECS").
2. My job duties include reviewing records searches performed on behalf of ECS.
3. As such, I am authorized to attest on behalf of ECS and to execute this affidavit on its behalf.
4. I am fully familiar with the facts in this affidavit based upon my personal knowledge and review of records prepared and maintained in the regular course of ECS's business.
5. I have reviewed the results of a records search for all ECS facilities and all jobs, installation, construction, excavation, paving, and/or work of any kind completed by ECS or on its behalf, at or near the location of plaintiff's alleged fall on June 12, 2019, specifically located at or near the bicycle lane in front of 302 West 30th Street, between

8th and 95 Avenues in New York, New York (the "Subject Location"), for a period of two years prior to and including the date of the alleged incident.

6. ECS's search revealed no records of any ECS facilities located at or near the Subject Location.

7. ECS's search revealed no records of any jobs completed by ECS, or any jobs performed at ECS's direction, at the Subject Location.

8. ECS's search revealed no records of any installation, construction, excavation, paying, and/or work of any kind completed by ECS or on its behalf at the Subject Location.

9. Accordingly, because ECS had no facilities, performed no work, and had no connection or involvement with the Subject Location of plaintiff's incident, which is the subject of this lawsuit, ECS is an improper defendant and should be dismissed.

Opposition papers were filed by plaintiff and defendants Perciballi Industries Inc. ("Perciballi") and HW Manhattan One LLC ("HW Manhattan").

Perciballi argues that to date, there has only been limited exchange of written discovery and no depositions have yet taken place. Perciballi argues that without knowing the nature and extent of ECS's work and the parameters of the searches it conducted, ECS's motion is premature, as the information required is within the exclusive knowledge and control of ECS.

HW Manhattan also argues that ECS's motion is premature, as an ECS representative has not yet been deposed; ECS's motion relies solely on a "bare-bones self-serving affidavit;" and ECS provides no other admissible evidence in support of its motion. HW Manhattan argues that Mr. Tergesen averred that he that he had searched for records "at or near" the subject location, but does not provide the parameters of that search, or what "at or near" means with respect to the location. HW Manhattan argues that the "extremely vague" Tergesen Affidavit does not make clear whether ECS is a contractor, a professional services provider, a consultant, or what type of business ECS performs. HW Manhattan argues that any potential liability on the part of ECS is not explicitly referenced in the very limited paper discovery thus far exchanged and that it is not dispositive on to the issue of ECS's possible liability here.

Plaintiff argues that this motion is premature, as the discovery proceedings in this action have been virtually nonexistent, and the Affidavit of Mr. Tergesen is “woefully insufficient.” Plaintiff argues that the Affidavit does not set forth Mr. Tergesen’s job duties and/or responsibilities, and it does not explain how Mr. Tergesen became “familiar with the facts” he alleges he is familiar with. Plaintiff argues that Mr. Tergesen fails to outline the following: the precise parameters of the search he allegedly conducted; whether ECS performed any work sufficiently close to the loss location which could have caused and/or contributed to the defective condition; a detailed explanation of the scope and breadth of ECS’s work, more particularly, precise descriptions of the work ECS performs; how the records he claims to have searched are stored; what form the records are in, to wit, electronic and/or paper format; where the records are physically kept for storage and retrieval purposes; whether any other individuals have access to these records; whether any other individuals which have access to these records could have made any changes to them; what “at or near” the accident location means; and whether there are any records pertaining to contracting and/or invoicing for the subject location to other subsidiaries or entities, which may have played a part in the occurrence of this accident.

Conclusions of Law

Here, it is undisputed that no witness from ECS has been deposed. Further, as the opposition properly argues, the affidavit of Mr. Tergesen can not replace a deposition of ECS, as the Affidavit fails to set forth basic information such as the type of work customarily performed by ECS, the types of records kept by ECS, the manner in which said records are stored, or the exact geographical parameters of the search performed by Mr. Tergesen. Accordingly, ECS’s motion is denied as premature. *See 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”).

Accordingly, it is hereby:

ORDERED that this motion is denied as premature; and it is further

ORDERED that the ECS is given leave of court to refile or renew this motion after relevant discovery has been completed.

10/5/2022
DATE


J. MACHELLE SWEETING, J.S.C.

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