SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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PHILIP SOTTILE,

Plaintiff,

- v -

THE CITY OF NEW YORK, JUDLAU CONTRACTING, INC.,EMPIRE CITY SUBWAY COMPANY (LIMITED), CONSOLIDATED EDISON COMPANY OF NEW YORK

Defendants.

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INDEX NO. 161425/2018

MOTION DATE 04/25/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 101, 102, 103

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff alleges that he sustained personal injuries on October 22, 2017, when he was caused to trip and fall over rebar (construction material) that was protruding through a fenced-in area along the sidewalk of Sherriff Street, in between Delancey Street South and Delancey Street North, New York, New York (the "Accident Location"). The fenced-in area was a storage yard, with an address of 235 Delancey Street South, which stored construction materials and equipment (the "Yard").

Now pending before the court is a motion in which where defendant Judlau Contracting, Inc. ("Judlau") seeks an order: (i) pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, granting Judlau summary judgment and dismissing all claims and crossclaims asserted against it, and directing the Clerk of the Court to enter judgment accordingly on behalf of

defendant; or (ii) in the alternative, denying without prejudice and with leave to renew upon the completion of discovery, Judlau's motion pursuant to CPLR § 3212.

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

Judlau argues that it is entitled to summary judgment because it "had absolutely no relationship to the location where this accident allegedly occurred, and absolutely no involvement whatsoever with the 'rebar' which allegedly caused the allegedly dangerous condition." Specifically, Judlau argues that it never owned, maintained, repaired controlled, inspected, constructed, occupied, or otherwise operated at or near the Accident Location.

Judlau argues that they conducted work on Delancey Street North, but not on Delancey Street South or Sherriff Street. Judlau argues that its work on Delancey Street North was part of the MED-625 project which included replacing water mains beneath the roadway on Delancey Street North between Willett Street and Sherriff Street, and that such work at Delancey Street North was completed two years prior to plaintiff's alleged accident. Judlau argues that following the completion of its work on Delancey Street North, Judlau vacated the area and removed of all its materials and equipment. Further, Judlau argues that it never used "rebar" of any kind in

connection with its Delancey Street North work, and that Judlau never stored materials at or adjacent to Sherriff Street or Delancey Street South, and never used the Yard at 235 Delancey Street South to store any materials.

In support of this argument, Judlau submitted, *inter alia*, a sworn Affidavit by Michael Iovino, (NYSCEF Document #42), which states, in part:

> 1. I have been employed by JUDLAU CONTRACTING, INC. ("JUDLAU") as a project manager since 1984.
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> […]
>
> 4. JUDLAU was the general contractor for the MED-625 Project, a large, multi-year project to replace and extend the water mains beneath the roadway throughout the borough of Manhattan. I was the Project Manager for JUDLAU for the MED-625 Project. A subpart of the MED-625 Project involved specifically replacing the water mains beneath the roadway on Delancey Street North in Manhattan including at the intersection of Delancey Street North and Sheriff Street. However, JUDLAU's work at this location was completed by October 2015 and neither JUDLAU employees nor JUDLAU materials remained anywhere near Plaintiff's accident location beyond 2015.
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> 5. JUDLAU also never had a materials storage area (a.k.a. yard) on the block/property between Delancey Street North and Delancey Street South and Willett Street and Sheriff Street, which location—I am advised—is where the rebar involved in the accident was stored ("rebar storage location yard") and from whence it stuck through the fence and over the sidewalk at the accident location.
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> […]
>
> 9. *JUDLAU never even used rebar for the MED-625 project* as rebar was not necessary for JUDLAU's work. Therefore, JUDLAU would have had no reason to have rebar onsite at that location.
>
> […]
>
> 13. Based on the documents attached hereto and my personal knowledge as DLAU's Project Manager for the MED-625 Project, UDLAU's work at Delancey Street North/Sheriff Street was fmished approximately two years before Plaintiff's alleged accident. Furthermore, after completing its work in the general vicinity, UDLAU vacated the area. At no time, did DLAU ever maintain a construction storage yard at or near the corner of Delancey Street South and Sheriff Street and therefore any materials stored at the rebar storage location yard did not belong to UDLAU and were not connected with UDLAU in any way. Accordingly, UDLAU neither caused, created nor contributed to the condition that allegedly caused Plaintiff's injuries because JUDLAU no longer had any presence near the accident location at the time of the accident.

Attached to Mr. Iovino's Affidavit were work permits for the project referenced therein.

The only opposition was filed by plaintiff, who argues, first, that this motion is premature because Judlau has not yet provided any responses to plaintiff's discovery demands or appeared for a deposition. Plaintiff argues, second, that the Affidavit and records submitted by Judlau "create more questions than provide answers as to whether or not they had any connection with the construction material which caused plaintiff's accident." Plaintiff argues that at the very least, there are questions of fact about the large and multi-year project Judlau undertook in that area to replace water mains for defendant City and about the type of work Judlau was performing in the vicinity of the location.

Conclusions of Law

Here, the alleged accident happened in October 2017, almost five years ago; the summons and complaint were filed in December 2018, almost four years ago; and the preliminary conference order was generated in November 2019, almost three years ago. Despite the passage of time, plaintiff's counsel contends that "no discovery has taken place in this matter;" and that "plaintiff has not been afforded one scintilla of discovery from defendant, JUDLAU, but for the records they deemed relevant in support of this motion." Plaintiff further maintains that Judlau has "not provided responses to plaintiff's discovery demands;" and that this motion was "made before any discovery has been exchanged and before plaintiff has had the right to take any depositions of JUDLAU witnesses or CON ED witnesses." It is undisputed that no witness from Judlau, including Mr. Iovino or anyone else, has been deposed.

Given the above, this court denies Judlau's motion as premature. *See* Guzman v City of New York, 171 AD3d 653 (1st Dept 2019) ("The summary judgment motion was properly denied as premature. No discovery had been conducted before Bronx Parking moved for summary judgment, thereby depriving plaintiff of the opportunity to depose the parties who would have knowledge concerning the relevant issues in this action including the negligence if any, of Bronx Parking").

Conclusion

It is hereby:

ORDERED that Judlau's motion for summary judgment is denied without prejudice with leave to renew upon the completion of discovery.

10/7/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE