

Bachayev v City of New York
2022 NY Slip Op 33466(U)
October 12, 2022
Supreme Court, New York County
Docket Number: Index No. 153037/2016
Judge: J. Machelles 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

MIKHAIL BACHAYEV,

Plaintiff,

- v -

THE CITY OF NEW YORK, ETNA CONSTRUCTION INC.,
GALASSO TRUCKING & RIGGING, INC., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC., JC-DUGGAN
INC.,

Defendants.

-----X
-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,

Third-party Plaintiff,

- v -

TRIUMPH CONSTRUCTION CORP.,
Third-party Defendant.

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INDEX NO. 153037/2016
MOTION DATE 08/02/2022
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 104, 105, 106, 107

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

In the underlying action, plaintiff alleges that on December 1, 2015, he fell from his scooter while at the crosswalk on the corner of 66th Street and York Avenue in Manhattan, New York (the “Accident Location”).

Pending before the court is a motion filed by defendant JC-DUGGAN, INC. (“JC”) seeking an order:

- (a) granting summary judgment in JC's favor, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, and dismissing the complaint and all other claims against JC; and
- (b) granting costs, sanctions and reasonable attorney's fees associated with JC's defense of this matter pursuant to CPLR § 8303-a and 22 NYCRR 130.1.1.

In its motion JC argues that it had nothing to do with plaintiff's alleged accident. JC argues that it did not own any property or perform any work at the Accident Location and that the only work it did perform nearest the area was at the other end of the block, and the record establishes that JC was never issued any citation, violation, Corrective Action Request, or complaint of any kind in connection with its work.

JC alleges that in the intervening years, since the filing of the underling complaint, JC made numerous and extensive good faith requests for plaintiff to voluntarily dismiss this action against JC for plaintiff to provide a good faith reason for continuing this action against JC. JC argues that plaintiff's counsel ignored and/or rejected all of JC's attempts, despite the fact that plaintiff knew that JC had no possible connection to the incident.

In support of its motion, JC submitted, *inter alia*, a sworn affidavit from Gerald Cereghino, President of JC, (NYSCEF Document #86), which provides in part:

7. JC-Duggan did not perform any services at, on, or to the roadway/cross-walk at the intersection of East 66th Street and York Avenue (the "Alleged Accident Location"). In fact, JC-Duggan's services were performed at the opposite end of the block from the alleged injury, at the intersection of East 66th Street and 1st Avenue. See Aerial View of Intersection attached hereto as Exhibit C.

8. A search of our records shows that JC-Duggan employees did not return to the building located at 400 E 66th St., or the area around 400 E 66th St., from the date of service, November 25, 2015, through the date of the alleged injury, December 1, 2015.

[. . .]

11. JC-Duggan did not provide services to any other buildings located on East 66th Street between 1st Avenue and York Avenue from the date services were performed by JC-Duggan to the date of the alleged accident.

12. JC-Duggan did not own, operate, occupy, manage or control any property at the Alleged Accident Location.

13. JC-Duggan was not provided notice of any defect at the Alleged Accident Location, nor is there any reason why JC-Duggan would have been provided such notice.

14. JC-Duggan's Work was not subject to any complaint, citation, violation, investigation or Corrective Action request.

In opposition, plaintiff maintains that there was a good faith basis to commence the action against JC, and in response to JC's motion, plaintiff submitted a "Stipulation of Discontinuance," discontinuing the action against JC. Plaintiff contends that the action was not discontinued earlier, because he was seeking "an affidavit that ruled out the possibility that JC's crane took a route over the subject intersection on its way to its job site and created the subject defect." In the absence of any evidence in opposition, that branch of JC's motion seeking summary judgment in its favor is granted.

With regard to that branch of JC's motion seeking sanctions, 22 NYCRR 130-1.1 (Costs; sanctions) provides, in relevant part:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part [...]

[...]

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

[...]

In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

CPLR 8303-a (Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death) states, in relevant part:

(a) If in an action to recover damages for personal injury [...] and such action or claim is commenced or continued by a plaintiff or a counterclaim [...] and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.


Here, plaintiff had a good faith basis for commencing suit and, upon service of JC's motion, plaintiff executed a stipulation of discontinuance. Accordingly, and in the exercise of this court's discretion, an order imposing sanctions and awarding costs and fees is not warranted here. *See, e.g., Esannason by Bowers v New York City Hous. Auth.*, 163 AD2d 160 [1st Dept 1990] (denying

the imposition of sanctions and counsel fees where plaintiff's counsel advanced a reasonable theory upon which suit was commenced, despite being presented with evidence that defendant was not the party responsible for plaintiff's injuries); Watson by Watson v City of New York, 178 AD2d 126 [1st Dept 1991] (finding that the information available to plaintiffs' counsel was sufficient to justify plaintiff's reluctance to voluntarily discontinue the action and the imposition of sanctions was unwarranted).

It is hereby:

ORDERED that JC's motion (Motion #003) for summary judgment dismissing the complaint and any/all claims and counter against JC with prejudice is **GRANTED**; and it is further

ORDERED that the branch of JC's summary judgment motion (Motion #003) seeking an award of costs, sanctions, and attorney's fees is **DENIED**.

<u>10/12/2022</u> DATE					 J. MACHELLE SWEETING, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER			
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>		REFERENCE