

Figueroa v City of New York
2022 NY Slip Op 34304(U)
December 20, 2022
Supreme Court, New York County
Docket Number: Index No. 161409/2015
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 161409/2015

SAMUEL FIGUEROA,

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
TRANSIT AUTHORITY, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., and CONSOLIDATED
EDISON, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

TP Plaintiff,

Third-Party
Index No. 595730/2017

-against-

NAMOW, INC.

TP Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Samuel Figueroa against defendants The City of New York, The New York City Transit Authority, Consolidated Edison, Inc., and defendant/third-party plaintiff Consolidated Edison Company of New York, Inc. (“Con Ed”), third-party defendant Namow, Inc. (“Namow”) moves, pursuant to CPLR 3212, for summary judgment dismissing Con Ed’s third-party claims against it. Con Ed opposes the

motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on August 9, 2014 in which plaintiff was injured when he rode his bicycle over "a defective sidewalk and/or sidewalk grate" on Tenth Avenue between 50th and 51st Street in Manhattan. Doc. 1. It is undisputed that Namow contracted to perform pavement restoration work for Con Ed in the City of New York ("the City"). Doc. 73. Pursuant to paragraph 36 of the Standard Terms and Conditions ("STC") of its agreement with Con Ed, Namow was required to indemnify Con Ed for any claims arising in whole or in part from its work. Doc. 73 at par. 36. On or about October 16, 2013, Con Ed provided Namow with a "pickup sheet" which identified numerous assignments to be completed by Namow pursuant to the STC. Doc. 74. The pickup sheet refers, inter alia, to "PS616096", the opening ticket relating to the restoration of the sidewalk at the location of the alleged incident. Docs. 74-75.

Plaintiff commenced the captioned action by filing a summons and complaint against the City and the New York City Transit Authority ("NYCTA") on November 5, 2015. Doc. 1. On January 4, 2017, plaintiff amended the complaint to name Con Ed and Consolidated Edison, Inc. as additional defendants and alleged that he was injured due to the negligence of the defendants in causing and/or failing to repair the allegedly dangerous condition. Doc. 6.

Con Ed joined issue by its answer filed January 19, 2017, in which it denied all substantive allegations of wrongdoing and asserted various affirmative defenses. Doc. 10.

On or about September 8, 2017, Con Ed filed a third-party complaint against Namow, asserting claims of contribution, common-law and contractual indemnification, and breach of

contract to procure insurance. Doc. 71. Namow's answer to the third-party complaint is not filed on NYSCEF.

In its third-party bill of particulars against Namow filed May 29, 2019, Con Ed alleged that, if it is found negligent, then Namow must be held liable for the occurrence since it created and/or had notice of the alleged condition. Doc. 39.

The claims against the NYCTA and the City were discontinued by stipulations dated October 15 and December 10, 2020, respectively. Docs. 50 and 52.

Plaintiff filed a note of issue and certificate of readiness on April 12, 2022. Doc. 56.

Namow now moves, pursuant to CPLR 3212, for summary judgment dismissing Con Ed's "third-party complaint, sounding in indemnification, breach of contract and negligence," Docs. 58-67. In support of the motion, Namow argues, inter alia, that the third-party complaint must be dismissed because Con Ed has "no record or proof of Namow's alleged completion of work" at the site. Doc. 67. Namow further asserts that Con Ed's paving order, which reflects that Namow was hired to perform "paving restoration" at the site, does not raise an issue of fact regarding whether it (Namow) completed its work there. Doc. 67.

In support of the motion, Namow submits, inter alia, an affidavit by Joseph Hassoune, a project manager for Namow from 2010 – 2016. Doc. 60. In his affidavit, Hassoune states, among other things, that: Namow was a construction contractor that specialized in excavations, concrete and asphalt work, and installing sewers and water mains; Namow stopped functioning as a contractor in 2016, after the death of its founder, Nicholas Nubile; Con Ed was a customer of Namow's for several years during his tenure with the company; and Namow performed numerous pavement restoration jobs for Con Ed. Doc. 60.

Although Hassoune states “I am advised that Con Ed alleges” that Namow “performed pavement restoration work around the border of a Con Ed grate” at the site, he searched the records of Namow, which were stored in the home of Nubile’s widow, Maria Nubile, and found no records relating to any such work. Doc. 60 pars. 8-10. He insists that, had Namow actually performed work at the site, “Con Ed would have copies of several documents that would confirm [Namow’s] completion of the work – including a ‘paving order’ signed by both [Namow] and a Con Ed site inspector” upon the completion of Namow’s work. Doc. 60 at pars. 12-13. He further represents “I am advised that Con Ed has produced no other document or other evidence, besides the inconclusive paving order, to support the claim that [Namow] completed [the sidewalk restoration work at the site].” Doc. 60 at par. 14. Thus, concludes Hassoune, Namow did not perform pavement restoration work at the site. Doc. 60 at par. 19.

In opposition to the motion, Con Ed argues that Namow’s contention that there is no evidence that it [Namow] “completed” the work is disingenuous since Namow’s failure to complete its work caused the alleged accident. Doc. 70. Con Ed maintains that Namow’s alleged inability to locate records does not warrant summary judgment dismissing the third-party complaint. Doc. 70. Specifically, Con Ed urges that Namow does not deny that it had a contract to perform restoration services or that it failed to complete the said services. Doc. 70.

In reply, Namow admits that it had a contract with Con Ed but insists, relying on Hassoune’s affidavit, that “many of the pavement restoration jobs [it was assigned by Con Ed] were returned to Con Ed, without being completed, because of the expiration of a designated time frame, and/or a variety of site factors and impediments to the work.” Docs. 64, 79. Namow further asserts that “Con Ed has proffered no proof that it authorized and then actually made payment to Namow for the allegedly completed work.” Doc. 79 at par. 8. Additionally, Namow

reiterates its contention that Con Ed fails to submit any evidence that it [Namow] completed its work at the site. Doc. 79 at pars. 9-15.

LEGAL CONCLUSIONS

A party moving for summary judgment pursuant to CPLR 3212 “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In order to obtain summary judgment, the movant “must make [its] showing by producing evidentiary proof in admissible form” (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). However, the moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*).

This Court finds that Namow fails to meet its prima facie entitlement to summary judgment. Initially, Hassoune’s affidavit is based at least in part on hearsay and, thus, does not constitute evidence in admissible form. Specifically, Hassoune claims “I am advised that Con Ed alleges that [Namow] performed pavement restoration [at the site]” (Doc. 60 at par. 8); “I am advised that Con Ed has produced no other document or other evidence, beside the inconclusive paving order, to support the claim that [Namow] completed” its work at the site (Doc. 60 at par. 14); and that “I am advised that, based on the complete and unexplained lack of any proof that [Namow] performed [work at the site] and/or got paid for that project”, the claims against it must be dismissed. Doc. 60 at par. 20.

Hassoune also represents that “[h]ard copies of [Namow’s] records are maintained in multiple bankers boxes at the [home of Maria Nubile]” and that he searched the boxes for any documentation reflecting that Namow performed work at the site. Doc. 60 at pars. 9-10. However, this is insufficient to entitle Namow to summary judgment since Hassoune fails to state whether Nubile’s home was the *sole* location where copies of the records were kept.

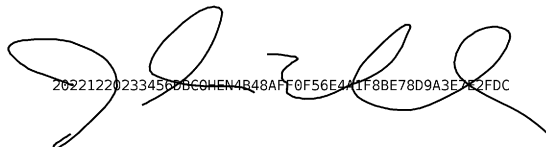
Additionally, “[t]he crux of [Namow’s] argument before th[is] [C]ourt, that [Con Ed] could not establish a prima facie case in negligence against it, misapprehends a summary judgment movant’s burden” (*Nesteborg v Std. Intl. Mgt. LLC*, 191 AD3d 579, 579 [1st Dept 2021] [citations omitted]). “Moreover, a summary judgment movant cannot satisfy its burden ‘by pointing to perceived gaps in the proof’” (*Nesteborg v Std. Intl. Mgt. LLC*, 191 AD3d at 579 [citations omitted]), as Namow attempts to do here.

Even if Namow had satisfied its burden, triable issues were raised by, among other things, Con Ed’s submission of the STC evidencing the existence of a contract between Con Ed and Namow, as well as the paving order and pickup sheet indicating that Namow performed work in the area in question. Therefore, viewing the facts in a light most favorable to the nonmoving party, Con Ed, the motion seeking dismissal of Con Ed’s claims against Namow is denied (*See Nesteborg v Std. Intl. Mgt. LLC*, 191 AD3d at 580 [citations omitted]).

Finally, although not raised by Con Ed, this Court notes a motion for summary judgment cannot be granted where the movant fails to submit a complete set of pleadings (*See 850 third Ave. Owner, LLC v Discovery Communications, LLC*, 205 AD3d 498 [1st Dept 2022] [citation omitted]). Here, as noted above, Namow has not filed its answer to the third-party complaint on NYSCEF, either as an exhibit to this motion or otherwise. Therefore, the motion must be denied on this ground as well.

Accordingly, it is hereby:

ORDERED that the motion by Namow, Inc. seeking summary judgment dismissing the third-party complaint pursuant to CPLR 3212 is denied.



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12/20/2022

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE