

Nicolas v Triborough Bridge & Tunnel Auth.
2023 NY Slip Op 30067(U)
January 5, 2023
Supreme Court, New York County
Docket Number: Index No. 451638/2021
Judge: J. Machele 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

XAVIER NICOLAS, NISMA RAZAK	INDEX NO. <u>451638/2021</u>
Plaintiffs,	MOTION DATE <u>10/12/2022</u>
- v -	MOTION SEQ. NO. <u>001</u>

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, THE
CITY OF NEW YORK,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

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

This is an action for personal injuries allegedly sustained by the plaintiff Xavier Nicolas on August 26, 2019 while he was working on the Kosciuszko Bridge in the Borough of Kings, City and State of New York.¹ Plaintiff alleges that the “porta potty” (portable toilet) that plaintiff was using on the job site was lifted by a forklift with plaintiff inside.

This action was initially filed in Kings County. On February 4, 2022, the court (Hon. Rosemarie Montalbano) issued an order (NYSCEF Document #22) granting the motion made by defendant Triborough Bridge and Tunnel Authority (the “TBTA”) to move the venue of this action to New York County.²

¹ Plaintiff Nisma Razak is the wife of plaintiff Xavier Nicolas, and alleges, *inter alia*, the loss of support, services, love, companionship, affection, society, sexual relations, and solace of her husband.

² In its motion, the TBTA argued that that it did not own, operate, control or have any relationship to the Kosciuszko Bridge; that it had no facilities involved in the action; and therefore, any action venued against the TBTA must be brought in New York County, where the TBTA has its principal office.

Now pending before the court is a motion in which TBTA seeks: (1) summary judgment pursuant to Civil Practice Rules and Laws (“CPLR”) 3212, dismissing the complaint and all cross-claims against the TBTA; and (2) an award of costs and attorneys’ fees on its counter-claim for plaintiffs’ willful filing and proceeding of what TBTA alleges is a frivolous action.

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

In its motion, the TBTA argues that it should be granted summary judgment because it does not own, operate, maintain, lease or control the Kosciuszko Bridge. In support of its argument, it attached the sworn Affidavit (NYSCEF Document #38) of PAUL L. FRIMAN, which states, in substantive part:

1. I am the Acting General Counsel and Corporate Secretary of the TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY and, as such, am fully familiar with the properties and facilities owned, operated, and maintained by the TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY (“TBTA”) [...]
2. The TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY is a public benefit corporation and is charged and authorized pursuant to Public Authorities Law §550 et seq. to operate, maintain, improve, repair, and reconstruct its seven (7) toll bridges and two (2) toll tunnels within the City of New York. Those nine (9) facilities are the following:
 - The Robert F. Kennedy Bridge (formerly known as the Triborough Bridge);
 - The Henry Hudson Bridge;
 - The Marine Parkway-Gil Hodges Memorial Bridge;
 - The Cross Bay Veterans Memorial Bridge;

The Throgs Neck Bridge;
The Verrazzano-Narrows Bridge;
The Queens Midtown Tunnel; and
The Hugh L. Carey Tunnel.

3. The plaintiff claims that he was injured while engaged in a construction project on the Kosciuszko Bridge on August 26, 2019. The TBTA does not have any connection to, jurisdiction over or responsibility for the Kosciuszko Bridge. Upon information and belief, the Kosciuszko Bridge is owned, operated, and maintained by the State of New York's Department of Transportation and I have been advised that plaintiff has filed suit against the State of New York in the Court of Claims seeking compensation for the injuries which he allegedly sustained on the Kosciuszko Bridge on August 26, 2019.

Defendant, the City of New York (the "City"), did not oppose this motion, and plaintiffs do not dispute that the TBTA does not own, operate, manage or control the subject bridge, but instead argue that this motion is premature, because no discovery has yet occurred. Plaintiffs also argue that the Affidavit submitted by the TBTA is misleading in that it suggests that the TBTA's responsibility is limited to the facilities listed by Mr. Friman in his Affidavit when, in fact, the Public Authorities Law ("PAL") 553 (Powers of the authority) clearly provides that the TBTA has other powers, including:

PAL 503(9)(r): "at the request of the New York city transit authority or the metropolitan transit authority, (i) the planning for and the design, acquisition, construction, improvement, reconstruction, or rehabilitation, in the name of the authority, of any capital asset, whether in the nature of personal or real property (or any interest therein) which is used or useful for a transit or transportation purpose other than a marine or aviation purpose of the requesting authority or its designated subsidiary."

PAL 503(11): "to design and with the consent of the City, to construct and develop public parks, parkways or highways or improvements to existing parks, parkways or highways"

PAL 03[17]: "to assist and cooperate with the metropolitan transportation authority to carry out the powers of the metropolitan transportation authority in furtherance of the purposes and powers of the authority..."

Plaintiffs argue that they should be afforded the opportunity to depose witnesses from the TBTA to see whether the TBTA possessed an ownership interest, easement, lease or other such interest in any of the lands whether above or under water associated with the Kosciuszko Bridge, which spans Brooklyn and Queens. Finally, plaintiffs argue that in the Answer filed by the City (NYSCEF Document #2), the City asserted cross-claims against the TBTA, on the basis that the TBTA “are or may be liable to the defendant(s) answering hereby for contribution on the basis of their equitable shares of responsibility, or for indemnity on the basis of a contract between them, actual or implied.”

Conclusions of Law

On its face, the Affidavit from Mr. Friman, the Acting General Counsel and Corporate Secretary of the TBTA, is internally inconsistent, as it states that the TBTA operates “(9) facilities,” but lists only eight facilities. Further, although the City did not file any papers in opposition, the City did not withdraw its cross-claims against the TBTA. Finally, given the scope of powers granted to the TBTA in the PAL, plaintiff has the right to explore whether the TBTA possesses an ownership interest, easement, lease or other such interest in any of the lands above or under water associated with the Kosciuszko Bridge.

Accordingly, this branch of the TBTA’s motion seeking dismissal is denied.

Counsel Fees

In its counter-claim, TBTA alleges that this action is frivolous and seeks an award of costs and attorneys' fees. 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.

Costs are not appropriately awarded here, as this court finds that it is not frivolous for plaintiffs to suggest that the TBTA may possess an ownership interest, easement, lease or other such interest in any of the lands above or under water associated with the Kosciuszko Bridge. *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); *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).

Conclusion

Given the above, it is hereby:

ORDERED that the branch of the TBTA's motion seeking summary judgment, pursuant to Civil Practice Rules and Laws 3212, is DENIED, without prejudice; and it is further

ORDERED that the branch of TBTA's motion seeking an award of costs and attorneys' fees is DENIED without prejudice; and it is further

ORDERED that the TBTA is given leave to re-file this motion after relevant discovery has been conducted.

1/5/2023
DATE

J. MACHELLE SWEETING, J.S.C.

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