

Haut v Consolidated Edison Co. of N.Y., Inc.

2023 NY Slip Op 31000(U)

March 30, 2023

Supreme Court, New York County

Docket Number: Index No. 153071/2021

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM **PART** **05**

Justice

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MARK HAUT,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ZWW VANDERBILT ASSOCIATES, THE BOARD OF MANAGERS OF THE VANDERBILT CONDOMINIUM, ALLIED PARTNERS RESIDENTIAL MANAGEMENT LLC, ROSE TERRA MANAGEMENT, ROSE ASSOCIATES, INC., STANKEN FINANCING LLC, WELLS REIT II - 222 EAST 41ST STREET, LLC, NEW YORK UNIVERSITY, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, JOHN DOE (NAME BEING FICTITIOUS) AS GENERAL PARTNER OF ZWW VANDERBILT ASSOCIATES,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to

COMPEL/STRIKE

In this negligence action, plaintiff alleges that on August 30, 2020, he sustained injuries when he tripped and fell over a defect within the sidewalk and/or street abutting the property located at 240 East 41st Street, New York, New York (the “Building”) (See NYSCEF Doc. Nos. 79 [Compl.] and 81 [Bill of Particulars]).

On or about September 22, 2021, plaintiff served discovery demands (the “Initial Demands”) on all answering defendants¹ (NYSCEF Doc. No. 85 [September 22, 2021 Demands]).

¹ Defendants ZWW Vanderbilt Associates and Rose Terra Management have not appeared in this action.

All of the answering defendants responded to this demand (See NYSCEF Doc. Nos. 88, 94, 105, and 126).

On or about July 6, 2022, plaintiff served defendants the Board of Managers of the Vanderbilt Condominium and Allied Partners Residential Management LLC (collectively, the “Condo Defendants”) with additional discovery demands (the “First Supplemental Demands”) seeking:

1. A complete copy of the management agreement between [Vanderbilt and Allied] related to 235 East 40th Street, New York, New York a/k/a 240 East 41st Street, New York, New York.
2. A complete copy of the management agreement between [Vanderbilt and Allied] related to the common areas of 235 East 40th Street, New York, New York a/k/a 240 East 41st Street, New York, New York.
3. A complete copy of all management agreement(s) related to 235 East 40th Street, New York, New York a/k/a 240 East 41st Street, New York, New York.

(NYSCEF Doc. No. 87 [July 6, 2022 Demands]).

In response to plaintiff’s First Supplemental Demands, the Condo Defendants produced an Extension of Management Agreement between Vanderbilt and Rose Associates, Inc., which they represented was “the only management agreement in the possession of defendants”² (NYSCEF Doc. No. 88).

A day after serving the First Supplemental Demands, plaintiff served the Condominium Defendants with another set of discovery demands (the “Second Supplemental Demands”) seeking documents and information related to photographs taken after plaintiff’s accident, which depict scaffolding upon the subject sidewalk, including

1. The names and/or designations of the individuals and/or company that performed the repair depicted in the photographs annexed hereto as Exhibit 1.

² Plaintiff discontinued this action against defendant Rose Associates Inc. without prejudice (NYSCEF Doc. No. 104 [Stipulation of Discontinuance]).

2. The name of the individuals, companies and/or entities responsible for, and/or that actually performed maintenance and/or repair of the subject area and/or sidewalk as depicted in the photographs annexed hereto as Exhibit 1.
3. Dates of all repairs done upon the subject area and/or sidewalk as depicted in the photographs annexed hereto as Exhibit 1.
4. A copy of any contract, agreement, emails, correspondence, invoices, receipts related to the repairs depicted in the photographs annexed hereto as Exhibit 1.

(NYSCEF Doc. No. 89 [July 7, 2022 Demands]).

The Condo Defendants objected to plaintiff's Second Supplemental Demands as vague, burdensome, overbroad, and improper (NYSCEF Doc. No. 90).

Plaintiff now moves for an order, pursuant to CPLR §3126, striking the answers of: (1) the New York City Department of Environmental Protection and the City of New York (collectively, the "City"), Consolidated Edison Company of New York Inc. ("ConEd"), and Stanken Financing LLC, Wells Reit II – 222 East 41st Street, LLC, and New York University (collectively, the "Stanken Defendants"), based upon their alleged failure to respond to plaintiff's Initial Demands; and (2) the answer of the Condo Defendants based upon their insufficient responses to the First and Second Supplemental Demands. Specifically, plaintiff argues that that the Extension of Management Agreement produced by the Condo Defendants in response to plaintiff's First Supplemental Demands is insufficient and the Condo Defendants' objections to plaintiff's Second Supplemental Demands are improper.

Alternatively, plaintiff moves, pursuant to CPLR §3124, to compel these defendants to respond to the Initial Demands and First and Second Supplemental Demands, respectively. Finally, plaintiff moves for an extension of time to file the note of issue.

ConEd, the City, the Condominium Defendants, and the Stanken Defendants oppose plaintiff's motion. The Stanken Defendants also cross-move for an order, pursuant to CPLR

§§3124 and 3126, compelling ConEd to respond to its April 15, 2022 discovery demand seeking “any/all records pertaining to the specific work that [ConEd] was performing on the sidewalk in August of 2017” (NYSCEF Doc. No. 125). ConEd does not oppose the Stanken Defendants cross-motion.

For the reasons set forth below, plaintiff’s motion is granted in limited part, as set forth below, and the Stanken Defendants’ cross-motion is denied.

DISCUSSION

CPLR §3124 provides that “[i]f a person fails to respond or comply with any request, notice, interrogatory, demand, question or order under this article ... the party seeking disclosure may move to compel compliance or a response” (CPLR §3124).

CPLR §3126, in turn, authorizes the court to sanction a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed” (CPLR §3126). However, “[t]he striking of a party’s pleading ... is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith” (Henderson-Jones v City of New York, 87 AD3d 498, 504 [1st Dept 2011] quoting McGilvery v New York City Tr. Auth., 213 AD2d 322, 324 [1st Dept 1995]).

That branch of plaintiff’s motion seeking an order striking defendants’ answers is denied. As a threshold matter, any motion relating to disclosure must be filed with “an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion” (22 NYCRR §202.7[a]). The efforts detailed in plaintiff’s counsel’s good faith affirmation to procure the subject discovery—i.e., a single good faith letter, dated July 5, 2022, and a phone call to the Condominium Defendants’ counsel—do not “evinced a diligent effort by the plaintiff to resolve the discovery dispute” (Roye v Gelberg, 172 AD3d 1260, 1263

[2nd Dept 2019]) and mandate the denial of plaintiff's motion, without prejudice (Sixty-Six Crosby Assoc. v Berger & Kramer, L.L.P., 256 AD2d 26 [1st Dept 1998]). The Court further notes that, although plaintiff requested a preliminary conference in May 2022, plaintiff has not requested a discovery conference with the DCM Part to resolve this particular issue prior to making this motion, as dictated by paragraph 6 of the Part 5 Rules.

Even leaving the foregoing aside, the Court does not find, on the record before it, that any of the defendants have engaged in willful or contumacious conduct such that the "imposition of punitive sanctions" are appropriate (See Masotto v City of New York, 38 Misc 3d 1226(A) [Sup Ct, Kings County 2013]) particularly in light of the fact that all defendants have responded to the plaintiff's Initial Demands and the Condo Defendants have at least substantially complied with the three sets of demands served upon them³. Finally, that branch of plaintiff's motion seeking an extension to file the note of issue is granted to the extent that the parties are directed to select a note of issue date at the parties' upcoming conference with the Court.

The Stanken Defendants' cross-motion to compel is denied, without prejudice, in light of their deficient good faith affirmation, and is another subject to be discussed at the upcoming status conference.

Accordingly, it is

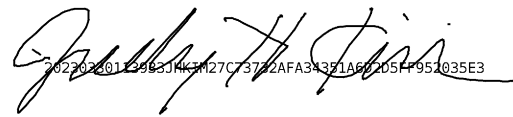
ORDERED that plaintiff's motion is granted to the limited extent that that the parties are to select a note of issue date at their next status conference with the Court, and otherwise denied, without prejudice; and it is further

³ To the extent plaintiff argues that the Second Supplemental Demand seeks material relevant to the question of who owns, controls, or maintains the subject sidewalk or street where plaintiff allegedly fell, this is an issue to be discussed at the parties' upcoming status conference with the Court.

ORDERED that the cross-motion by defendants Stanken Financing LLC, Wells Reit II – 222 East 41st Street, LLC, and New York University is denied, without prejudice; and it is further

ORDERED that the parties are to appear for a status conference on May 2, 2023 at 2:30 p.m. in Part 5, located at Supreme Court, New York County, 80 Centre Street, Room 320.

This constitutes the decision and order of this Court.



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3/30/2023

DATE

HON. JUDY H. KIM, 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