

Hui Zhao v I & A Enters. LLC

2023 NY Slip Op 33538(U)

October 6, 2023

Supreme Court, New York County

Docket Number: Index No. 154996/2020

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 52

Justice

| | | | |
|--|------------|-----------------|----------------------------|
| -----X | | INDEX NO. | <u>154996/2020</u> |
| HUI ZHAO, | | | 01/10/2023, |
| | Plaintiff, | | 01/17/2023, |
| | | | 03/28/2023, |
| | | MOTION DATE | <u>03/29/2023</u> |
| | - v - | | |
| I & A ENTERPRISES LLC, SWEET VILLAGE FLORIST & GIFT INC, MANNA 2 BAKERY, THE CITY OF NEW YORK | | MOTION SEQ. NO. | <u>001 002 003 004</u> |

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 158

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 79, 80, 81, 82, 83, 84, 85, 86, 159

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 160

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 161

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

Upon the foregoing documents, it is

Motion sequences 001, 002, 003, and 004 are consolidated for disposition.

Motion sequence 001 is defendant I & A Enterprise LLC's (hereinafter "I & A") motion to vacate the note of issue and compel discovery. Motion sequence 002 is the motion of defendant Manna Two Inc. i/s/h/a Manna 2 Bakery (hereinafter "Manna") to vacate the

note of issue and certificate of readiness for trial, compel discovery, and extend the time to file a motion for summary judgment. Motion sequence 003 is I & A's motion to strike the answer of defendant City of New York (hereinafter "City") for failure to respond to discovery demands or, alternatively, to compel the City to provide outstanding discovery. Motion sequence 004 is the City's motion to dismiss the complaint and for summary judgment dismissing all claims and counter-claims against the City. I & A and Manna (the "co-defendants") oppose the City's motion. The plaintiff has not submitted any opposition to the City's motion.

Motion Sequence 004

The City moves to dismiss the complaint pursuant to CPLR § 3211(a)(7) and General Municipal Law ("GML") §§50-e and 50-i for failure to state a cause of action. The City also moves, pursuant to CPLR § 3212, for summary judgment dismissing all claims and cross-claims against it. The plaintiff does not oppose the City's motion. However, both I & A and Manna oppose the motion, contending that it is premature because there is outstanding discovery regarding NYPD barricade placement and the deposition of Manna employee Yui Keung Lee (hereinafter "Lee") is outstanding. The issue of Lee's deposition was resolved by this court's order of June 21, 2023, which order that the deposition be held within 60 days of the date of said order.

"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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment is a drastic

remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion” (CPLR § 3212[b]). “In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]).

This case involves a trip and fall on the sidewalk in front of 87 East Broadway, New York, NY (the “Premises”) on December 7, 2019. The plaintiff testified that she was caused to fall by a dent area on the ground, clarifying that “It’s just an uneven spot on the ground, like a pit” (City Exh. K, Feb. 4, 2022 Tr at 40, NYSCEF 113).

Pursuant to NYC Admin. Code § 7-210(c), “the city shall not be liable for any injury to property or personal injury ... proximately caused by the failure to maintain sidewalks ... in a reasonably safe condition” unless the city is the property owner of the abutting property or the abutting property is a one, two, or three family residential property. As set forth in the affirmation of David Atik, the abutting property is not owned by the City and is not a one-, two-, or three-story residential building (see City Exh. P, Atik Aff., NYSCEF 118). Furthermore, a records search by the City indicates that they did not do any work on the sidewalk or curb in front of the Premises on or before the date of the incident (see City Exh, Q, Gonzalez-Molina Aff., NYSCEF 119). Plaintiff has not opposed the motion.

The co-defendants oppose the City’s motion for summary judgment contending that the motion should be denied pursuant to CPLR § 3212(f), because they need

records from the NYPD barricade detail to determine whether the City caused, created, or had notice of the condition that allegedly caused plaintiff to fall (see Manna Response to Statement of Material Facts, NYSCEF 150). Their contention that these records are needed is based on a photograph marked at plaintiff's deposition, which shows a police barricade at the location plaintiff fell, and hospital records indicate that the plaintiff reported that she "was walking down the street in NYC and tripped and fell on a metal grate in the street" and that "she tripped over a metal grate on 12/7/19 evening" (see Meade Aff. In Opp., NYSCEF 145; Meade Aff. In Reply to Mot. Seq. 003, NYSCEF 139; I & A Reply to Mot. Seq. 003 Exh. B, HSS Discharge Summary, NYSCEF 142). However, the plaintiff testified that the fence seen in the photograph, which was not taken on the date of her fall but at a later date, was not there at the time of her accident (see City Exh. K, Feb. 4, 2022 Tr at p. 48, NYSCEF 113). Furthermore, as set forth above, plaintiff testified that a dent or pit in the ground caused her to fall. This testimony is consistent with plaintiff's testimony at her GML § 50-h hearing wherein she stated that a hole caused her to trip (see City Exh. J, Aug. 25, 2020 Tr at p. 23-24). Plaintiff further testified that she didn't tell anyone at the emergency room that she tripped over something metal, she said that she landed on her stomach on some sort of metal stuff (see City Exh. K, Feb. 4, 2022 Tr at p. 67, NYSCEF 113). Considering plaintiff's unrebutted testimony under oath that the police barricade was not present on the date of her fall and that she didn't tell anyone at the emergency room that she tripped over something metal, only that she landed on something metal, the co-defendants' discovery demand for NYPD barricade records are nothing more than a fishing expedition.

While, pursuant to CPLR 3212(f), where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied, the mere hope that some evidence might be uncovered during further discovery is insufficient to deny summary judgment (see *Shah v MTA Bus Co.*, 201 AD3d 833, 833 [2d Dept 2022]). “To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under the authority of CPLR 3212 (subd [f])” (*Auerbach v Bennett*, 47 NY2d 619, 636 [1979]). “Vague and speculative allegations of wrongdoing are insufficient to support a request for disclosure” (*Artigas v Renewal Arts Realty Corp.*, 22 AD3d 327, 328 [1st Dept 2005]). Accordingly, the City’s motion for summary judgment should not be denied merely because requested discovery has not been provided where, as here, the co-defendants’ requests for disclosure are based on vague and speculative contentions that a police barricade may have been a cause of the plaintiff’s fall, particularly as such allegations are contradicted by the record.

The City has set forth sufficient evidence to eliminate any material issues of fact and has met its prima facie burden demonstrating entitlement to summary judgment dismissing the claims and cross-claims against the it. The plaintiff and co-defendants have not shown that any questions of material facts exist that would preclude summary judgment in the City’s favor. Therefore, the City’s motion for summary judgment dismissing the claims and cross-claims against them is granted.

Motion Sequences 001, 002, and 003

The motions of I & A and Manna seeking discovery and vacatur of the Note of Issue are denied as moot. As set forth hereinabove, the co-defendants are not entitled to the discovery they are seeking from the City. Defendants concede that the portions of their motions which sought discovery from the plaintiff were responded to (see Meade Reply Aff. in Mot. Seq. 001, NYSCEF 72; Belmonte Reply Aff. in Mot. Seq. 002, NYSCEF 86). The portion of the motions seeking to compel Manna to produce witness Lee for depositions has been resolved by the order of this court dated 6/21/2023. Accordingly, as there are no remaining discovery issues, there is no need or reason to vacate the Note of Issue, compel discovery, or strike the City's Answer. Therefore, those portions of the motions of I & A and Manna are denied. That portion of Manna's motion which seeks an extension of time to file a motion for summary judgment is granted.

Conclusion

For the reasons set forth hereinabove, it is hereby

ORDERED that the motion (Mot. Seq. 004) for summary judgment of defendant The City of New York is granted, and the complaint is dismissed against it; and it is further

ORDERED that the cross-claims against said defendant by defendants I & A Enterprise LLC and Manna Two Inc. i/s/h/a Manna 2 Bakery are dismissed; and it is further

ORDERED that the said claims and cross-claims against defendants I & A Enterprise LLC and Manna Two Inc. i/s/h/a Manna 2 Bakery are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant The City of New York dismissing the claims and cross-claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion (Mot. Seq. 001) of defendant I & A Enterprise LLC to vacate the note of issue and compel discovery is denied; and it is further

ORDERED that the motion (Mot. Seq. 002) of defendant I & A Enterprise LLC to vacate the note of issue and certificate of readiness for trial, compel discovery, and extend the time to file a motion for summary judgment is granted to the extent that the time for the parties to file a motion for summary judgment is extended to 60 days from the entry of this order and is otherwise denied; and it is further

ORDERED that the motion (Mot. Seq. 003) of defendant I & A Enterprise LLC to strike the answer of defendant The City of New York or to compel discovery is denied.

This constitutes the decision and order of the court.

Mot. Seq. 001

10/6/2023
DATE

HON. NICHOLAS W. MOYNE, J.S.C.

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| APPLICATION: | <input type="checkbox"/> GRANTED | | <input type="checkbox"/> GRANTED IN PART | |
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Mot. Seq. 002

10/6/2023

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| <input type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | DENIED |
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APPLICATION:

CHECK IF APPROPRIATE:

Nicholas W. Moyne

HON. NICHOLAS W. MOYNE, J.S.C.

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Mot. Seq. 003

10/6/2023

DATE

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APPLICATION:

CHECK IF APPROPRIATE:

Nicholas W. Moyne

HON. NICHOLAS W. MOYNE, J.S.C.

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Mot. Seq. 004

10/6/2023

DATE

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APPLICATION:

CHECK IF APPROPRIATE:

Nicholas W. Moyne

HON. NICHOLAS W. MOYNE, J.S.C.

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