

Worg v City of New York

2023 NY Slip Op 33819(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 151163/2021

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** **05RCP**

Justice

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LARS WORG,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,

Defendants.

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INDEX NO. 151163/2021

MOTION DATE 07/20/2023,
08/01/2023

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 41, 42, 43, 44, 45, 46, 47, 48, 57, 58, 59, 60, 61, 62, 63

were read on this motion to VACATE/STRIKE - NOTE OF ISSUE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to VACATE/STRIKE - NOTE OF ISSUE.

Upon the foregoing documents, the motions by defendants Consolidated Edison Company of New York, Inc. (“ConEd”) and the City of New York (the “City”) to vacate the note of issue is granted for the reasons set forth below.

Plaintiff commenced this action to recover for injuries allegedly sustained on August 26, 2020 when his bicycle stuck a “depressed and sunken steel utility cover” within the roadway of First Avenue, between East 89th Street and East 90th Street, New York, New York (NYSCEF Doc. Nos. 1 [Compl. at ¶¶10, 26] and 29 [Bill of Particulars at ¶8]).

ConEd now moves, pursuant to NYCRR §202.21, to vacate the note of issue on the grounds that the certificate of readiness incorrectly states that discovery is complete. In support of its motion, ConEd observes that documentary discovery from plaintiff remains outstanding,

specifically: (i) HIPAA-compliant authorizations for plaintiff's medical records from the physicians and facilities testified to at plaintiff's examination before trial ("EBT"); and (ii) authorizations for plaintiff's medical records from the Joan H. & Preston Robert Tish Center at Essex Crossing and Cheung and Kan Medical Group regarding plaintiff's additional surgery and treatment as alleged in plaintiff's June 7, 2023 supplemental bill of particulars (See NYSCEF Doc. Nos. 18 [March 6, 2023 Post-EBT Demand] and 45).

ConEd also observes that documentary discovery from the City remains outstanding, namely: (i) copies of the City's agreement with non-party contractor Delaney Associates LP ("Delaney") to replace manholes throughout the borough which, pursuant to a May 2019 permit issued by the City, permitted Delaney to open the roadway between East 89th Street and East 90th Street to "regrade/replace street hardware casting"; and (ii) records detailing Delaney's work at the subject location pursuant to its agreement with the City and the above permit (See NYSCEF Doc. Nos. 32 and 59 [June 5, 2023 Post-EBT Demand]).

The City also moves for the same relief, submitting, in support, an affirmation adopting ConEd's arguments.

Plaintiff opposes these motions, arguing that vacatur of the note of issue is inappropriate as plaintiff has produced the authorizations demanded. Plaintiff further argues that the discovery sought by ConEd from the City presents no basis to vacate the note of issue because it is not relevant to this action. Specifically, plaintiff states that discovery revealed that Delaney was contracted by the City to replace manholes while the defect at issue is a gas vault owned by ConEd.

In reply, ConEd maintains that it has never received the subject authorizations from plaintiff and argues, in addition, that the material sought from the City is relevant and may lead to further discovery regarding Delaney's role at the subject location.

DISCUSSION

22 NYCRR §202.21[e] provides, in pertinent part, that:

Within 20 days after service of a note of issue and certificate of readiness, any party of the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect ... After such period ... no such motion shall be allowed except for good cause shown.

As a general matter, “[a] note of issue should be vacated where it is based upon a certificate of readiness that incorrectly states that all discovery has been completed” (Matos v City of New York, 154 AD3d 532, 533 [1st Dept 2017] [internal citations and quotations omitted]). In this case, ConEd’s timely motion establishes that plaintiff’s July 12, 2023 note of issue (NYSCEF Doc. No. 23) incorrectly states that discovery is complete. Although plaintiff avers that he has produced the material demanded by ConEd, ConEd disputes ever receiving same. Moreover, the City does not dispute that it has yet to produce the material sought by ConEd regarding Delaney’s work at the subject location.

ConEd has established that the discovery sought from the City is relevant to whether Delaney worked at the subject location and whether such work could have caused and created the defective condition and that such material may lead to further discovery regarding Delaney’s role at the subject location. Accordingly, ConEd and the City’s motion is granted and plaintiff’s note of issue and certificate of readiness are vacated and this matter is stricken from the trial calendar (See Matos v City of New York, 154 AD3d 532, 533 [1st Dept 2017]).

In light of the foregoing, it is

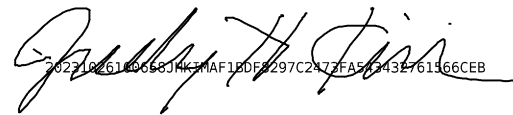
ORDERED that defendants Consolidated Edison Company of New York, Inc. and the City of New York’s motion to vacate the note of issue are granted; and it is further

ORDERED that the note of issue is hereby vacated and the case is stricken from the trial calendar; and it is further

ORDERED that counsel for Consolidated Edison Company of New York, Inc. and the City of New York shall serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) within ten days of the date of this decision and order; and it is further

ORDERED that service upon the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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10/26/2023

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