

**Zygmunt v 215 E. 68th St. LP**

2025 NY Slip Op 30697(U)

February 28, 2025

Supreme Court, New York County

Docket Number: Index No. 150096/2021

Judge: Emily Morales-Minerva

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

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GALANEK ZYGMUNT,

Plaintiff,

- v -

215 EAST 68TH STREET LP, 215 EAST 68TH STREET LLC, RUDIN MANAGEMENT CO., INC., NESTLE WATERS NORTH AMERICA, INC., POLAND SPRING CORPORATION,

Defendants.

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215 EAST 68TH STREET LP, 215 EAST 68TH STREET LLC, RUDIN MANAGEMENT CO., INC.

Plaintiffs,

-against-

BRNO ELECTRICAL CONTRACTING

Defendant.

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INDEX NO. 150096/2021
MOTION DATE 10/21/2024, 11/14/2024, 01/17/2025
MOTION SEQ. NO. 006 007 008

DECISION + ORDER ON MOTION

Third-Party
Index No. 595928/2021

The following e-filed documents, listed by NYSCEF document number (Motion 006) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 135, 136, 137, 138, 139

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 140, 142, 143, 144, 145, 146, 147, 152

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 148, 149, 150, 151

were read on this motion to/for EXTEND - TIME

APPEARANCES :

Liakas Law, P.C., New York, NY (Craig Warren Phemister, Esq., of counsel), for plaintiff.

Wilson Elser, New York, NY (Antony Lembersky, Esq., of counsel), for defendants 215 EAST 68TH STREET LP, 215 EAST 68TH STREET LLC, and RUDIN MANAGEMENT CO. INC.

Sobel Pevzner, LLC, New York, NY (Anthony Peter Orlich, Esq., of counsel), for defendants NESTLE WATERS NORTH AMERICA, INC., and POLAND SPRING CORPORATION.

EMILY MORALES-MINERVA, J.S.C.

In this personal injury trip-and-fall action, which has been pending for 4 years, defendants 215 EAST 68TH STREET LP, 215 EAST 68TH STREET LLC, and RUDIN MANAGEMENT CO. INC. (collectively, Rudin), move, by notice of motion (sequence number 006), for orders (a) striking the crossclaims of defendants NESTLE WATERS NORTH AMERICA, INC., and POLAND SPRING CORPORATION (collectively, Nestle), pursuant to CPLR § 3126, and (b) compelling Nestle to appear for deposition pursuant to CPLR § 3124.

Defendant Nestle opposes and separately moves, by notice of motion (sequence number 007), pursuant to CPLR § 3212, for an order of summary judgment, dismissing the complaint of plaintiff GALANEK ZYGMUNT (plaintiff) against it. Both defendant Rudin and plaintiff oppose the motion.

Plaintiff moves, unopposed, by notice of motion (sequence number 008), for an order, pursuant to CPLR § 2004, extending the note of issue deadline.

For the reasons set forth below, defendant Rudin's motion (seq. no. 006) is granted, in part, to the extent that defendant

Nestle shall appear for deposition on or before May 21, 2025, and is otherwise denied; defendant Nestle's motion (seq no. 007) is denied entirely; and plaintiff's motion (seq. no. 008) is granted entirely.

#### BACKGROUND

Plaintiff GALANEK ZYGMUNT (plaintiff) was injured when he tripped and fell over a hand-truck/dolly containing water jugs at 215 East 68<sup>th</sup> Street (premises) (see New York State Court Electronic Filing System [NYSCEF] Doc. No. 001, Complaint). Defendants 215 EAST 68TH STREET LP, 215 EAST 68TH STREET LLC, and RUDIN MANAGEMENT CO. INC. (collectively, Rudin), INC. own and/or lease the premises, and Defendants NESTLE WATERS NORTH AMERICA, INC., and POLAND SPRING CORPORATION (collectively, Nestle) deliver water jugs to said premises (see id.).

On January 05, 2021, plaintiff commenced this action against defendants for negligence, seeking to recover damages (see id.). Plaintiff alleges that on or around January 19, 2018, while working as an electrician's helper on the premises, he tripped over a hand truck/dolly containing Poland Spring water jugs, which caused him to fall while exiting an elevator (see NYSCEF Doc. No. 130, Plaintiff's Deposition Transcript).

Plaintiff sustained severe injuries, which has impacted his ability to work (see NYSCEF Doc. No. 001, Complaint).

On February 05, 2021, defendant Nestle answered, asserting 26 affirmative defenses, and cross-claimed against defendant Rudin for indemnification (see NYSCEF Doc. No. 003, Nestle's Answer with Cross-Claims). On April 23, 2021, Rudin answered, asserting 11 affirmative defenses, and cross-claimed against Nestle for indemnification (see NYSCEF Doc. No. 010, Rudin's Answer with Cross-Claims). Additionally, Rudin commenced a third-party action against third-party defendant BRNO ELECTRICAL CONTRACTING on October 18, 2021 (see NYSCEF Doc. No. 41, Third-Party Complaint).

The parties engaged in discovery, filed numerous discovery motions, and participated in conferences with the court (L. Headley, J.S.C.). As part of the parties' discovery, defendant Nestle's deposition was initially scheduled for November of 2023, but based on Nestle's unavailability, it was rescheduled to February 01, 2024 (see NYSCEF Doc. No. 114, Email Exchange). Nestle was unavailable to appear for its deposition on February 01, 2024, as well as the rescheduled date of April 19, 2024 (see id.; see NYSCEF Doc. No. 115, Email Exchange).

Most recently, the court (L. Headley, J.S.C.) held a compliance conference, determining that the parties failed to comply with the preliminary conference order, dated February 17,

2022, as "defendant [depositions] remain[ed] outstanding" (NYSCEF Doc. No. 105, Compliance Conference Order, dated April 11, 2024 [L. Headley, J.S.C.]). The same court then directed that the deposition of Nestle to occur on or before July 10, 2024, and that the parties file note of issue by January 17, 2025 (see id.).

Thereafter, the parties scheduled Nestle's deposition for June 28, 2024. However, based on Nestle's alleged unavailability, the parties rescheduled Nestle's deposition to September 13, 2024 (see NYSCEF Doc. Nos. 116, 118, Email Exchanges). Nestle did not appear for the deposition, and it remains outstanding.

Consequently, defendant Rudin moves (motion seq. no. 006) for (1) an order, pursuant to CPLR § 3124,<sup>1</sup> compelling defendant Nestle to appear for its court-ordered deposition, and (2) an order, pursuant to CPLR § 3126,<sup>2</sup> striking Nestle's crossclaims.

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<sup>1</sup> CPLR § 3124 provides, "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response."

<sup>2</sup> CPLR § 3126 provides, "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain

Rudin argues that such court intervention is required as it has rescheduled Nestle's deposition numerous times to accommodate Nestle and Nestle has repeatedly failed to appear. Rudin also contends that an order compelling Nestle is warranted as Nestle violated the compliance conference order (L. Headley, J.S.C.), dated April 11, 2024, which required its deposition by July 10, 2024 (see NYSCEF Doc. No. 109, Memorandum of Law; see also NYSCEF Doc. No. 105, Compliance Conference Order, dated April 11, 2024 [L. Headley, J.S.C.]).

Defendant Nestle opposes the motion to compel, and moves, by notice of motion (seq. no. 007), for an order of summary judgment, dismissing plaintiff's complaint (see CPLR § 3212). Nestle argues that the court cannot compel it to appear for deposition, as its summary judgment motion stays all discovery. Further, Nestle argues that it is entitled to summary judgment as a matter of law, because the individual, who delivered the Poland Spring water jugs to the premises on the date of plaintiff's injury, was not Nestle's employee (see NYSCEF Doc. No. 121, Affirmation in Support).

Both defendant Rudin and plaintiff oppose Nestle's motion for an order of summary judgment as premature given that

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witnesses; or 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party."

discovery remains outstanding (see NYSCEF Doc. Nos. 144, 146, Affirmations in Opposition). Further, these parties contend that, as Nestle has not permitted itself to be deposed, an issue of fact exists as to the identity of the delivery person and such person's relationship to Nestle (see id.).

Finally, in addition to opposing Nestle's motion for summary judgment, plaintiff separately moves, by notice of motion (seq. no. 008), for an order, pursuant to CPLR § 2004,<sup>3</sup> extending the note of issue deadline. No party submits opposition to this motion.

#### ANALYSIS

##### *MOTION TO COMPEL AND STRIKE CROSS-CLAIMS (SEQ. NO. 006)*

CPLR § 3101 (a) generally governs disclosure, directing that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (emphasis added). The "'statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes

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<sup>3</sup> CPLR § 2004 provides, "Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."

on the merits, minimizing the possibility for ambush and unfair surprise'" (Forman v Henkin, 30 NY3d 656, 661 [2018], quoting Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]).

Accordingly, our governing Court of Appeals has long "emphasized that '[t]he words, "material and necessary"', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for the trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Forman v Henkin, 30 NY3d 656, 661 [2018], quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406, [1968], citing Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 746 [2000]).

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order [for discovery] the party seeking disclosure may move to compel compliance or a response" (CPLR § 3124). However, "no motion [relating to disclosure] shall be filed with the court unless [as here] there have been served and filed with the motion papers . . . 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" (Uniform Civil Rules for the Supreme Court and County Court [22 NYCRR] § 202.7; see NYSCEF Doc. No. 108, Affirmation of Good Faith).

Where a failure or refusal to comply with an order to disclose exists, the "court may make such orders . . . as are just," including "striking out pleadings or parts thereof" (see CPLR § 3126 [3]; see also Rodriguez v United Bronx Parents, Inc., 70 AD3d 492, 492 [1st Dept 2010] [providing: "A court may strike an answer only when the moving party establishes 'a clear showing that the failure to comply is willful, contumacious or in bad faith'" and finding failure to be willful and contumacious where the defendant repeatedly and persistently failed to comply with disclosure orders]).

Further, "CPLR 3126 [governing penalties for noncompliance with an order or disclosure] authorizes trial courts to craft self-executing orders that impose discovery sanctions on a party unless that party submits to the disclosure within a specified time" (Citizen Watch Co. of Am., Inc. v. Zapco 1500 Inv., L.P., 216 AD3d 562, 562 [1st Dept 2023], citing Gibbs v St. Barnabas Hosp., 16 NY3d 74, 80 [2010]). Such "[c]onditional orders become 'absolute' upon failure to fully comply therewith" (id., citing Casas v Consolidated Edison Co. of N.Y., Inc., 116 AD3d 648, 648 [1st Dept 2014] [emphasis added]).

Indeed, upon noncompliance with a conditional order, the trial "court [is] not required to find that [the litigant's] failure to comply was willful" and dismissal of an answer as set forth in the conditional order is automatic (Citizen Watch

Co., 216 AD3d at 562, quoting Center Sheet Metal v Cannon Design, Inc., 185 AD3d 507, 508 [1st Dept 2020]).

Here, defendant Nestle fails to substantiate a reasonable excuse for its failure to appear for its court-ordered deposition (see Diamond v WWP Off., LLC, 202 AD3d 503, 503 [1st Dept 2022] [finding that settlement discussions shall not be an excuse to stay discovery or to fail to comply with a court order of discovery]), and defendant Rudin sufficiently demonstrates good faith efforts to schedule Nestle's deposition (see NYSCEF Doc. No. 108, Affirmation of Good Faith). Accordingly, the court grants Rudin's motion (seq. no. 006) to the extent that Nestle must appear for deposition on or before May 21, 2025.

The court declines to strike defendant Nestle's crossclaims at this time (see Sadoyan v Castro, 102 AD3d 666 [2d Dept 2013] [stating that actions should be resolved on the merits, when possible]). However, let it be clear that the denial to strike such pleadings is without prejudice and with emphasis to Nestle that this is its final opportunity to appear for deposition. No dispute exists that Nestle has failed to appear for its deposition on five occasions, one of which was court-ordered (see NYSCEF Doc. No. 105, Compliance Conference Order, dated April 11, 2024 [L. Headley, J.S.C.]). Therefore, Nestle's failure, if any, to appear for deposition on or before May 21,

2025, shall result in dismissal of its crossclaims.

*MOTION TO EXTEND TIME (SEQ. NO. 008)*

CPLR § 2004 provides the courts with discretion to “extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed” (see Grant v City of New York, 17 AD3d 215, 217 [1st Dept 2005]; Rozefort v Bronx Lebanon Hosp. Ctr., 191 AD3d 586 [1st Dept 2021]). If key party depositions remain outstanding, this constitutes “good cause” to extend the note of issue filing deadline (Kellogg v All Saints Hous. Dev. Fund Co., Inc., 146 AD3d 615, 616 [1st Dept 2017]).

Here, the record demonstrates good cause to extend the note of issue filing deadline. It is undisputed that the deposition of defendant Nestle remains outstanding, and this is neither the fault of plaintiff nor defendant Rudin.<sup>4</sup> Because this court is ordering Nestle to appear for deposition on a date beyond the current note of issue deadline, the Court grants the motion

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<sup>4</sup> The deadline to file note of issue was January 17, 2025, and plaintiff filed his motion (seq. no. 008) before 5:00 P.M. on January 17, 2025. Accordingly, his motion was timely.

(seq. no. 008) and extends the deadline for filing note of issue to August 21, 2025.

*MOTION FOR SUMMARY JUDGMENT (SEQ. NO. 007)*

Summary judgment is an extraordinary remedy and is only appropriate where the movant has established that there is no question of fact on any issue which would require a trial (see Andre v Pomeroy, 35 NY2d 361, 364 [1975]; see also Bronx-Lebanon Hosp. Ctr. V Mount Eden Ctr., 61 AD2d 480 [1st Dept 1990] [holding that "summary judgment is a drastic remedy, the procedural equivalent of a trial [] it should not be granted where there is any doubt about the issue"])). The court may grant summary judgment upon prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR § 3212[b]; Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1975])). If the moving party makes the requisite showing, the non-moving party then has the burden "'to establish the existence of [factual issues] which require a trial of the action'" (id. at 763, citing Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012], quoting Alvarez, 68 NY2d at 324).

However, summary judgment is premature if -- as here -- the movant has yet to be deposed (see Figueroa v City of New York, 126 AD3d 438, 439 [1st Dept 2015] [holding that "a motion for summary judgment should be denied as premature where the movant has yet to be deposed"]; see also Brooks v Somerset Surgical Assoc., 106 AD3d 624, 625 [1st Dept 2013] [finding that "although Dr. Sohn submitted an affidavit stating that he was not present at the moment of plaintiff's fall, his motion for summary judgment was properly denied as premature, because essential facts concerning the cause of plaintiff's accident and the relationship between Dr. Sohn and another doctor defendant are exclusively within the possession of defendants and might well be disclosed by EBT or through cross-examination"]; Bey v Rosado, 192 AD3d 575 [1st Dept 2021] [finding that summary judgment motion was premature given defendants did not have the opportunity to depose plaintiff]).

Given the court's denial of the motion for summary judgment, Nestle's contention that discovery is stayed is moot. In any event -- as Nestle filed its motion for summary judgment at or around four months after failing to appear for the court-ordered deposition -- such filing provides no excuse for its noncompliance.

Accordingly, it is

ORDERED that motion (sequence no. 006) of defendants 215 EAST 68TH STREET LP, 215 EAST 68TH STREET LLC, and RUDIN MANAGEMENT CO. INC., to compel discovery is granted; it is further

ORDERED that that defendants NESTLE WATERS NORTH AMERICA, INC. and POLAND SPRING CORPORATION are directed to appear for deposition on or before May 21, 2025, and is otherwise denied; it is further

ORDERED that -- if NESTLE WATERS NORTH AMERICA, INC., and POLAND SPRING CORPORATION -- fail to appear for said deposition, the crossclaims of NESTLE WATERS NORTH AMERICA, INC. and POLAND SPRING CORPORATION shall be dismissed; it is further

ORDERED that upon such failure, if any, defendants 215 EAST 68TH STREET LP, 215 EAST 68TH STREET LLC, and RUDIN MANAGEMENT CO. INC.'s shall file with the court an affidavit/affirmation explaining such failure, upon notice to NESTLE WATERS NORTH AMERICA, INC., and POLAND SPRING CORPORATION; it is further

ORDERED that motion (sequence no. 007) of defendant NESTLE WATERS NORTH AMERICA, INC., and POLAND SPRING CORPORATION for an order of summary judgment is denied entirely; it is further

ORDERED that motion (sequence no. 008) of plaintiff GALANEK ZYGMUNT for an order extending note of issue is granted entirely; it is further

ORDERED that the note of issue deadline is extended to August 21, 2025.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/28/2025  
DATE

Emily M. Minerva  
EMILY MORALES-MINERVA, J.S.C.

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