

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

2025 NY Slip Op 33441(U)

September 12, 2025

Supreme Court, New York County

Docket Number: Index No. 159886/2017

Judge: Carol Sharpe

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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. CAROL SHARPE PART 52M

Justice

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INDEX NO. 159886/2017

SANDY KELLY, JOHN KELLY,

MOTION DATE 03/17/2025

Plaintiff,

MOTION SEQ. NO. 003

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC, THE CITY OF NEW YORK, TULLY CONSTRUCTION
INC., TULLY INDUSTRIES, INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

TULLY CONSTRUCTION INC., TULLY INDUSTRIES, INC.

Third-Party
Index No. 595615/2020

Plaintiff,

-against-

PRESTIGE STONE & PAVERS CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 117, 118, 119, 124, 129, 130

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

Defendant/third-party plaintiff Tully Construction Co. Inc. (“Tully”), filed a motion seeking to vacate plaintiffs’ note of issue, pursuant to 22 NYCRR § 202.21(e), on the grounds that discovery has not been completed, including depositions of Prestige employees and records pertaining to the work performed; to compel third-party defendant Prestige Stone & Pavers Corp. (“Prestige”) to provide all outstanding discovery responses pursuant to CPLR 3124, under penalty of striking their answer pursuant to CPLR 3126; to preclude Prestige from introducing any evidence at trial in light of their failure to comply with court orders to provide outstanding discovery responses pursuant to

CPLR 3126; and to extend Tully's time to move for summary judgment for an additional 120 days upon completion of outstanding discovery. Prestige and plaintiffs filed written opposition to this motion and Tully filed a reply.

In support of the motion, Tully submitted a So-Ordered Stipulation and Order dated February 19, 2025 ("So-Ordered Stipulation"); a Notice for Discovery and Inspection dated February 25, 2025; the examination before trial (EBT) transcript of Angelica Fortich, President of Prestige; and three Amended Notices for Discovery and Inspection - two dated March 13, 2025, and a third dated April 15, 2025. Prestige opposed the motion on the grounds that all discovery demands have been complied with pursuant to CPLR 3124, and that Tully waived any further discovery when it sent the demands to Consolidated Edison Company of New York, Inc. ("Con Ed"), instead of Prestige, resulting in a waiver of further discovery. In its reply, Tully admitted that while the final demand for discovery addressed the outstanding discovery from Prestige and listed Prestige's employees, it erroneously addressed the demand to Con Ed.

The parties appeared for oral arguments on the motion on July 16, 2025, where on the record the Court ordered that Prestige produce the name of a witness with knowledge of the alleged incident to Tully by August 1, 2025, and that Tully conduct the deposition of said witness by September 19, 2025. The Court also noted that failure to produce the witness could result in a missing witness charge against Prestige at the time of trial.

Tully filed a letter to Prestige dated August 19, 2025 (NYSCEF Doc. #131), rejecting the written responses Prestige previously provided to Tully's demands as insufficient, and requesting the name of the witness that Prestige was supposed to provide by August 1, 2025. The letter requested that Prestige provide a formal response to Tully's demands no later than Friday, August 22, 2025, to avoid further judicial intervention.

22 NYCRR §202.21(e) provides that “[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to 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, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.” However, “[t]rial courts are authorized to permit post-note of issue discovery without vacating the note of issue, so long as the parties will not suffer prejudice as a result [internal citations omitted]” (*Valencia v City of N.Y.*, 188 AD3d 549, 550 [1st Dept 2020]).

Here, the note of issue was timely filed pursuant to the So-Ordered Stipulation, and the parties have not proven that they will suffer any prejudice should discovery continue. Additionally, the parties signed a So-Ordered Stipulation dated June 25, 2025 (NYSCEF Doc. #123), in which the parties agreed to extend the deadline for filing summary judgment motions to September 24, 2025, and set a briefing schedule. Accordingly, it is hereby:

ORDERED, that Tully Construction Co. Inc.’s motion to vacate plaintiffs’ note of issue is denied without prejudice; it is further

ORDERED, that Tully Construction Co. Inc.’s motion to compel Prestige Stone & Pavers Corp. to provide all outstanding discovery responses is granted; it is further

ORDERED, that Tully Construction Co. Inc.’s motion to preclude Prestige Stone & Pavers Corp. from introducing any evidence at trial is denied without prejudice; it is further

ORDERED, that Prestige Stone & Pavers Corp. shall provide formal responses to the demands by Tully Construction Co. Inc., as stated in the letter dated August 19, 2025, to the extent not previously provided, no later than September 17, 2025; it is further

ORDERED, that that Prestige Stone & Pavers Corp. shall produce the witness for deposition no later than September 19, 2025, or another date agreed upon by the parties; it is further

ORDERED, that should Prestige Stone & Pavers Corp. fail to comply with the terms of this Order by September 19, 2025 (or the date agreed upon by the parties), Tully Construction Co. Inc., is granted leave to file further appropriate motion; it is further

ORDERED, that Tully Construction Co. Inc.'s motion to extend the time to move for summary judgment is denied as moot, pursuant to the So-Ordered Stipulation dated June 25, 2025, however, the briefing schedule for any summary judgment motions is amended as follows: summary judgment motions shall be filed no later than 60 days after the deposition of Prestige's witness; and it is further

ORDERED, that the parties are to appear for a status conference on October 8, 2025, at 10:30a.m. in Part 52, located at 111 Centre Street, Rm. 1045, New York, NY 10013.

This constitutes the Decision and Order of the Court.

E N T E R:

September 12, 2025

DATE


HON. CAROL SHARPE, J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: