

Concord VII. Owners v Trinity Communications Corp.
2009 NY Slip Op 30797(U)
April 7, 2009
Supreme Court, New York County
Docket Number: 106917/04
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. Denis Ling-Cohan (5)

PART 36

Index Number : 106917/2004
CONCORD VILLAGE OWNERS
VS.
TRINITY COMMUNICATIONS
SEQUENCE NUMBER : 013
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

1, 2
3, 4
5

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *to reargue by third-party defendant Central Locating Service Ltd is denied in accordance with the attached memorandum decision.*

(consolidated for disposition with ^{notar} sequence 014 + 015)

FILED
APR 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

JUSTICE DENIS LING-COHAN

Dated: 4/7/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
CONCORD VILLAGE OWNERS, INC.,

Motion Seq. No: 013
014 & 015

Plaintiff,

-against-

Index No.: 106917/04

TRINITY COMMUNICATIONS CORP, TIME WARNER
CABLE OF NEW YORK CITY, a division of
TIME WARNER ENTERTAINMENT COMPANY, L.P.,
TIME WARNER, INC., and KEYSpan CORPORATION,

Defendants.

-----X
TRINITY COMMUNICATIONS CORP.,

Third-Party Plaintiff,

-against-

Third Party
Index No.: 590684/04

CENTRAL LOCATING SERVICE, LTD. and
KEYSPAN CORPORATION,

Third-Party Defendant

-----X
LING-COHAN, J.:

FILED
APR 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence numbers 013, 014, 015 are consolidated for disposition. The facts of this case have been set forth in this court's decision and order dated April 15, 2008 (Prior Order), and will not be repeated here.¹

Motion sequence numbers 013 and 015 are the respective motions of CLS and Trinity for leave to reargue the court's denial of their summary judgment motions as reflected in the Prior Order. In motion sequence number 014, plaintiff moves to reargue the court's grant of summary

¹The Court will use the same abbreviations of the parties' names used in the Prior Order.

judgment in favor of Keyspan, dismissing the complaint against Keyspan.

The purpose of a motion for reargument is to afford a party an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied a controlling principle of law (CPLR 2221 [d] [2]), but not to allow a party to relitigate issues already decided, or to present new arguments (*see William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]).

The motions of CLS and Trinity for leave to reargue are denied as such parties failed to establish that this court overlooked or misapprehended relevant facts or misapplied a controlling principle of law.

As to Keyspan, in the Prior Order, it was granted summary judgment because the record revealed no material issues of fact as to Keyspan's negligence in testing plaintiff's building's pipes after an outside gas main rupture. Plaintiff argues that the court mistakenly did not consider plaintiff's alternative theory of liability against Keyspan, that Keyspan supplied inaccurate and/or incomplete blueprints or maps (Prints) of its gas line to CLS, which CLS used as a reference to place markings to indicate the location of Keyspan's underground gas line. Keyspan's gas line was ruptured during excavation. Plaintiff claims that this rupture caused plaintiff to have to replace some of its building's gas pipes.

In support of its motion to reargue, plaintiff refers to its comment, in the opposition papers on the underlying summary judgment motion (Underlying Motion), that: "the negligence of Defendants Trinity and Time Warner [does] not excuse Defendant Keyspan from liability if it omitted to provide complete, accurate and current information as to the location of its utilities. The facts being unclear, Keyspan's negligence in causing the rupture cannot be ruled out" (Vassalle Aff., Exh. C, at 24, ¶ 85). Plaintiff also states that its expert, Harvey Brickman, submitted an affidavit in

the Underlying Motion stating that there existed a factual dispute as to whether Keyspan contributed to the gas main rupture because it provided inaccurate maps,² and that plaintiff argued that “Keyspan’s inability to locate its own street valve [was] due to the alleged lack of maps” (*see* Vassalle Aff., Exh. C, at 26, ¶ 95). In the Prior Order the court stated that: “Brickman opines that Trinity was negligent in digging mechanically, without first locating the Gas Main, particularly as there is evidence that a map was missing and that Trinity could not locate the Gas Main on available maps” (Prior Order, at 14).

Plaintiff argues that summary judgment should not have been granted to Keyspan because, as the moving party, Keyspan did not meet its summary judgment burden to eliminate issues of fact regarding the Prints. Plaintiff also argues that the evidence in the record in the Underlying Motion reveals that there exists an issue of fact as to whether Keyspan provided CLS with Prints showing the location of the gas line that Keyspan had an obligation to properly mark out.

In opposition to the motion, Keyspan argues that a motion to reargue shall not include matters of fact not offered on the prior motion, and that plaintiff should be precluded here from relying on evidence that it did not submit in the Underlying Motion, or facts that it did not point out, or argument that it did not make initially. All of the motions were consolidated for disposition, however, and Keyspan does not contend that the evidence was not in the record, but merely that

²Brickman stated:

“the negligence of Defendants Trinity and Time Warner would not necessarily excuse Defendant Keyspan from liability if it omitted to provide complete, accurate and current information via Third Party Defendant Central Locating Service to Defendants Trinity Communications and Time Warner. The facts being unclear on this point, I cannot completely rule out negligence on the part of Defendant Keyspan in causing the rupture”

(Vassalle Aff., Exh. C [internal exhibit B, at 7]).

plaintiff was not the party that submitted it. In deciding a summary judgment motion, the court is not prohibited from reviewing all of the evidence in the record.

Keyspan argues that plaintiff's motion to reargue should be denied because the print theory of liability is not in plaintiff's complaint or a bill of particulars against Keyspan. Keyspan also argues that plaintiff's argument that Keyspan did not meet its summary judgment burden concerning the prints cannot be raised here, as it was not raised in the Underlying Motion. Plaintiff does not dispute that, in the Underlying Motion, it did not argue that Keyspan failed to meet its summary judgment burden regarding the Prints, or that there are no facts in its complaint or bills of particulars against Keyspan concerning the Prints. Under such circumstances, plaintiff's argument that Keyspan failed to meet its prima facie burden on the Underlying Motion is unpersuasive.

Keyspan further argues that the Prior Order was correct because plaintiff failed to raise more than mere expressions of hope, speculation, conjecture and the unsupported rumination of counsel as opposition in the Underlying Motion. As to Brickman's affidavit, Keyspan argues that it is speculative, and reveals that Brickman had no knowledge of the operative facts concerning the Prints. Keyspan also notes that Brickman merely stated that the facts are unclear.

In reply, plaintiff argues that Keyspan's only opposition is that plaintiff has advanced a new theory of liability against Keyspan on reargument of Keyspan's motion for summary judgment. However, as demonstrated by the discussion above, this statement is inaccurate. Plaintiff also contends that its theory concerning the Prints is not a new theory of liability, but a set of facts, as plaintiff sued Keyspan on a negligence theory, and the issues concerning the Prints form the factual basis plaintiff's negligence theory. Plaintiff maintains that, as Keyspan was brought into the action by Trinity, with Trinity alleging that Keyspan failed to provide accurate prints or plans for purposes of marking its underground gas pipes, these facts are not new.

Certainly there is authority that a plaintiff may not oppose summary judgment by arguing a theory not raised in the complaint (*Hassan v Bellmarc Prop. Mgt. Servs., Inc.*, 12 AD3d 197 [1st Dept 2004]), but this rule is not absolute. Indeed, a court may look beyond the allegations of the complaint, and deny summary judgment, where the evidence demonstrates a triable fact issue as an unpleaded cause of action, provided there is no inexcusable delay in the claim's presentation.

In its pleading against Keyspan, Trinty alleges that Keyspan, among other things, negligently failed to maintain proper plans or update its plans as to the location of the involved ruptured gas line (*see Vassalle Aff.*, Exh. B [internal exhibit B (Third-Party Complaint, ¶¶ 9-14)]. In light of these allegations, and that the record demonstrates that the parties conducted discovery regarding the Prints, Keyspan cannot claim surprise or prejudice, and it has not argued inexcusable delay. While plaintiff's opposition in the Underlying Motion was certainly less than ideal, reference was made to missing prints by plaintiff, and the court.

It is well known that summary judgment may be denied where the existence of a fact issue for trial is even arguable or debatable (*International Customs Assoc. v Bristol-Myers Squibb Co.*, 233 AD2d 161 [1st Dept 1996]). The court has reviewed the evidence in the Underlying Motion, including the deposition testimony of Keyspan's employee, Robert Terjesen, about the Prints. This evidence raises a fact issue as to whether Keyspan provided a print, or an accurate print, of its gas line to CLS for mark out of Keyspan's gas line. While Brickman's affidavit highlights that this fact issue exists, the significance of his notation to this determination is negligible. Accordingly, plaintiff's motion for leave to reargue is granted, and upon granting reargument, the court denies Keyspan's summary judgment motion, but denial of that motion is limited to the issue concerning the Prints only. Those issues previously determined in Keyspan's favor in the Prior Order, on the theories plaintiff advanced in its complaint based on Keyspan's testing of the building's pipes,

remain resolved in Keyspan's favor.

Accordingly, it is

ORDERED that the motion of third-party defendant Central Locating Service, Ltd. (motion sequence number 013) pursuant to CPLR 2221 for leave to reargue the court's order and decision dated April 15, 2008 which denied Central Locating Service Ltd.'s motion for summary judgment is denied; and it is further

ORDERED that the motion by plaintiff (motion sequence number 014) pursuant to CPLR 2221 for leave to reargue the court's order and decision dated April 15, 2008 is granted and, upon reconsideration, the court denies the motion for summary judgment of defendant Keyspan Energy Delivery New York sued herein as Keyspan Corporation in accordance with the decision above; and it is further

ORDERED that the motion of defendant Trinity Communications Corp. (motion sequence number 015) pursuant to CPLR 2221 for leave to reargue the court's order and decision dated April 15, 2008 which denied Trinity Communications Corp.'s motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties in this action with notice of entry; and plaintiff shall also provide telephone notice to defendant Keyspan to appear at the next mediation date.

Dated: April 7, 2009

FILED
 APR 09 2009
 COUNTY CLERK'S OFFICE
 NEW YORK
 JUSTICE DORIS LING-COHAN, J.S.C.