

Abel v Chiofalo

2007 NY Slip Op 30339(U)

March 22, 2007

Supreme Court, Suffolk County

Docket Number: 0022378

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

COPY

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #001-Mot D
R/D: 112806
S/D 121206

GEORGE P. ABEL

PLTF'S/PET'S ATTY:
JOSEPH J. FILARDI, P.C.
565 Plandome Road, #334
Manhasset, New York 11030

Plaintiff,

- against -

ARLENE R. CHIOFALO, JOSHUA M. CHIOFALO, JOSEPH
CHIOFALO, THE TOWN OF RIVERHEAD, NEW YORK
TELEPHONE COMPANY/VERIZON NEW YORK INC.,

DEFT'S/RESP'S ATTY:
(Atty for Chiofalo)
CASCONA & KLUEPFEL, LLP
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

Defendants.

(Atty for Riverhead)
SLEDJESKI & TIERNEY, PLLC
18 First Street
Riverhead, New York 11901

(Atty for Verizon)
MONTFORT, HEALY, MCGUIRE, ESQS
1140 Franklin Avenue, POB 7677
Garden City, New York 11530

Upon the following papers numbered 1 to 34 read on this motion for an order pursuant to CPLR §3212

_____ Notice
of Motion/Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers _____ Answering
Affidavits and supporting papers 11-30 Replying Affidavits and supporting papers 31-32 Other
33-34; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant New York Telephone Company/ Verizon, New York Inc. (“Verizon”) seeking an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff’s complaint and all cross claims against “Verizon” is determined as follows:

On July 18, 2004 plaintiff George Abel (“Abel”) was a passenger in a car driven by defendant Joshua M. Chiofalo (“Chiofalo”) and owned by defendant Joseph Chiofalo. The “Chiofalo” vehicle struck a telephone pole located approximately two feet from the edge of the roadway. Plaintiff’s action seeks damages for personal injuries sustained in the one car crash. Plaintiff claims “Verizon’s” telephone pole was negligently situated in an unsafe, unsuitable and dangerous location near a curve in the roadway where the accident occurred. Plaintiff also claims that “Verizon” negligently failed to provide protective devices around the pole.

Defendant "Verizon's" motion seeks an order granting summary judgment dismissing plaintiff's complaint and all cross claims against "Verizon" claiming that no evidence is submitted to support a finding that "Verizon" negligently installed and/or maintained the utility pole. In support of the motion defendant, submits two affirmations of counsel and claims that the "Verizon" pole was within the telephone company's guidelines for placement of a pole on a local roadway which requires placement at least 18 inches from the surface of the curb or edge of the roadway. Defendant claims that plaintiff's expert confirms that the pole was 19 inches from the roadway's edge and claims that such placement conforms with New York State Department of Transportation regulations. It is "Verizon's" position that the phone company has no duty to install warning signs or guardrails on public roadways and no basis exists therefore to find "Verizon" liable based upon the Town of Riverhead's road design. Defendant claims that the undisputed facts in the form of the parties deposition testimony establishes that defendant "Chiofalo's" negligent failure to negotiate the roadway curve without striking the telephone pole was the proximate cause of the accident and plaintiff's injuries.

In opposition plaintiff "Abel" submits an affidavit together with an affidavit from a consulting professional engineer and an attorney's affirmation. Plaintiff claims substantial issues of fact exist concerning "Verizon's" placement of the telephone pole in the area where the accident occurred and "Verizon's" failure to provide adequate safeguards around the pole. Plaintiff claims that "Verizon's" negligence is a question of fact to be determined by jury at the conclusion of trial. Plaintiff's engineer states that he examined the area where the incident occurred and that "Verizon" negligently failed to relocate the pole since it was placed in an unreasonably dangerous location and that "Verizon" negligently failed to provide a guard rail to protect the area hazard.

In further opposition defendants "Chiofalos" submit an attorney's affirmation and claim that "Verizon's" motion is premature since discovery has not been completed. Defendants claim that material questions of fact exist concerning "Verizon's" pole placement and contend that "Verizon" has not produced responses to their discovery demands seeking records concerning 1) the pole inventory system, 2) prior writings concerning placement of the telephone pole 3) prior accidents; and 4) permits and records filed with the Town concerning placement of the pole. Defendants contend that such documents and records should be disclosed by "Verizon" prior to a determination of defendant's summary judgment motion.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

Based upon the submission of evidence by the parties significant issues of fact exist concerning defendant "Verizon's" negligence sufficient to require plenary trial. Defendants motion for an order granting summary judgment dismissing plaintiff's complaint and all cross claims against "Verizon" must therefore be denied. Accordingly, it is

ORDERED that defendant "Verizon's" motion for an order pursuant to CPLR §3212 is denied without prejudice to renewal following completion of discovery.

Dated: March 22, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION