

Kelley-Blake v City of New York

2007 NY Slip Op 32538(U)

August 3, 2007

Supreme Court, Richmond County

Docket Number: 0012324/2001

Judge: Thomas P. Aliotta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
JEANNINE KELLEY-BLAKE and RODNEY BLAKE,

Plaintiffs,

-against-

**THE CITY OF NEW YORK, STATEN ISLAND CABLE,
LLC, AOL TIME WARNER CABLE, INC., and
KEYSPAN,**

Defendants
-----X

Part C-2

**Present:
HON. THOMAS P. ALIOTTA**

Index No. 12324/01

DECISION and ORDER

**Motion Nos. 3322-003
1050-004
3607-005**

The following papers numbered 1 to 14 were used on this motion the 16th day of May, 2007:

	Papers Numbered
Notice of Motion for Summary Judgment of Defendant City of New York (Affirmation and Exhibits in Support).....	1
Plaintiffs' Affirmation in Opposition.....	2
Time Warner Cable Partners Affirmation in Opposition	3
City's Reply Affirmation.....	4
Notice of Motion for Summary Judgment of Defendant Time Warner Cable Partners s/h/a Staten Island Cable, LLC and AOL Time Warner, Inc.(Affirmation, Exhibits and Memorandum of Law Support).....	5,6
Plaintiffs' Affirmation in Opposition.....	7
City's Affirmation in Opposition.....	8
Time Warner's Affirmation in Reply to City's Opposition.....	9
Time Warner's Affirmation in Reply to Plaintiffs' Opposition	10
Notice of Cross Motion for Summary Judgment of Defendant Keyspan.....	11
Time Warner's Affirmation in Opposition (Affidavit of Walter S. Stone in Support).....	12
Plaintiffs' Affirmation in Opposition to Cross-Motion.....	13
Keyspan's Reply Affirmation.....	14

Upon the foregoing papers, the motion (No. 3322) and cross motion (No. 3607) for summary judgment of defendants the City of New York and Keyspan (respectively) are denied; the motion (No. 1050) for like relief of defendant Time Warner Cable Partners s/h/a Staten Island Cable, LLC and AOL Time Warner, Inc. is granted, and the complaint and all cross claims against this defendant are severed and dismissed.

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This matter arises out of a trip-and-fall which occurred in the roadway in front of 221 Elvin Street, Staten Island, New York. According to the complaint, plaintiff Jeannine Kelley-Blake (hereinafter “plaintiff”) sustained extensive personal injuries when she fell “in the middle of the roadway” due to a “trench dug in the street” in front of a friend’s home on June 24, 2000 (*see* Plaintiff’s August 7, 2006 Affidavit in Opposition). The trench, as described by plaintiff, was approximately one inch deep by two- to-four inches wide, and extended for 50 feet (*see* Plaintiff’s 50-h hearing, pp 18-23).

In moving for summary judgment, the City of New York (hereinafter “City”) claims that plaintiffs have failed to comply with the statutory condition precedent to instituting a tort action against the City, i.e., Administrative Code §7-201(c)(2) which mandates that “No civil action shall be maintained against the City for...injury to person...in consequence of any street...being out of repair, unsafe, dangerous or obstructed unless it appears that written notice of the defective, unsafe, dangerous, or obstructed condition, was actually given.” In this case, a search of the City’s records for the preceding two years uncovered no prior written notice of the claimed roadway defect (*see* December 2, 2004 EBT testimony of Sherry Johnson, p 16, City’s Exhibit F). Nevertheless, the search did reveal that three permits and one repair order were issued for 221 Elvin Street. Insofar as it appears, the repair order was for a pothole which was “closed” on November 26, 1999. In addition, the December 17, 1999 Big Apple Map produced by Ms. Johnson revealed no roadway defect at the site of plaintiff’s fall. Accordingly, the City argues that in the absence of any evidence that it caused or created the alleged defect, the complaint must be dismissed.

In opposition, both plaintiffs and the co-defendants oppose the City’s motion on the ground that the City’s performance of work at the subject location within six months of the accident raises a triable issue of fact. Plaintiffs also argue that the City’s repair order concerning a “pothole” located in front of 221 Elvin Street represents a written acknowledgment of a defective condition which renders prior written notice unnecessary.

In their motion, Time Warner Cable Partners and AOL Time Warner (hereinafter “Time Warner”) argue that all of Time Warner’s cable service on Elvin Street is by overhead lines and that it maintains no underground cables on Elvin Street. In addition, it is claimed that a search of its records for any street opening permits on Elvin Street was negative (*see* October 10, 2002 EBT of Michael Schwab, Construction Supervisor for Time Warner, Time Warner’s Exhibit E).

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In opposition, neither plaintiffs nor the co-defendants contest the substance of Time Warner's motion, but argue that it has failed to present a prima facie case for summary judgment because the documentation submitted in support of its motion is not in admissible form, i.e., the deposition transcripts are unsigned (*see* CPLR 3116).

On its cross motion for summary judgment, Keyspan claims that a search of the relevant records indicates that all of the work it performed in the area was done on the opposite side of Elvin Street, in front of the houses numbered 243, 247, 248 and 251.¹ The nearest of these addresses is purportedly located at least six house lots away from the location of plaintiff's fall.

In opposition to Keyspan's motion, it is argued that at least one witness has averred that the subject trench extended from 221 Elvin Street to 251 Elvin Street, thereby raising an issue of fact as to Keyspan's involvement (*see* April 26, 2007 Affidavit of Lana Knight, Plaintiffs' Affirmation in Opposition, Exhibit 2).

It is well settled that on a motion for summary judgment, the function of the court is issue-finding, and not issue-determination (Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY 2d 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (Glennon v. Mayo, 148 AD2d 580), and it will be denied if there are "facts sufficient to require a trial of any issue" (CPLR 3212[b]). Thus, summary judgment is only appropriate where it is clearly demonstrated that there are no genuine issues of fact. "[S]ummary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable" (American Home Assur. Co., v. Amerford Intl. Corp., 200 AD2d 472, 473).

In the absence of any evidence to contradict Time Warner's proof that all of its work on Elvin Street was conducted above street level, its motion (No. 1050) for summary judgment should

¹The Court notes that odd numbered houses are typically located on the opposite side of the street from the even numbered houses. In any event, Keyspan's argument is that it did no work within 164 feet of plaintiff's accident.

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be granted.² With respect to the City and Keyspan, however, plaintiffs have successfully demonstrated the existence of triable issues of fact through, e.g., the deposition testimony indicating that both of these defendants performed work in the roadway in front of 221 Elvin Street during the relevant time period. Under these circumstances, a view of the evidence taken in the light most favorable to plaintiffs requires that the remaining motions for summary judgment be denied.

Accordingly, it is

ORDERED, that the motion for summary judgment of defendant Time Warner Cable Partners s/h/a Staten Island Cable, LLC and AOL Time Warner, Inc. is granted, and the complaint and all cross claims against this defendant are severed and dismissed; and it is further

ORDERED, that the remaining motions for summary judgment are denied, and it is further

ORDERED, that the Clerk of the Court enter an order severing and dismissing the complaint and all cross claims against defendant Time Warner Cable Partners s/h/a Staten Island Cable, LLC and AOL Time Warner, Inc.

The foregoing constitutes the Decision and Order of the Court.

Law Clerk to notify all parties of this Decision/Order.

Dated: AUGUST 3/2007

/s/
HON. THOMAS P. ALIOTTA, J.S.C.

²In this regard, the Court must note that none of the other parties have submitted signed copies of the relevant transcripts that differ in content from those submitted by Time Warner.

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All parties notified by EVE/pt of this Decision/Order on 8/3/07.

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