McCarthy v Town of Oyster Bay
2007 NY Slip Op 33106(U)
September 19, 2007
Supreme Court, Nassau County
Docket Number: 6421-05/
Judge: Daniel Martin
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

ALICE McCARTHY.

Plaintiff.

Sequence No.: 002 & 003
Index No.: 006421/05

- against -

TOWN OF OYSTER BAY, NASSAU COUNTY, LONG ISLAND POWER AUTHORITY, KEYSPAN ENERGY, VERIZON NEW YORK INC. And VERIZON COMMUNICATIONS, INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants Verizon New York, Inc. and Verizon Communications, Inc.'s (hereinafter "Verizon defendants") motion for summary judgment dismissing the complaint and all cross-claims asserted against these defendants is granted. Defendant Nassau County's cross-motion for summary judgment dismissing the complaint and all cross-claims asserted against this defendant is granted.

The following facts are undisputed. On May 23, 2005 plaintiff suffered personal injuries as the result of a trip and fall accident which occurred on the sidewalk near the base of a utility pole located on the southwest corner of Jackson Avenue at its intersection with Ira Road in Syosset, New York.

Plaintiff commenced the instant action against defendants based upon their negligence ownership, maintenance, operation and control over the pole and sidewalk resulting in "an uneven, broken, raised sidewalk" in the area where plaintiff fell. Defendants have all answered, asserting cross-claims against each other. The Verizon defendants move for summary judgment

dismissing the complaint on the bases that these defendants did not own, maintain or use the pole which plaintiff alleges caused the uneven sidewalk and that they did not otherwise create the condition. Defendant County moves for summary judgment dismissing the complaint and all cross-claims asserted against it on the grounds that it had no notice of the condition that caused plaintiff's fall and did not itself create it.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Any party opposing a summary judgment motion must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

Verizon Defendants' Motion

At his deposition Frank Ernst, an operations network engineer employed by Verizon testified that there were "no telephone facilities attached to the pole" which would indicate that Verizon used the pole. (See, deposition transcript of Frank Ernst, page 14, lines 3-24). Mr. Ernst further testified that he checked a computerized system that maintains data on utility poles and nothing in said search revealed that the Verizon defendants owned or used the utility pole. (*Id.*, pp. 16-18). It should further be noted that Mr. Ernst testified that at the time of his deposition he was unable to determine if Verizon had facilities on the pole on or prior to the date of plaintiff's accident. (*Id.*, pp. 14-15).

John Cromer, a foreman employed by defendant Keyspan Energy (hereinafter "Keyspan") testified that the pole which plaintiff alleges caused the defect in the sidewalk was installed by Keyspan in 2001. Mr. Cromer did not recall if his crew replaced the pole at some point after its installation, but was able to testify as to the procedure for replacing a pole. Where Cablevision last had facilities on the pole, it would be LIPA/Keyspan's responsibility to remove the pole. If it was Verizon who last had facilities on the pole it would be responsible for the pole's removal and restoration of the sidewalk. Further, Mr. Cromer did not recall if Verizon had facilities on the pole. (See, deposition transcript of John Cromer, pp. 9, 11-13, 15, 16-17, 22-23).

The Verizon defendants also annex an affidavit from Mr. Ernst in which he avers that following his deposition he was able to access Verizon's plat map for the accident location. Mr. Ernst stated that as a result of his review of the map that the subject pole is not referenced on the map because Verizon does not have facilities on the pole. A review of Verizon's Pole Record System or "PRS" revealed that Verizon conducted no maintenance or repair work on the pole. Thus, Mr. Ernst concludes that Verizon did not own or maintain any facilities on the pole going back to at least 2000 which predated the installation of the pole.

The Verizon defendants assert that the condition of the public sidewalk is not its responsibility unless it created the condition. Further, as it did not own, use or maintain the pole in the area of uneven sidewalk where plaintiff fell, defendant contends that it cannot be claimed that this defendant created the condition which caused plaintiff to fall.

Liability for a dangerous or defective condition which causes plaintiff to suffer personal injury must be based upon a defendant's ownership, control, occupancy or special use. See, Warren v. Wimorite, Inc., 211 A.D.2d 904 (3rd Dep't 1995); Turisi v. Ponderosa, Inc., 179 A.D.2d 956 (3rd Dep't 1992); Bridgham v. Fairview Plaza, Inc., 257 A.D.2d 914 (3rd Dep't 1999). Where, here, as here, a defendant demonstrates that it did not own the area where the accident occurred, created the condition or enjoyed a special use of same, it has met its *prima facie* burden on a motion for summary judgment. See, Delano v. Consolidated Edison Company of New York, 231 A.D.2d 671 (2nd Dep't 1996).

The Verizon defendants having met their *prima facie* burden of demonstrating entitlement to summary judgment, the burden shifts to any party opposing the motion to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

Plaintiff opposes the motion by asserting that an issue of fact exists as to whether it was Verizon who removed the pole and caused the damage. Plaintiff first points to the testimony of Christopher Ecker who testified on behalf of the County's department of public works. Mr. Ecker testified that the last wire to be removed from the pole is the most dangerous which could be either cable or telephone and that after the pole is clean the owner of the pole is responsible for its removal and sidewalk restoration. The court sees no way in which this raises an issue of fact as to whether Verizon used, owned or maintained the pole.

Plaintiff also asserts that the court should conclude that an issue of fact exists based upon Mr. Cromer's testimony. At his deposition Mr. Cromer testified that according to certain paperwork prepared by LIPA/Keyspan that it appears that LIPA would have removed the pole. The basis for this is that in the portion of the form denoted "Telephone Company [Verizon] Notification Report Required," the "yes" box is checked. The reason the box would have been checked, testified Mr. Cromer is that telephone facilities would be visually inspected on the pole. An inspection of said document which is annexed to plaintiff's opposition papers reveals that for a section denoted "attachment," a box for "Bell Atlantic" (Verizon's predecessor) is not marked. Further, as set forth above Mr. Cromer testified at pages 22-23 of his deposition that he did not recall if Verizon had facilities on the pole.

Plaintiff has set forth mere expressions of hope which are insufficient to defeat a motion for summary judgment. See, David B. v. Millar, 2 A.D.3d 763 (2nd Dep't 2003).

The Verizon defendants' motion for summary judgment dismissing the complaint and all cross-claims asserted against it is granted.

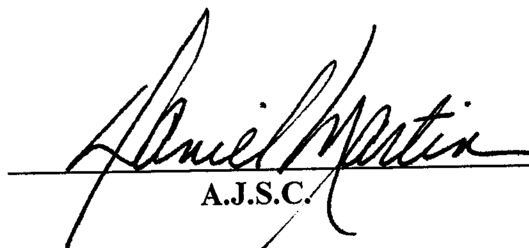
Defendant County's Motion

Defendant County adequately demonstrates lack of notice and repairs and/or maintenance in the area of the accident which could have created the condition in the affidavits of Veronica Fox of the County's claims and investigation division of the County Attorney's office and Christopher Ecker, a civil Engineer II employed by the County. See, Frullo v. Village of Rockville Center, 274 A.D.2d 499 (2nd Dep't 2000).

The sole opposition comes from LIPA/Keyspan on the grounds that these defendants assert that no issues of fact should be resolved against these defendants on the issue of removal of the pole. The court does not find this to be a proper basis for opposition.

Accordingly, the County's motion for summary judgment is granted. Based upon the foregoing, it is hereby directed that the complaint as well as any cross-claims asserted against defendants Verizon New York, Inc., Verizon Communications, Inc. and Nassau County are dismissed.

So Ordered.



A.J.S.C.

Dated: September 19, 2007

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COUNTY CLERK'S OFFICE