

Jessup v Keyspan Corp.

2007 NY Slip Op 33177(U)

September 28, 2007

Supreme Court, Nassau County

Docket Number: 8323-05/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack
Acting Justice of the Supreme Court**

_____x

JANICE L. JESSUP,

Plaintiff(s),

Index No. 18323/05

-against-

Motion Seq. No.: 002, 003,
004 & 005

Motion Submitted: 8/3/07

KEYSPAN CORPORATION, KEYSPAN ENERGY CORPORATION, FRANK STAMM & SONS, INC. GREGORY STAMM, DONALD STAMM, KEYSPAN GAS EAST CORPORATION, d/b/a KEYSPAN ENERGY DELIVERY LONG ISLAND, and HAWKEYE CONSTRUCTION, INC.,

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....XX
- Notice of Cross Motion/Supporting Exhibits.....XX
- Affirmation in Opposition.....XX
- Reply Affirmation.....XX

Defendant Hawkeye Construction ("Hawkeye") motion and defendants Frank Stamm & Sons, Inc., Gregory Stamm and Donald Stamm ("Stamm defendants") cross motion for summary judgment are denied for the reasons set forth herein.

Plaintiff's cross motion to vacate a stipulation of discontinuance, amend her summons and complaint, and have Hawkeye and Keyspan Corp., Keyspan Energy

Corp., Keyspan Gas East Corp d/b/a Keyspan Energy Delivery Long Island ("Keyspan") comply with certain discovery demands is decided as indicated below. The cross motion by Keyspan for leave to make a summary judgment motion is denied as moot for the reasons set forth herein.

Plaintiff commenced this action, pro se (plaintiff is an attorney) for money damages for injuries allegedly sustained in a slip and fall on a sidewalk in front of 610 Seaman Avenue, Baldwin, New York (the "premises") on October 30, 2004. Plaintiff alleges the incident occurred in front of Frank Stamm & Sons Repair Shop. The individual Stamm defendants are the owners of the premises. Frank Stamm & Sons lease the property from the individual Stamm defendants (see Exhibit B, pgs. 8, 45 annexed to Hawkeye's reply affirmation).

Plaintiff alleges she slipped and fell on gravel and sand on the sidewalk.

Keyspan stated it had installed new gas pipeline on or near 614 Seaman Avenue on November 5, 1999 (see Exhibit E, pgs. 42, 43 and 63 annexed to Hawkeye's motion). Hawkeye stated it started the task of replacing 800' of the existing gas line in August, 1999 and it ended in December, 1999. Hawkeye's job was to run the new gas line under the sidewalk that runs next to Seaman Avenue (see Exhibit G, pg. 36 annexed to Hawkeye's motion). Hawkeye stated it "missiled" the sidewalk in front of 610 Seaman Avenue (see Exhibit G, pg. 67, 68 annexed to Hawkeye's motion). That is, it passed the gas line under the sidewalk without excavating at the 610 Seaman Avenue location where plaintiff fell.

Hawkeye thus contends there is no evidence that it created or caused the condition on the sidewalk that allegedly caused plaintiff to fall.

The Stamm defendants allege the actual location where plaintiff fell is not on their property (see Exhibit E, pg. 43 annexed to the Stamm defendants' cross motion). The Stamm defendants state they did not create or cause the condition upon which the plaintiff fell. They also allege the sidewalk is owned by the Town of Hempstead and any condition was not caused by any special use of the sidewalk by the Stamm defendants.

As to Hawkeye's contentions, they are refuted by the deposition of defendant Gregory P. Stamm (see Exhibit B annexed to Hawkeye's reply affirmation; the following pages refer to that exhibit). Stamm stated the gas line work was done later than 1999 (pgs. 47, 48). The sidewalk in front of the premises was ripped up, broken up, and taken out (pg. 49). Blocks or slabs of the sidewalk were removed (p. 50). The work was done "months" before the plaintiff's incident (p. 50). The gas line work involved three to four slabs out of ten slabs in front of the premises (p. 54). Stamm defendants contacted Keyspan, gas line installer, to repair the broken concrete part of the sidewalk (pgs. 56, 57). Stamm observed the work and Keyspan was the sole proprietor of the gas line. Stamm assumed the gas line work was by Keyspan (p. 57).

Stamm sought the County's help to repair the sidewalk, County described the work or a part of the work as "shoddy" (p. 59).

Defendant Gregory Stamm's deposition clearly conflicts with the "minimally

invasive” work allegedly performed by Hawkeye five years before the incident as alleged and related in Hawkeye’s motion.

Clearly, based on the record now before the court, the plaintiff’s proceeding against Hawkeye is not frivolous, and that branch of Hawkeye’s motion requesting sanctions and fees against plaintiff must be denied (*see Reback v Reback*, 41 AD3d 814).

As to the Stamm defendants’ allegation that plaintiff’s fall did not occur on their property, plaintiff has offered her sworn statement that the location of her fall was in the immediate area of a manhole cover directly in front of the Stamm defendants’ property (see Exhibit D, ¶ 5 annexed to plaintiff’s cross motion). Plaintiff has also offered the sworn affidavit of Chuck Noell, a paralegal investigator (see Exhibit E annexed to plaintiff’s cross motion). Noell concluded, from his measurements, plaintiff fell in front of the Stamm defendants’ property.

As to the issue of “special use,” the liability for a dangerous condition on property is predicated upon occupancy, ownership, control or special use of the premises (*Balsam v Delma Engineering Corp.*, 139 AD2d 292). The existence of one or more of the above elements is sufficient to give rise to the duty to exercise reasonable care (*Turrisi v Ponderosa, Inc.*, 179 AD2d 956).

An owner of land abutting a public way does not, solely by reason of being an abutting owner, owe a duty to keep the public way in a safe condition; liability may be imposed on the abutting landowner where the landowner either created the defective condition, voluntarily but negligently made repairs, created the defect through special

use, or violated a statute or ordinance which expressly imposes liability on the abutting landowner for failure to repair (*Cahill v Foodland Deli of L.I., Inc.*, 270 AD2d 445).

Liability can be imposed upon an abutting landowner for a condition of an adjoining public property where the landowner has created an unsafe condition or where he has put part of the public way to a special use for his own benefit and the part of the public way is subject to his control (*Bruno v City of New York*, 36 AD3d 640; *Balsam v Delma Engineering Corp.*, 139 AD2d 292).

Although “special use” or “special benefit” has long been enunciated as a legal doctrine for imposition of liability, no definitive definition of the terms has been established; most often the special use or benefit is found when the adjacent property owners make special use of a public sidewalk (see *Marisco v Brennan*, 162 Misc2d 666).

On the Stamm defendants’ motion for summary judgment, they bare the initial burden of establishing, *prima facie*, that they did not make special use of the sidewalk (as a driveway?) in the area where the plaintiff allegedly fell (*Colonna v Allen*, 35 AD3d 517). The affidavit of Chuck Noell, the independent paralegal investigator for plaintiff, clearly states that the sidewalk in front of the Stamm defendants’ store has been used as a driveway (see Exhibit E, ¶ ¶ 15-26, annexed to plaintiff’s opposition affirmation; see also plaintiff’s photographs following plaintiff’s affidavit in Exhibit A annexed to plaintiff’s reply affidavit).

Credibility of witnesses, truthfulness and accuracy of testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues

for the trier of facts (*Pedone v B&B Equipment Co., Inc.*, 239 AD2d 397). Clearly, there are issues of fact, elicited from the record and noted above which preclude granting both Hawkeye's motion and Stamm defendants' cross motion for summary judgment.

It is well settled that the proponent of a motion for summary judgment must establish that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851). Neither the Stamm defendants nor Hawkeye has met their respective burdens.

The Court will next consider the cross motion of the plaintiff. in her cross motion, the plaintiff first seeks to vacate the Stipulation of Discontinuance and to restore Keyspan to the matter herein.

Here, the stipulation in issue was drafted by counsel to Keyspan on December 22, 2006, eleven days after a Certification Conference (on December 11, 2006) with the law secretary of the Justice (since retired) then handling the case. At the conference, plaintiff alleges the law secretary advised plaintiff she had no case against Keyspan and plaintiff would be fined or sanctioned if she "unjustly" kept Keyspan as a defendant in this proceeding (see plaintiff's affidavit ¶¶ 12 and 13 annexed to plaintiff's reply affidavit as Exhibit A). Plaintiff contends defendant Gregory Stamm had not yet been deposed (his deposition date was February 1, 2007) wherein defendant Stamm stated Keyspan was responsible for the sand/ gravel at the site where plaintiff allegedly fell (see Exhibit B pg. 57 annexed to Hawkeye's reply affirmation).

Keyspan's counsel, Lisa M. Zafonte, stated at no time was there any mention by

the Court as to fines and/or sanctions against plaintiff if plaintiff did not discontinue the action as to Keyspan.

The Court notes the deposition of Donald A. Stamm, the co-owner of Frank Stamm & Sons, Inc. (see Exhibit C annexed to Hawkeye's reply affirmation) is revealing. Donald Stamm stated he believed Keyspan was involved in the laying of the new gas line (Exhibit C, pgs. 10, 19, 25, 32, 36). The deposition of Donald was held on June 26, 2006 with Amy Christensen representing plaintiff. Thus, the deposition was done some six (6) months before plaintiff signed the stipulation of discontinuance. Plaintiff, an attorney herself, had counsel of Ms. Christensen. Clearly, the deposition of Donald Stamm made note of Keyspan's involvement in the pipeline installation. At this point, June 26, 2006, plaintiff had to have an idea if Keyspan was a viable defendant.

A party will be relieved of the consequences of a stipulation made during litigation only if there is sufficient cause to invalidate a contract such as fraud, collusion, mistake or accident (*Bellefleur v Gervais*, 201 AD2d 524).

Efforts by a court to assist in the settlement of a matter do not rise to the level of coercion, such as will permit relief from a stipulation of settlement, when trial is the only alternative to settlement (*Doppelt v Doppelt*, 215 AD2d 715).

Parties may be relieved from stipulations if there has been a showing of fraud, collusion, mistake, accident, or surprise, or where it is otherwise appeared that to deny relief would be harsh or unjust (*Bussing v Caligiuri*, 65 AD2d 764). The court, evaluating the full record, sees no need to vacate the Stipulation of Discontinuance signed by

plaintiff.

That branch of the plaintiff's cross motion deeming the accident site to be on the Stamm defendants' premises must be denied since as discussed *supra*, there are issues of fact in dispute as to where exactly the alleged incident occurred.

In her cross motion, plaintiff seeks to amend her complaint. While CPLR 3025 does allow that amendments be freely granted, leave to amend is not to be granted upon the mere request of a party without a proper basis; it is incumbent upon the movant to make some evidentiary showing that the claim can be supported (*Morgan v Prospect Park Associates Holdings, LP*, 251 AD2d 306).

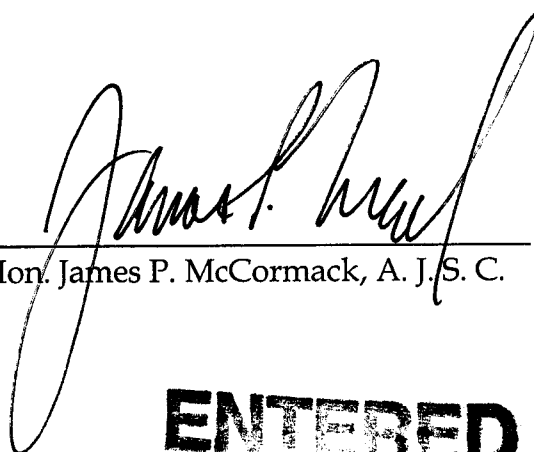
Here, plaintiff makes no valid effort that the court can detect to properly identify Accurate Construction Co. as a viable defendant. There is no reference in her motion and the amended complaint only offers the name. Thus, plaintiff's branch of her motion to amend her complaint, as proposed, must be denied with leave to renew upon proper papers.

As to that branch of the plaintiff's motion to restore this proceeding to the "discovery calendar," a conference shall be held in chambers to determine, based on the court's objective evaluation of the situation, if any further discovery is required from any of the parties.

Finally, Keyspan's cross motion to make a summary judgment motion is denied as moot since the court has denied plaintiff's cross motion to vacate the Stipulation of Discontinuance as to Keyspan.

This constitutes the Decision and Order of the Court.

Dated: September 28, 2007
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED

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