Davar v City of New York
2007 NY Slip Op 33826(U)
November 5, 2007
Supreme Court, Queens County
Docket Number: 0031498/2001
Judge: Kevin Kerrigan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

BORIS DAVAR,

Plaintiffs,

- against -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK INC., VERIZON NEW YORK INC., and TRI-MESSINE CONSTRUCTION COMPANY, INC.

Defendants.

----------X

Index Number: 31498/01

Motion Date: OCT. 2, 2007

Motion Cal. Number: 12
Motion Seq. No. 6

The following papers numbered 1 to 21 read on this motion by defendant Verizon New York, Inc. for vacatur of the stay of this action and to dismiss the complaint and all cross-claims against it or, in the alternative, for leave to move for summary judgment and for summary judgment, "cross-motion" by defendant City of New York to dismiss the complaint and all cross-claims against it and "cross-motion" by defendant Consolidated Edison Company of New York, Inc. to dismiss the complaint and all cross-claims against it.

	Papers Numbered
Amended Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation-Exhibits (the City)	5-8
Notice of Cross-Motion-Affirmation (Con Edison)	9-11
Affirmation in Opposition to Motion-Exhibits (Plaintiff)	12-13
Affirmation in Opposition to Con Edison's Cross-Motion (Plaintiff)	14-15
Reply Affirmation to City's Opposition (Verizon)	16-17
Reply Affirmation to Con Edison's Opposition (Verizon)	18-19
Reply Affirmation to Plaintiff's Opposition (Verizon)	20-21

Upon the foregoing papers it is ordered that the motion and cross-motions are decided as follows:

The instant motion and "cross-motions" were referred to this Court pursuant to a memorandum of Justice Martin J. Schulman issued

on October 9, 2007 and were received in chambers on October 10, 2007.

Motion by Verizon for vacatur of the stay of this action imposed on September 29, 2004, and, upon such vacatur, to dismiss the complaint and all cross-claims against it, pursuant to CPLR 3404, upon the ground that the action was abandoned or, in the alternative, for leave to move for summary judgment for good cause shown, pursuant to CPLR 3212(a), and for summary judgment, pursuant to CPLR 3212, is granted solely to the extent of allowing it to move for summary judgment. However, in all other respects, the motion is denied.

This matter was marked "stayed" on September 29, 2004 in the Trial Scheduling Part. The parties represent that the stay was imposed in order to afford Verizon and plaintiff the opportunity to conduct depositions of each other, although the record on this motion does not reflect that such was the reason for the stay. Counsel for Verizon alleges that plaintiff was deposed by Verizon on December 21, 2004 but that plaintiff has not moved forward with the deposition of Verizon. Counsel contends that since plaintiff has failed to move to vacate the stay and "restore" the matter within one year of the stay, he has abandoned the action and, thus, Verizon is entitled to dismissal of the action for failure to prosecute, pursuant to CPLR 3404. Counsel's argument is without merit.

In the first instance, although the parties fail to reveal such fact, the Court notes that the stay of this matter was vacated in the Trial Scheduling Part on July 3, 2007. Therefore, that branch of the motion seeking vacatur of the stay in order to afford Verizon the opportunity to move for dismissal or summary judgment is denied as moot.

Moreover, CPLR 3404 relating to the dismissal of cases deemed abandoned on account of their not being restored within one year relates only to cases marked "off" or struck from the calendar. There is no allegation or any indication that this action was stricken from the calendar. The parties, indeed, assert that the matter was marked "stayed". Therefore, plaintiff could not have neglected to "restore" this action to the calendar, since it was never marked "off" the calendar in the first place. Therefore, CPLR 3404 does not apply to mandate dismissal of this action, since "[t]he issuance of a stay of the action . . . was not the equivalent of marking the case 'off' the calendar" within the meaning of CPLR 3404 (Ballestero v. Haf Edgecombe Assocs., L.P., 33 AD 3d 952, 953 [2nd Dept 2006]).

With respect to that branch of the motion seeking leave to move for summary judgment, the Court notes that the motion was

served on June 18, 2007, three and one-half years after the note of issue was filed on August 15, 2003. Pursuant to CPLR 3212(a), in the absence of a court order setting a specific date by which a motion for summary judgment must be made, such motion may not be made later than 120 days after the filing of the note of issue, except with leave of court on good cause shown.

In the instant matter, Verizon has demonstrated good cause to allow it to make the instant motion, even at this late juncture (see Brill v. City of New York, 2 NY 3d 648 [2004]). Verizon was not made a party to this action until January 12, 2004 when a supplemental summons and complaint were filed naming it as a defendant. Verizon interposed its answer on February 9, 2004. Thus, not only had the note of issue been filed prior to the date Verizon was brought into this action, but the 120-day deadline for making summary judgment motions had also expired. Moreover, discovery was outstanding between Verizon and plaintiff that was deemed significant enough to warrant a stay of the action until such discovery was completed. Under the circumstances, since the note of issue was filed more than 120 days before Verizon appeared in the action and there was significant outstanding discovery after Verizon appeared warranting a stay of the action pending completion of such discovery, there is good cause, on this record, to allow Verizon to move for summary judgment at this juncture (see e.g. Herrera v. Felice Realty Corp., 22 AD 3d 723 [2nd Dept 2005]).

That branch of the motion for summary judgment, however, is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling in what he describes as a hole in the public roadway adjacent to the premises between 64-36 108th Street and 64-40 108th Street in Queens County on February 18, 2001.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Verizon has failed to meet its initial burden.

Verizon moves for summary judgment upon the basis of the affidavit of its employee, Aaron Crawford, who is employed by Verizon as its scheduling manager. Crawford avers that Verizon has no trenches or conduits in the immediate area of 64-36. He also avers that the pay telephone in front of 64-36 is not a Verizon telephone and there is no Verizon conduit running underneath that pay phone. He also avers that the Verizon pay telephones located in front of 64-48 have no conduits running underneath them.

He also avers that he examined two work permits applied for by Verizon. The first one was for a 5 by 5 foot sidewalk cut. But he states that there were no records to indicate whether the work was done. He fails to indicate the location for the work. He merely assumes that since the Verizon pay phone was in front of 64-48, the work, if done, was at that location. He further speculates that any work it may have done in front of 64-48 would not create the condition near 64-36.

As to the second permit, Crawford avers that it was a street opening permit for the pay phones in front of 64-48 and that said permit indicated that the cut would not exceed 10 feet. He again speculates that such work was not close enough to the street defect at issue to have caused such condition. Therefore, the entire basis of Crawford's position that Verizon did not cause or contribute to the condition upon which plaintiff tripped and fell was his unsupported conclusory assertions that Verizon had no conduits running under the subject location and that the Verizon pay phones and any work performed by Verizon in front of them was too far away to have caused the street defect at issue.

In the first instance, Crawford fails to set forth in his affidavit the basis of his knowledge that there are no Verizon conduits running underneath the area where plaintiff fell, that there are no conduits running underneath the Verizon pay phones or that the work performed by Verizon did not encompass the area where plaintiff fell. Although he identifies himself as the scheduling manager, he fails to explain what his duties are in that position that would give him knowledge of the facts he asserts.

Moreover, Crawford merely speculates that work performed by Verizon pursuant to the aforementioned permits was too far to have caused the defect in question. Plaintiff alleges that the defect was between 64-36 and 64-40. Crawford fails to state what the distance is between those addresses and 64-48 where the Verizon pay phones are located.

Moreover, the application for the street opening permit, annexed as Exhibit "J" to the motion and marked plaintiff's exhibit 9, indicates that it was a permit for "conduit construction and franchise", which seems to contradict Crawford's averment that Verizon has no conduits running underneath its pay phones.

Although it is true that a work permit does not constitute proof that any work was, in fact, done, the permit application which Verizon annexes to its moving papers that seemingly contradicts the averments of its employee raises questions of fact.

Therefore, since Crawford's affidavit fails to set forth the basis of his knowledge, and since its conclusions are based on mere speculation, it is of no probative value. At best, it fails to eliminate all questions of fact. Therefore, Verizon has failed to establish a prima facie entitlement to summary judgment.

Motions by the City and Con Edison to dismiss the complaint and all cross-claims against them, pursuant to CPLR 3404, upon the ground that the action was abandoned (erroneously denominated as "cross-motions")are also denied, for the reasons heretofore stated.

Accordingly, the motion and "cross-motions" are denied.

Dated: November 5, 2007

KEVIN J. KERRIGAN, J.S.C.