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| Hembury v Abovenet Communications, Inc. |
| 2007 NY Slip Op 34530(U) |
| February 7, 2007 |
| Supreme Court, New York County |
| Docket Number: 101895/2005 |
| Judge: Marcy S. Friedman |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

CHRISTOPHER HEMBURY and
ROSEMARY HEMBURY,

Plaintiff(s),

against

ABOVENET COMMUNICATIONS, INC.,
et al.,

Defendant(s).

Index No.: 101895/2005

DECISION/ORDER

FILED
FEB 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiff sues to recover damages for personal injuries sustained on April 26, 2002, when he fell from his bicycle after hitting a depression in the street which caused him to run into a concrete planter on the sidewalk in front of 250 West 50th Street in Manhattan. By separate motions, defendants Consolidated Edison Company of New York, Inc. ("Con Ed") and Abovenet Communications, Inc. ("Abovenet") move, and defendants Empire City Subway Company ("ECS"), Triumph Construction Corp. ("Triumph"), Nico Asphalt Paving Inc. ("Nico") and RCN Telecom Services of New York, Inc. and RCN Communication, Inc. (collectively "RCN") cross-move, for summary judgment dismissing the complaint and all cross-claims.

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851,853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing

party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman v City of New York, *supra*, at 562.)

According to plaintiff's bill of particulars, his accident occurred 30 feet east of 250 West 50th Street, between 8th Avenue and Broadway, New York, New York. Plaintiff testified at his deposition that while on duty as a New York City police officer, he fell from his bicycle after he hit a depression in the roadway of West 50th Street between 8th Avenue and Broadway. (Hembury Dep. at 42-44.) He testified that he was riding eastbound on West 50th Street, a one-way eastbound street with two traffic lanes (*id.* at 44-45), and that his accident occurred closer to 8th Avenue on the south side of the street (Hembury Dep. at 43-44), in front of the Palm Restaurant. (*Id.* at 47.) He described the depression in the roadway as a dip or sunken area of asphalt approximately 3-4 feet long and 2-3 feet wide (*id.* at 48, 90) about five feet from the south curb. (*Id.* at 47.) After his bicycle hit the depression, the bicycle veered to the right, went up on the curb and hit a large concrete flower box on the sidewalk (*id.* at 49-50), causing plaintiff to fall off the bicycle. (*Id.* at 50-51). Plaintiff further testified that he fell on the sidewalk just east of the easternmost of four flower pots on the sidewalk. (*Id.* at 69.)

Defendant Con Ed moves for summary judgment on the ground that it did not perform work at the location of plaintiff's accident. In support of its motion, Con Ed relies on records showing Con Ed work done on the block where the accident occurred, and the deposition testimony of plaintiff and Con Ed's witness, Mario Smith. Mr. Smith, a record searcher, testified that the records that he reviewed indicated that Con Ed performed excavation work in front of 205 West 50th Street (Smith Dep at 17-18) and that the only other work it did on 50th Street between 8th Avenue and Broadway was to secure a manhole cover in front of 250 West 50th

Street in response to a complaint on April 12, 2002 about a noisy manhole cover in the street. (Id. at 13.) Based on this testimony, and on the assertion of counsel for Con Ed that 205 West 50th Street is at the opposite end of the block from 250 West 50th Street, Con Ed argues that it performed no work near the site of the accident. However, on this record, it is not clear how near or far from the site of the accident Con Ed performed work. Unlike certain of the other movants, Con Ed fails to submit evidence to establish clearly the extent of Con Ed's work on the street and the distance from its work to the accident site. The work records, which are barely legible, are not self-explanatory and Con Ed's witness did not testify with any precision about what the records reflect or how to interpret them. Nor does Con Ed furnish the court with any evidence based on which it can take judicial notice of the distance between 205 and 250 West 50th Street and, more particularly, between the location of Con Ed's work near 205 West 50th Street and the location of plaintiff's fall, 30 feet east of 250 West 50th Street. Thus, contrary to Con Ed's contentions, it fails to eliminate triable issues of fact as to whether the area where Con Ed performed work was in the vicinity of the area where plaintiff's accident occurred. Con Ed therefore fails to establish as a matter of law that it is entitled to summary judgment.

Defendant Abovenet also seeks dismissal of the complaint on the ground that it performed no work near the site of plaintiff's accident. John Scaglione, a senior project manager employed by Abovenet, testified that Abovenet is a telecommunications company which performed work on a project to provide cable to a building located at 1633 Broadway near 50th Street. (Scaglione Dep. at 15, 21-24.) According to Mr. Scaglione, Abovenet's work on this project involved cutting into the roadway to run cable underground and into the 1633 Broadway building. (Id. at 20-22, 36-37, 42.) Based on his review of work permits and schematics

identified at his deposition, Mr. Scaglione described the cut in the roadway as 70 feet long and described the location of this cut as approximately 100-170 feet west of Broadway and running north-south from about the middle of the street to the north side. (Id. at 40-44.) After inspecting where the work was done on 50th street, he testified that it did not extend to the vicinity of the Palm Restaurant, the area where plaintiff's accident occurred (id. at 62-64), and he estimated that there were three or four buildings between the Palm restaurant and the western end of the roadway cut made by Abovenet. (Id. at 48.) Relying on the work permits and diagrams and the testimony of Mr. Scaglione, as well as plaintiff's testimony, Abovenet argues that there is no evidence that it did work near the site of plaintiff's accident in front of the Palm Restaurant at 250 West 50th Street.

Contrary to plaintiff's argument in opposition, the testimony of Abovenet's witness was not based on mere conjecture. Rather, he reviewed diagrams marked with distances and, based on his experience in interpreting such diagrams, was able to estimate other distances using the scale on the diagrams. Contrary to plaintiff's contention (Aff. of Ocasio-Douglas in Opp., ¶ 12), the diagram relied on and explained by Mr. Scaglione (identified as "Plaintiff's Exhibit 5") does not show that 250 West 50th Street was immediately to the right of 1633 Broadway, but shows that 250 West 50th Street was across the street and to the west of (to the left of) 1633 Broadway. Notably, moreover, plaintiff offers no evidence, expert or other, to dispute Abovenet's testimony that the area of its work was several buildings away from the area of plaintiff's accident. Accordingly, Abovenet has established its entitlement to summary judgment dismissing the complaint and all cross-claims against it.

Defendant ECS similarly cross-moves for summary judgment on the ground that it did

not perform work at the location of plaintiff's accident. In support of its motion, ECS relies on documents showing the location of its work in the area and the deposition testimony of its employee, Dirk Rolff, a local manager of operations responsible for searching for and reviewing records. (Rolff Dep. at 6-7.) Mr. Rolff testified that ECS owns a system of conduits and manholes in Manhattan (id. at 7), and that ECS performed work on 50th Street between 8th Avenue and Broadway in November 2000. (Id. at 8, 10, 14-15.) Based on his review of records, he testified that the work done by ECS began at the corner of 8th Avenue and 50th Street, went 84 feet east of 8th Avenue and then turned north and went to the north curb. (Id. at 17-18.) Mr. Rolff also went to the site of the accident and measured the distance from the easternmost part of ECS' work to the flower pot identified by plaintiff as the site of his accident, which he testified was 147 feet. (Id. at 18-19.) Based on this testimony, Empire argues that it did not perform work near the vicinity of plaintiff's accident. In opposition, plaintiff offers nothing to dispute ECS' evidence. In fact, plaintiff acknowledges that the documentary evidence shows that ECS did no work in front of 250 West 50th Street. Plaintiff instead relies on the conclusory assertion that ECS owned other conduits closer to the accident site which may have been used by other entities, and that it therefore had a responsibility to maintain the other conduits. This assertion is insufficient to raise a triable issue of fact as to whether ECS is liable for work performed at the accident site. Accordingly, ECS has demonstrated its entitlement to summary judgment dismissing the complaint against it. As to ECS' request for dismissal of the cross-claims, only second third-party defendant Time Warner Cable of New York City ("Time Warner") submits opposition. However, Time Warner does not submit a copy of its pleadings to show what, if any, claims it has against ECS. Nor does Time Warner otherwise demonstrate a basis for denial of

ECS' motion to dismiss the cross-claims. Time Warner's bare assertion that discovery is needed is insufficient to warrant denial of summary judgment here. (See Harris v Alcan Aluminum Corp., 91 AD2d 830 [4th Dept 1982], affd 58 NY2d 1036 for reasons stated below.)

In support of its cross-motion for summary judgment, defendant Triumph contends that the only work that it performed on 50th Street between Broadway and 8th Avenue involved the installation of a public telephone kiosk to the west of the entrance to the building located at 250 West 50th Street, and that the work it performed was approximately 120 feet to 136 feet west of the location of plaintiff's accident. At his deposition, Triumph's vice president, Carl Cuzzi, testified that in October 2000 Triumph applied for a permit to install conduit for a pay phone on the south side of West 50th Street between 8th Avenue and Broadway (Cuzzi Dep. at 18-19, 21), and that the permit provided for the cutting of a trench in the street in front of 238 West 50th Street, approximately 135 feet west to east and about 10 feet north to south. (Id. at 19-21.)

Although Triumph claims that the documents and witness testimony show that the telephone kiosk was installed more than 100 feet from the location of plaintiff's accident, its own witness testified that the distances on the records are approximations, and that it was not possible to tell from Triumph's application for the permit whether the 135 foot cut ran from the corner or not. (Id. at 21.) The records and testimony also indicate that the cut in the road was in front of 238 West 50th Street (id. at 25), an address that at the time of the accident was encompassed by the building at 250 West 50th Street. (Pesce Aff. in Support of Triumph's Cross-Motion, ¶ 9.) The documents and testimony submitted by Triumph thus do not clearly establish that it did no work in the roadway in the vicinity of plaintiff's accident. Nor does the affidavit of Mr. Cuzzi submitted in support of Triumph's cross-motion eliminate triable issues of fact. In his affidavit,

Mr. Cuzzi, relying on a drawing identified as Exhibit A to his affidavit (but actually attached as Exhibit B), asserts that the cut made in the street started at a manhole in the intersection of 8th Avenue and West 50th Street and ran approximately 90 to 95 feet east down West 50th Street. However, although Mr. Cuzzi claims that the drawing on which he relies was “prepared on behalf of Triumph” (Cuzzi Aff in Support, ¶ 1), he does not identify who prepared the drawing or the source of the information included in it. The document therefore is neither competent nor conclusive evidence. On this record, Triumph fails to establish as a matter of law that its work did not extend into the vicinity of plaintiff’s accident.

Defendant Nico cross-moves for summary judgment dismissing the complaint and all cross-claims against it. In support of its cross-motion, Nico states that it does asphalt roadway restoration work for certain utility customers, including Con Ed and ECS, but contends that there is no evidence that it did any work on West 50th Street between 8th Avenue and Broadway prior to the date of plaintiff’s accident. Nico’s superintendent, John Denegall, testified at his deposition that he conducted a search of work records kept by Con Ed and ECS for the two-year period prior to plaintiff’s accident and found no records of any work done by Nico. Plaintiff’s opposition to Nico’s cross-motion is without basis. Nico accordingly is entitled to summary judgment dismissing the complaint against it. To the extent that Nico also seeks dismissal of all cross-claims, the only opposition submitted is from second third-party defendant Time Warner. However, as noted earlier, Time Warner does not attach its pleadings to show what claims it has, if any, against Nico. Nor does Time Warner otherwise demonstrate that summary judgment should be denied based on its asserted need for discovery.

Finally, RCN also cross-moves for summary judgment dismissing the complaint against

it. Plaintiff opposes the cross-motion as untimely, based on a stipulation signed by counsel for all appearing parties in the action, which provided that “all Motions and Cross-Motions for Summary Judgment pending before the Court on May 12, 2006 are adjourned [and] * * * are deemed timely served.” The stipulation also provided that opposition papers were to be served by May 25, 2006. RCN served its cross-motion on May 25, 2006. Assuming arguendo that RCN’s cross-motion was untimely, it was made in response to co-defendants’ pending, timely summary judgment motions, and seeks nearly identical relief to that sought by the co-defendants’ motions. (See Filannino v Triborough Bridge & Tunnel Auth., ___ AD3d ___, 824 NYS2d 244 [1st Dept 2006].) The court accordingly will consider the merits of RCN’s cross-motion.

In support of its cross-motion, RCN relies on documents and testimony of its witness, Kevin Comfort, to show that RCN itself did no work in the area where plaintiff’s accident occurred, and that Time Warner, an independent contractor, did excavation work on its behalf in the area. RCN further asserts that it did not hire any of the contractors who performed the work and did not control or supervise the work. In opposition, plaintiff argues that excavation work done in front of 250 West 50th Street was done for the benefit of RCN and at the behest of RCN.

Although generally an employer who hires an independent contractor is not liable for the negligent acts of the independent contractor, there are recognized exceptions to this rule. (Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 668 [1992].) The exceptions include situations where the work done by the contractor is “inherently dangerous.” (Id.; Ortiz v Nunez; 32 AD3d 759, 760 [1st Dept 2006].) While it has been held that the laying of underground cable is not inherently dangerous work (Steel v City of New York, 271 AD2d 435, 436 [2d Dept 2000]), it is well settled that excavation work on a public roadway is work which, if

negligently performed by an independent contractor, may be a basis for imposition of liability on the employer. (See Ortiz, 32 AD3d at 760; Emmons v City of New York, 283 AD2d 244 [1st Dept 2001].) Here, RCN's witness testified that the conduit work was done entirely underground and that RCN gained access to the underground through an ECS manhole. However, he also testified that after the conduit work was performed, street excavation work was done by Time Warner or its agents. (Comfort Dep. at 50-52.) Under these circumstances, RCN has not demonstrated as a matter of law that no work was performed by its independent contractor on the surface of the roadway, and therefore that RCN cannot be held liable for the negligent acts, if any, of its independent contractor.


Accordingly, it is ORDERED that the motion of Con Ed and the cross-motions of Triumph and RCN for summary judgment are denied; and it is further

ORDERED that the motion of Abovenet and the cross-motions of ECS and Nico for summary judgment are granted to the extent that the complaint and all cross-claims are dismissed against them and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
February 7, 2007



MARCY FRIEDMAN, J.S.C.

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