

Cox v City of New York
2008 NY Slip Op 32966(U)
October 20, 2008
Supreme Court, New York County
Docket Number: 110320/2004
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KAREN SMITH

PART 62

Index Number: 110320/2004

COX, LOIS ANN

INDEX NO. _____

VS.

MOTION DATE 09/18/08

CITY OF NEW YORK

MOTION SEQ. NO. _____

SEQUENCE NUMBER: 007

MOTION CAL. NO. _____

SUMMARY JUDGMENT

The following papers, numbered 1 to 14 were read on this motion and 2 "cross-motions" to/for Summary Judgment

PAPERS NUMBERED

1
2, 3
4
5
6, 7, 8
9-11
12, 13
14

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Opposition Papers
Answering Affidavits — Exhibits

Time witness "Cross-Motion"
Replying Affidavits *Time witness "Cross-Motion"*

"Cross-Motion": Yes No (2)

Upon the foregoing papers, it is ordered that this motion and two "cross-motions" are decided in accordance with the annexed memorandum decision and order.

FILED

OCT 30 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/20/08

KSS
HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
LOIS ANN COX,

Plaintiff,

-against-

Index No.: 110320/2004
Motion Seq.: 007
Motion Date: 09/18/2008

THE CITY OF NEW YORK, CONSOLIDATED EDISON,
INC., EMPIRE CITY SUBWAY COMPANY LTD., TIME
WARNER CABLE, INC., NICO ASPHALT PAVING, INC.,
HYLAN DATACOM AND ELECTRICAL, INC., AND
TRINITY COMMUNICATIONS CORP.

Defendants.

DECISION AND ORDER

-----X
EMPIRE CITY SUBWAY COMPANY, LTD.,

Third-Party Plaintiff,

-against-

Third-Party
Index No.: 590321/2005
Motion Date: 09/18/2008

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

-----X
TIME WARNER CABLE OF NEW YORK CITY, a division
of TIME WARNER ENTERTAINMENT COMPANY, L.P.

Second Third-Party Plaintiff,

-against-

Third-Party
Index No.: 590854/2005
Motion Date: 09/18/2008

HYLAN DATACOM & ELECTRICAL, INC.,
Individually and successor in Interest to TRINITY
COMMUNICATIONS CORP., Individually and
NEW HAMPSHIRE INSURANCE COMPANY

Second Third-Party Defendants.

FILED
OCT 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Third Third-Party Plaintiff,

-against-

Third-Party
Index No.: 590925/2006
Motion Date: 09/18/2008

SAFEWAY CONSTRUCTION ENTERPRISES, INC.,
Third Third-Party Defendant.

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Hylan Datacom & Electrical, Inc. (“Hylan”)’s motion, on behalf of itself individually and as successor in interest to Trinity Communications Corp. (“Trinity”), for summary judgment dismissing the complaint and all cross-claims asserted against it in the primary action, as well as the second third-party action is granted solely to the extent that Hylan is granted summary judgment dismissing the complaint in the primary action and in the second third-party action against Hylan. However, the portions of Hylan’s motion seeking dismissal of all cross-claims is denied.

Time’s “cross-motion” is granted solely to the extent that Time is granted summary judgment dismissing the complaint and the cross-claims of Empire City Subway Company (“ECS”), and Consolidated Edison Company of New York, Inc. (“Con Ed”) asserted against Time in the primary action, the counter-claims of Hylan asserted in the second third-party action and the cross-claims of Nico Asphalt Paving, Inc. (“Nico”) asserted in the third-party action (by ECS against Nico, Index No. 590321/2005). Time is also granted summary judgment declaring that New Hampshire Insurance Company has a duty to defend Time in the primary action. However, the portions of Time’s “cross-motion” seeking dismissal of all cross-claims is denied.

Safeway Construction Enterprises, Inc. (“Safeway”)’s “cross-motion” seeking summary judgment dismissing the complaint and any cross-claims asserted against Safeway in the primary action and dismissing Consolidated Edison Company of New York, Inc. (“Con Ed”)’s third-party complaint against Safeway in the third third-party action is denied.

This is a personal injury action in which the Plaintiff seeks to recover for injuries she allegedly sustained on April 29, 2003 when she tripped and fell in a hole in the street pavement

located in the cross-walk of 9th Avenue on the south side of West 42nd Street near the east curb-line. Plaintiff has provided at least two descriptions of the location of her accident. They are; 1) between 6 and 9 feet west of the east curb and 2) 3/4 of the way across 9th Avenue (traveling west to east). The documents and records submitted with the motion papers indicate that 9th Avenue is approximately 69 feet wide. Therefore, the location of Plaintiff's accident could have been almost 20 feet from the eastern curb line of 9th Avenue. Although Plaintiff marked an "x" on at least two pictures to illustrate the location of her accident, the pictures have no scale and offer no means for the court to reach any better conclusion about the distance of Plaintiff's accident from the curb line than the Plaintiff's description of the location of her accident.

Hylan now moves for summary judgment dismissing the complaint and all cross-claims asserted against it in the primary action as well as all claims asserted against Hylan in Time's second third-party complaint. At the time of the accident, Hylan was the successor in interest to Trinity and, as such, was subject to all in all of the rights and obligations Trinity had based upon Trinity's agreement with Time. Under the agreement, Trinity was obligated to install certain cables and conduits, running from a manhole in 9th Avenue just north of 42nd Street continuing to, along and within, the street bed of 42nd Street, and into a building on the north side of 42nd Street. Hylan contends that the Plaintiff's description of the location of her accident places it in 9th Avenue to the south of the southerly curb line of 42nd Street and that the records of the street excavation work undertaken by Trinity, prior to the Plaintiff's accident, indicate that all of Trinity's work took place well north of the southerly curb line of 42nd Street. Based upon this information, Hylan argues that Plaintiff's injuries did not arise out of Trinity's work. Therefore, Hylan concludes that neither it nor Trinity may be held liable to Plaintiff, nor can Hylan or

Trinity be liable to any of the other parties in the primary action based upon any cross-claims asserted therein. Further, as Trinity's contract with Time only required Trinity to indemnify Time for losses and expenses "arising out of" Trinity's work and the Plaintiff's accident did not "arise out of" Trinity's work, Trinity and Hylan cannot be held liable to Time pursuant the contract between Trinity and Time.

Hylan's papers present a *prima facie* showing that Trinity's work was not located at or even near the site of Plaintiff's accident. Plaintiff and Time oppose Hylan's motion. However, neither of them has presented any evidence in admissible form to raise a triable issue of fact concerning the location of Trinity's work. Therefore, Hylan's motion is granted to the extent of granting Hylan a judgment dismissing the plaintiff's complaint as it relates to Hylan and Trinity. However, as Hylan has not presented any pleadings of the other parties herein which may have asserted cross-claims against Hylan or Trinity, the court is not in a position to determine what the cross-claims are and whether Hylan has any basis to seek summary judgment dismissing them. Accordingly, the branch of Hylan's motion seeking summary judgment dismissing all cross-claims asserted against it and Trinity is denied.

Hylan's obligation to indemnify and defend Time is governed by the contract entered into between Trinity and Time (attached to Time's opposition papers as Exhibit B). The contract specifically provides that Trinity's indemnity obligations extend to matters; "...arising out of or in any way connected with the acts or omissions of Contractor ..." (Exhibit B, Page 6). The term "Contractor" is defined in the contract means Trinity (and, in this case, Hylan, as successor in interest to Trinity). Since it has been determined that the Plaintiff's injuries do not arise out of any work performed by Trinity, Hylan is not obligated to indemnify Time for any losses or

defense costs it has incurred or will incur in connection with the instant action. Therefore, the branch of Hylan's motion which seeks a summary judgment dismissing the claims asserted by Time against Trinity and Hylan in the second third-party complaint is granted,

Time has submitted what it denominates a "cross-motion" to Hylan's motion¹. In addition to the relief requested as against Hylan, Time's motion seeks summary judgment dismissing the complaint and all cross-claims and counter-claims asserted against it and summary judgment in favor of Time as against New Hampshire Insurance Company ("New Hampshire"), as Trinity's insurer, declaring that Time is an additional insured on the insurance policy issued by New Hampshire and, as such, New Hampshire is obligated to defend and indemnify Time for all losses and defense costs incurred by Time as a result of the primary action. The motion is opposed by Hylan and New Hampshire.

Time has made a *prima facie* showing that the only street excavation work performed by it, or on its behalf, near the location of Plaintiff's accident was not at or close to the location described by Plaintiff as the location of her accident. None of the other parties to this action has presented any evidence in admissible form to challenge Time's showing. Therefore, the branch of Time's motion seeking summary judgment dismissing the Plaintiff's complaint in the primary action against it, is granted.

The branch of Time's motion seeking summary judgment dismissing the cross-claims

¹ Time's motion is only a cross-motion to the extent that it seeks summary judgment against Hylan for defense costs and indemnity in the primary action. While the motion is not in proper form to the extent it seeks summary judgments against other parties, this technical defect may be overlooked because the court records indicate the Note of Issue has not yet been filed in the instant matter. Therefore, the motion is timely and no prejudice has been demonstrated by any other party.

asserted against it by ECS and Con Ed in the primary action, the counter-claims asserted by Hylan in the second third-party action and the cross-claims asserted by Nico in the third- party action commenced by ECS against Nico, is granted as all of these claims are premised upon common law indemnity and apportionment of fault and Time has demonstrated that it is not responsible for the alleged defects involved in Plaintiff's accident.

The branch of Time's motion seeking summary judgment declaring that Hylan must indemnify Time for all losses (including litigation and defense costs) arising out of the primary action is denied. As indicated above, based upon the contract between Time and Trinity, Hylan's obligation to directly indemnify Time for losses (including litigation and defense costs) is only triggered where it is found that Plaintiff's injuries arose out of Trinity's work on behalf of Time. As the court has determined that the Plaintiff's injuries did not arise out of Trinity's work, Hylan is not obligated to indemnify Time.

The branch of Time's motion seeking summary judgment declaring that New Hampshire must defend and indemnify Time is denied, except to the limited extent that the court declares that New Hampshire has a duty to defend Time in the primary action. New Hampshire's direct obligations, if any, to Time are governed by the insurance policy it issued to Hylan/Trinity rather than the contract between Time and Trinity itself. In the instant matter, New Hampshire's obligations to Time arise by virtue of the status of the contract between Trinity and Time as an "insured contract" (as that term is defined in New Hampshire's insurance policy). Pursuant to Section I 2.b.(2) of the insurance policy, New Hampshire would have been obligated to insure Hylan/Trinity (and Time) for Plaintiff's damages if they had arisen out of Trinity's work for Time. As it has been determined that the Plaintiff's damages did not arise out of Trinity's work,

New Hampshire has no duty to indemnify Time for any such damages. However, New Hampshire is obligated to insure Hylan/Trinity and Time for Time's defense and litigation costs in any; "... proceeding in which damages to which this insurance applies are alleged." In the instant matter, it was initially alleged that Plaintiff's damages were the result of Trinity's work so it follows that New Hampshire had a duty to defend both Time and Hylan (as successor in interest to Trinity) against the Plaintiff's litigation. Nevertheless, because Time has not submitted a copy of its liability insurance policy, the court is unable to determine whether New Hampshire's insurance is "Primary" or "Excess" and whether the "Method of Sharing" provisions of New Hampshire's policy apply (see Section IV 4. of New Hampshire's policy). Moreover, Time's counsel has not submitted any information as to the value of its services to Time in the primary action to date. As questions of fact exist on the issue of how much of the cost of Time's defense should be borne by New Hampshire and summary judgment must be denied with respect to this issue.

Safeway Construction Enterprises, Inc. ("Safeway") also submits what it denominates a "cross-motion" seeking summary judgment dismissing the complaint in the primary action as against it, Con Ed's third third-party action and all cross-claims asserted against Safeway in these actions. Safeway is the third-party defendant in the third third-party action (Index No. 590925/2006) commenced by Con Ed. Safeway had been engaged by Con Ed in connection with certain street openings and excavations of Con Ed near the location of Plaintiff's accident. However, Safeway has not submitted any of the complaints or answers which purportedly assert claims against Safeway. Therefore, the court has no basis upon which to determine if there are any claims properly asserted against Safeway and, if such claims exist, whether triable issues of

fact preclude the grant of summary judgment. Moreover, the street opening records provided by Safeway with its motion papers contain records of at least two excavations opened by Safeway which could be at the location of Plaintiff's accident (see Exhibit D to Safeway's moving papers). Therefore, Safeway has not made a *prima facie* showing of its entitlement to judgment as a matter of law and its motion is denied. Accordingly, it is;

ORDERED: that, upon the service of a copy of this order, together with notice of entry hereof and such other forms and fees as the Clerk may reasonably require, on the appropriate division of the Clerk's office, the Clerk shall forthwith enter judgment, in favor of Hylan (and Trinity), dismissing the complaint in the primary action against Hylan (and Trinity) and a judgment in favor of Hylan (and Trinity) dismissing Time's third party complaint against Hylan (and Trinity) but continuing both actions with respect to the other remaining parties in each action, and it is further;

ORDERED: that, upon service of a copy of this order, together with notice of entry hereof and such other forms and fees as the Clerk may reasonably require, on the appropriate division of the Clerk's office, the Clerk shall forthwith enter judgment in favor of Time dismissing the complaint as well as the cross-claims of ECS and Con Ed in the primary action as they relate to Time and a judgment in favor of Time dismissing, as they relate to Time, the cross-claims of Nico which are asserted in the third-party action commenced by ECS against Nico and a judgment in favor of Time dismissing the counter-claims asserted by Hylan in the second third-party action as they relate to Time but continuing all actions as against all the other parties involved in each action, and it is further;

ORDERED: that, upon Time's filing of a Note of Issue in the second third-party action,

together with such other forms and fees as the Clerk may reasonably require, the matter shall be set down for a trial on the issue of the reasonable amount of Time's defense costs, in connection with the primary action, for which New Hampshire is liable, and it is further;

ORDERED: that Safeway's motion for summary judgment is denied.

The foregoing constitutes the decision and order of this court.

Dated: October 20, 2008

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
OCT 30 2008
COUNTY CLERK'S OFFICE
NEW YORK