[* 1]

FILED

SHORT FORM ORDER

2008 SEP 25 PM 12: 33

JUDITH A. PASCALE
SUFFOLK COUNTY CLERK

INDEX No. 05-26220
CAL. No. 07-02933-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-27-08 (002, 003, 004 & 005)
MOTION DATE 5-30-08 (006)
ADJ. DATE 6-19-08
Mot. Seq. # 002 - MD
003 - XMG
004 - XMD
005 - XMG
006 - MG

ANTHONY ARCESE and MARY ARCESE,

Plaintiffs,

- against -

LONG ISLAND POWER AUTHORITY, VERIZON COMMUNICATIONS INC., COUNTY OF SUFFOLK and TOWN OF BABYLON,

Defendants.

STOCK & CARR
Attorneys for Plaintiffs
88 Second Street
Mineola, New York 11501

GEORGE D. ARGIRIOU, ESQ.
Attorney for Deft Long Island Power Authority
175 E. Old Country Road
Hicksville, New York 11801

LEWIS JOHS AVALLONE AVILES, LLP
Attorneys for Defendant Verizon
425 Broad Hollow Road, Suite 400
Melville, New York 11747

CHRISTINE MALAFI, ESQ., Suffolk County Atty.
By: Diana T. Bishop, Esq.
Attorneys for Defendant County of Suffolk
100 Veterans Memorial Highway, P.O. Box 6100
Hauppauge, New York 11788-0099

BESEN & TROP, L.L.P.
Attorneys for Defendant Town of Babylon
585 Stewart Avenue, Suite 416
Garden City, New York 11530

Upon the following papers numbered 1 to 63 read on these motions and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 54 - 61; Notice of Cross Motion and supporting papers 14 - 28; 29 - 43; 44 - 53; Answering Affidavits and supporting papers 10 - 12; 62; Replying Affidavits and supporting papers 13; 63; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Verizon Communications, Inc. for summary judgment (motion sequence #002), the cross motion by defendant County of Suffolk for summary judgment (motion sequence #003), the cross motion by defendant County of Suffolk for summary judgment (motion sequence #004), the cross motion by defendant Town of Babylon for summary judgment (motion sequence #005), and the motion by defendant Long Island Power Authority for summary judgment (motion sequence #006) are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Verizon Communications, Inc., for summary judgment (motion sequence #002) dismissing the complaint against it is denied; and it further

ORDERED that the cross motion by defendant County of Suffolk for summary judgment (motion sequence #003) dismissing the complaint and any cross claims against it is granted; and it is further

ORDERED that the cross motion by defendant County of Suffolk for summary judgment (motion sequence #004) dismissing the complaint and any cross claims against it is denied as moot; and it is further

ORDERED that the cross motion by defendant Town of Babylon for summary judgment (motion sequence #005) dismissing the complaint and any cross claims against it is granted; and it is further

ORDERED that the motion by defendant Long Island Power Authority for summary judgment (motion sequence #006) dismissing the complaint and any cross claims against it is granted; and it is further

ORDERED that this action is severed and continued against defendant Verizon Communications, Inc.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Anthony Arcese when he tripped over a guy wire anchor that was protruding from the ground on the west side of Bay Shore Road approximately 150 feet south of its intersection with Brook Avenue in Deer Park, New York. The plaintiff alleges that he was walking along the sidewalk on April 5, 2005, at approximately 9:15 a.m., when his foot hit the guy anchor causing him to stumble and fall. Near to the anchor was a utility pole. However, there was no guy wire running from the pole to this anchor. The complaint alleges that the defendants were negligent in their ownership, operation, maintenance, management, design, construction and control of the premises, in allowing a defective condition to exist.

Defendant Verizon Communications, Inc. (hereinafter "Verizon") now moves for summary judgment dismissing the complaint against it on the ground that the record is devoid of evidence indicating that the subject guy anchor was owned or in the control of Verizon. In support of its motion, Verizon submits, *inter alia*, the deposition testimony of plaintiff Anthony Arcese. Mr. Arcese testified that he was going for his morning walk, that he was walking along Bay Shore Road, and that he took this route approximately two times a month. He stated that, as he was walking, he observed a man on a cell

phone walking up and down the sidewalk, and a woman standing in the middle of the sidewalk in front of a bus shelter waiting for a bus. He alleged that he had to go to his right in order to walk around this man and woman, and walk onto an asphalt area between the concrete sidewalk and the street. Mr. Arcese alleged that he took approximately three steps on the asphalt area, when his right foot hit something and he tripped. He testified that after his fall, he looked at the ground and noticed the bent anchor over which he had tripped. He described the anchor as protruding approximately two inches from the asphalt. Mr. Arcese also testified that prior to his accident taking place, he had never seen this anchor. Additionally, he testified that prior to the accident, he was not aware of anyone making a complaint to the Long Island Power Authority (hereinafter "LIPA"), the County of Suffolk (hereinafter "the County"), the Town of Babylon (hereinafter "the Town"), or Verizon about the condition of the area.

Verizon also submits in support of its motion, the deposition testimony of its employee, Keith Harris, a pole supervisor. Mr. Harris testified to the effect that Verizon's telephone poles are numbered with a metal tag, that the telephone pole near to the guy anchor at issue was pole number 44, and that such pole was put up in 1954. After being shown a document labeled as plaintiff's exhibit 5, Mr. Harris testified that a permit was issued to install the guy anchor in 1983. However, Mr. Harris did not know if the telephone company actually installed the guy anchor. In addition, Mr. Harris further explained that if Verizon owns the pole, LIPA has joint usage. He testified that when he went to look at the pole at issue six or seven months prior to his deposition, he did not remember seeing anything on the pole which would indicate where a guy wire either should be attached or had been attached in the past. He alleged that, upon examination of the guy anchor, he did not observe any markings on such anchor, nor did he make any determination as to who owned the anchor. Mr. Harris did acknowledge that if LIPA had installed this guy anchor in the ground, the guy wire would have been attached to the pole in the electrical space which is near the top of the pole.

In addition, Verizon submits the deposition testimony of Carmella R. Balbus, an assistant civil engineer with the County's Department of Public Works, and points to that portion of Ms. Balbus' testimony wherein she alleged that she conducted a search for maintenance complaints of the area to see if there was a report of something metal sticking out of the ground, and she found no complaints for that area. Ms. Balbus also testified to the effect that when she realized that an anchor for a utility pole was at issue, she then went to the permit division and did a search to see if any anchors had been installed at that location. She explained in pertinent part that the County requires utilities who are going to work within the County's right of way to submit an application for a permit. Ms. Balbus alleged that upon such search, she came up with plaintiff's exhibit 5, a page from the permit book concerning Bay Shore Road, wherein it indicates that New York Telephone (Verizon's predecessor) was issued a permit to install a guy anchor in 1983. She further explained that if the work had not been actually done, the permit number would have been revoked and the sheet would have read "unexecuted."

Lastly, Verizon submits the deposition testimony of Thomas Brandt, a field supervisor in the Electric Lines Department for Key Span Electric Design and Construction, who is the contractor for LIPA, and who maintains LIPA's electric facilities and equipment. Mr. Brandt testified that LIPA, the telephone company, and Cablevision, all use anchors in connection with utility poles, and there are no identifying marks on the anchors to differentiate whether it was LIPA's, the telephone company's, or

Cablevision's anchor. Mr. Brandt stated that he went to look at the utility pole at issue, and after being shown a photograph of the utility pole, confirmed that such pole was the pole he examined. Mr. Brandt pointed to a guy wire in the photograph which runs perpendicular to the sidewalk and was connected to an anchor, stating that such guy wire was installed by and maintained by LIPA. He also testified to the effect that he checked LIPA's computer records and the only guy wire on the poll that was installed by LIPA was the guy wire to the building-side of the road, and not parallel to the road.

Mr. Brandt further testified that when he went to examine the pole he also observed another anchor, that was to the east of the pole, in the asphalt area between the sidewalk and the curb, and which had no guy wire attached to it. He explained that after looking at the anchor on the ground, he then looked at the pole and saw an attachment, known as "rabbit ears," in the communication area of the pole. Mr. Brandt testified that the rabbit ears is an aluminum attachment that is bolted to the pole and is what the guy wire is attached to on the pole. He also explained in pertinent part that the different utilities place their lines on different portions of the pole: the electrical lines are on the top portion pole; the Cablevision lines are at least four feet lower; and the telephone lines are a foot below Cablevision's lines. He stated that the rabbit ears attachment that he saw on the pole was between the Cablevision's lines and the telephone lines, that is, in the communication area. He testified to the effect that although both Cablevision and the telephone company can place rabbit ears in this location on the pole, he could not ascertain who in fact attached this particular guy line to the pole. After confirming that the empty anchor was not LIPA's, Mr. Brandt stated that if LIPA had a guy wire that was not attached to an anchor, LIPA would either reinstall what should be attached to the anchor, or remove the anchor.

Verizon argues that based upon this evidence there is nothing to indicate that the guy anchor was in fact owned by Verizon. It maintains that the only testimony regarding ownership concerning the place of the accident suggested that the telephone pole was installed by Verizon's predecessor and owned by Verizon at the time of the accident. It asserts that this has no bearing on the ownership of the guy anchor. Verizon also contends that there is no evidence that it created the alleged condition, or that it had actual or constructive notice of the alleged condition. It claims that there is no evidence that the alleged condition existed for an appreciable length of time so as to permit Verizon to discover it. It points out that there were no prior complaints relative to this guy anchor. Verizon concludes that absent evidence that the alleged dangerous condition was either created by Verizon or that Verizon had notice, plaintiff has failed to make a prima facie case of negligence.

Defendant County cross-moves for summary judgment dismissing the complaint and any cross claims against it. The County argues that it does not maintain the situs of the accident, and in the alternative, even if it did have some maintenance responsibility at the situs, this action is precluded by lack of prior written notice. In support of this cross motion, the County submits, *inter alia*, a copy of the page from the Bay Shore Road permit book which shows that on January 24, 1983, permit #17319 was issued to New York Telephone to install a guy anchor for pole number 44. In addition, the County submits the affidavit of Peter Burke, an employee in the County's Department of Public Works, who alleges that after making a diligent search with regard to the ownership, maintenance and control of the guy wire anchor on Bay Shore Road, he found that although the County does own Bay Shore Road, it does not maintain the sidewalk. Mr. Burke alleges further, that his research disclosed that the County received no complaints pertaining to any dangerous conditions or guy wire anchor at the situs of the

plaintiff's accident. The County also provides the Court with an affidavit of John Donovan, who is an investigator with the County, and who searched the County's records for any complaints with regard to a guy wire anchor on Bay Shore Road. Mr. Donavan alleges that his search revealed that the County was not in receipt of any written notice or written complaints concerning the alleged defective condition of a guy wire anchor on Bay Shore Road at any time prior to the alleged accident date. Additionally, the County submits the affidavit of Renee Ortiz who is the Chief Deputy Clerk of the Suffolk County Legislature and whose duties include maintaining records of all written complaints received by the Clerk of the Legislature. Ms. Ortiz alleges that after making a search for any written complaints, her search revealed that the Clerk of the Legislature is not in receipt of any written notice or written complaint concerning the alleged defective condition of a guy wire anchor on Bay Shore Road prior to the plaintiff's alleged accident date.

The County alleges that based upon the affidavit of Mr. Burke, it is unequivocal that the County did not have responsibility for the location of the accident. The County argues that pursuant to Highway Law §140 (18),[1] it would appear that the Town is responsible to maintain the sidewalks adjacent to County roads. Furthermore, the County argues that even if it were responsible for the location, there was no prior written notice to the County pertaining to the condition, which is required pursuant to the County Charter, Article 8, Section 2.[2] The County contends that in the instant case, the evidence is uncontroverted that no such written notice was afforded to the County, and that the failure to comply with the prior written notice requirement of the County Charter is fatal to the plaintiffs' case.

Defendant Town also cross-moves for summary judgment dismissing the complaint and all cross claims against it. The Town argues that the Town does not own, control or maintain the area where plaintiff allegedly fell. The Town submits, *inter alia*, the deposition of Ms. Balbus, and highlights that portion of her testimony wherein she stated that Bay Shore Road, "is under the jurisdiction of the County of Suffolk." Further, the Town submits the deposition testimony of George Price, Highway Coordinator for the Town, and points to the portion of Mr. Price's testimony wherein he stated that the Town does not do any highway maintenance to Bay Shore Road in the vicinity of Deer Park. Upon being asked, "What about the sidewalks in that area, do you know who maintains the sidewalks on Bay Shore Road in this vicinity?" Mr. Price answered, "It would be Suffolk County." When asked how he knew that, Mr.

---

[1]This section of the Highway Law provides in pertinent part that, "The town superintendent shall ... [m]aintain all sidewalks in the town constructed by ... the county adjacent to county roads ...."

[2]This section of the County's Charter provides in pertinent part: "[N]o civil action shall be maintained against Suffolk County or any of its departments ... for damages or injuries to a person or property sustained by reason of any (a) highways; (b) roads; (c) streets ... [and] sidewalks ... allegedly being in a defective condition, out of repair, unsafe, dangerous or obstructed or in consequence of the existence of snow or ice thereon, unless the County had received written notice within a reasonable time before said injury or property damage was sustained, that the items ... identified ... above ... was in a defective, out of repair, unsafe, dangerous or obstructed condition ...."

Price responded, "Through past practice, previous incidents." The Town argues that based upon such proof, the Town did not own or control the area, and had nothing whatsoever to do with the anchor.

In addition, the Town asserts that it never received written notice of any defect as required by the Town Code.[3] The Town submits the affidavit of Ronnise Miller, the acting Town Clerk, whose duties include maintaining records of all written notice of defects of streets, roads, sidewalks, curbs and property owned or maintained by the Town. Ms. Miller states that she has made a diligent and thorough search of the records of the Town for any written notice of defects with regard to an anchor, guy wire or other object on Bay Shore Road prior to April 5, 2005. Ms. Miller alleges that her search revealed that the Town was not in receipt of any written notice or written complaints concerning the alleged defective condition of an anchor, guy wire or any other object at said location. The Town contends that Ms. Miller's affidavit establishes that the Town never received written notice of the defect, which is fatal to the plaintiff's case, and thus, that summary judgment in its favor is warranted.

Defendant LIPA also moves for summary judgment dismissing all causes of action against it. In support of its motion, it provides the Court with, *inter alia*, the deposition testimony of the plaintiff and Mr. Brandt, which the Court discussed hereinabove. LIPA argues that the plaintiff's testimony establishes that he tripped on an anchor located in the asphalt area between the sidewalk and the roadway of Bay Shore Road. LIPA asserts that Mr. Brandt's testimony establishes that LIPA did not own the anchor located in asphalt area between the sidewalk and the curb of Bay Shore Road. Thus, contends LIPA, there is no admissible evidence to show that the anchor over which the plaintiff tripped and fell was owned by LIPA or installed by LIPA or any of its predecessors. LIPA submits that it has met its burden of proof establishing conclusively that it did not cause or create the condition that allegedly contributed to the plaintiff's accident.

The plaintiffs submit no opposition to the motions for summary judgment made by the County and the Town. The plaintiffs do, however, oppose the motion for summary judgment by Verizon, claiming that Verizon is the responsible entity in this case. The plaintiffs allege that if this Court agrees, then Verizon's motion should be denied and LIPA's motion should be granted.

As to Verizon's motion, the plaintiffs argue that Verizon's statement that "the record remains devoid of evidence indicating that the subject guy anchor was owned or in the control of Verizon," is simply untrue based upon the page from the Bay Shore Road permit book showing that a permit was issued to the New York Telephone Company, the predecessor to Verizon, on January 24, 1983. The plaintiffs contend that at the very least, the existence of this permit creates a question of fact as to who

---

[3]The Town Code, §158-2, provides in pertinent part that no civil action will be maintained against the Town, "for damages or injuries to person or property sustained by reason of any defective, dangerous, unsafe, out-of-repair or obstructed sidewalks ... unless written notice thereof, specifying the particular place, was actually given to the Town Clerk or to the Commissioner of the Department of Public Works of the Town and there was a failure or neglect to cause such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks to be remedied... within a reasonable time after the receipt of such notice."

owned and installed the guy anchor. Additionally, the plaintiffs claim that from the testimony of the Verizon and LIPA witnesses, the identity of the utility that installed the anchor could be determined by where on the pole the wire for that anchor was attached. The plaintiffs point to Mr. Brandt's deposition testimony wherein he stated that the attachment for this anchor had been affixed at the lower "communication area" of the pole. The plaintiffs also point to that portion of Mr. Harris's deposition testimony wherein he acknowledged that if this particular pole was owned by Verizon, maintaining the pole would include maintaining the guy wire and guy anchor. Furthermore, argues the plaintiffs, there is no evidence to show that Verizon conducted any inspections relative to the pole, anchor or wires. The plaintiffs maintain that these facts demonstrate that the utility pole, the missing guy wire and the anchor were all owned, installed, maintained and controlled by Verizon.

In addition, the plaintiffs claim the doctrine of "special use"is particularly applicable to this case. They argue that by installing an object onto the sidewalk for its own special use and benefit, Verizon became obligated to properly inspect, maintain and repair the area of the special use so as not to subject others to the peril of injury. The plaintiffs provide the Court with numerous photographs of the accident site and the bent anchor. The plaintiffs allege that at a minimum, without presenting evidence relative to any inspections conducted of the anchor, or as to maintenance and repair of the anchor, Verizon failed to eliminate all questions of fact as to its negligence. The plaintiffs lastly contend that prior actual or constructive notice of an unsafe condition is not required to impose liability on a defendant who benefits from a special use of the sidewalk.

As to the County's and the Town's cross motions, initially, the Court notes that the asphalt area where the accident occurred was part of the sidewalk (*see*, Vehicle and Traffic Law §144). Nevertheless, it is unnecessary for the Court to determine whether it was the Town or the County who owned this sidewalk or had the duty to maintain the area where the plaintiff fell. Both municipalities have adopted prior written notice laws and cannot be held liable for a defect within the meaning of the law absent the requisite written notice, unless an exception to the requirement applies (***Delgado v County of Suffolk***, 40 AD3d 575, 835 NYS2d 379 [2007]). Clearly, a bent guy anchor protruding from the sidewalk would constitute an obstructed condition under the County's Charter or the Town's Code, for which prior written notice is a prerequisite to a negligence action against them (*see*, ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]). Here, both the County and the Town have established their entitlement to judgment as a matter of law by demonstrating that they did not have prior written notice of the bent anchor (*see*, ***Rodriguez v City of Mount Vernon***, 51 AD3d 900, 858 NYS2d 751 [2008]). Accordingly, since there is no evidence which demonstrates that the facts of this case fall within an established exception to the general rule mandating prior notice to a municipality (*see*, ***Poirier v City of Schenectady***, *supra*), the County's and the Town's unopposed cross motions for summary judgment dismissing the complaint and any cross claims against them is granted.[4]

---

[4]The Court notes that the County requests the exact same relief in motion sequence #004 as it does in motion sequence #003. Since motion sequence #004 is duplicative, it is denied as moot.

As to LIPA's motion for summary judgment, LIPA has established through deposition testimony of Mr. Brandt, that it did not install, own, or maintain the guy anchor at issue (*see*, ***Impenna v City of New York***, 256 AD2d 551, 682 NYS2d 464 [1998]). Neither the plaintiffs nor the co-defendants offer anything which refutes LIPA's contentions (*see*, ***Gray v City of New York***, 20 Misc3d 1125(A), 2008 WL 2884007, 2008 NY Misc LEXIS 4513). As no triable issue of fact has been raised as to whether LIPA breached a duty, its motion for summary judgment dismissing the complaint and all cross claims against it, is granted (*see*, ***Impenna v City of New York***, *supra*).

Finally, as to Verizon's motion for summary judgment, Verizon has failed to meet its initial burden of establishing its entitlement to judgment as a matter of law. Verizon's witness, Mr. Harris, did not know who owned or who installed the guy anchor. Additionally, Ms. Balbus indicated that the telephone company was issued a permit to install the guy anchor, and that if the work had not been done, the permit sheet would have read "unexecuted." Furthermore, Mr. Brandt's testimony suggests that, from the position of the rabbit ears on the pole, that a guy anchor was installed by either the telephone company or Cablevision. As such, Verizon's evidence fails to establish that it did not install the guy anchor or that it did not create the alleged obstruction in the sidewalk over which the plaintiff fell (*see*, ***Pacheco v Keyspan Corporation***, 28 AD3d 729, 814 NYS2d 674 [2006]; ***Adler v Suffolk County Water Authority***, 306 AD2d 229, 760 NYS2d 523 [2003]). Moreover, this evidence provides a sufficient link between Verizon and the guy anchor to preclude summary judgment in its favor (*see*, ***DeSilva v City of New York***, 15 AD3d 252, 790 NYS2d 87 [2005]). As to the issue of special use, the Court notes that, "[a]ny entity that installs an object onto the sidewalk or roadway with the permission of the municipality should be deemed a special benefit user" (***Ausderan v City of New York***, 219 AD2d 562, 563; 631 NYS2d 512, 513 [1995]). Here, Verizon also has failed to establish that it did not make a special use of the sidewalk where the guy anchor was located (*see*, ***Pacheco v Keyspan Corporation***, *supra*). Accordingly, Verizon's motion for summary judgment is denied.

Dated: September 9, 2008

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION