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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

VERIZON NEW YORK INC.,

Plaintiff,

- against -

SCIARRINO INDUSTRIES, INC.,

Defendant.

Motion Sequence #2, #3
Submitted June 18, 2009

INDEX NO: 10843/07

The following papers were read on these motions:

Notice of Motion.....1
Memorandum of Law in Support.....2
Notice of Cross-Motion.....3
Memorandum of Law in Opposition to Cross-Motion
and in Further Support.....4
Reply Affirmation.....5

Defendant, SCIARRINO INDUSTRIES, INC. (hereinafter referred to as "SCIARRINO"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint. Plaintiff, VERIZON NEW YORK INC. (hereinafter referred to as "VERIZON"), opposes the motion and cross-moves for leave to conduct the post note of issue deposition of Salvatore Sciarrino, President of SCIARRINO. The motion and cross-motion are determined as follows:

In this action, plaintiff seeks to recover costs incurred as a result of damage to its conduits, cables and other telephone facilities and appurtenances located at 1 Sheridan Boulevard, Inwood, New York, allegedly caused as a result of defendant's

negligence/recklessness in excavating, digging and/or performing demolition and/or construction, on or about August 31, 2004, at the subject premises owned by defendant SCIARRINO. According to the affidavit of VERIZON employee, Vincent Guarascio, he was present at 1 Sheridan Boulevard on June 12, 2004, when the building was being reconstructed, and found a VERIZON terminal box and cable off the wall and on the floor. He determined that the terminal box was wet causing, in his opinion, a phone outage to the ambulance service located at 40 Sheridan Boulevard and to other adjoining buildings. He states that, on a subsequent visit to the site in late August/early September 2004, the premises was still under reconstruction at which time temporary repairs were made in an effort to provide telephone service to the building, including replacement of a cable which had been removed and the splicing in of a new 50 pair terminal.

Defendant SCIARRINO seeks summary judgment dismissing the complaint and contends that plaintiff has failed to proffer even an iota of competent, relevant or admissible evidence to support its claim that said defendant, through its negligence or recklessness, damaged plaintiff's telephone cable while performing excavation or demolition work at 1 Sheridan Square, Boulevard.[1]

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact, as a matter of law, by the tender of evidentiary proof in admissible form. (*Econobill Corp. v S & S Machinery Corp.*, 62 AD3d 940, 880 NYS2d 117 [2nd Dept. 2009]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A.1986]). All

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[1]The record indicates that the premises, a former "crack house" was in the process of being converted to an office building.

evidence must be viewed in the light most favorable to the opponent of the motion. (*Crosland v New York City Transit Auth.*, 68 NY2d 165, 506 NYS2d 670, 498 NE2d 143 [C.A.1986]). Movant's failure to make the necessary showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 [C.A.1985]; *Seidman v Industrial Recycling Properties, Inc.*, 52 AD3d 678, 861 NYS2d 692 [2nd Dept. 2008)].

It is only when movant has met its initial burden that the burden shifts to the opponent to produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A.1980]. The burden always remains, however, where it began, i.e., with the movant on the issue. *(Ochoa v Walton Management LLC*, 19 Misc3d 1131A, 866 NYS2d 93 [Supreme Bronx Co. 2008]). When the existence of an issue of fact is even debatable, summary judgment should be denied. *(Birnbaum v Hyman*, 43 AD3d 374, 841 NYS2d 274 [1st Dept. 2007]).

After a careful reading of the submissions herein, it is the judgment of the Court that defendant has failed to meet its threshold burden of establishing, as a matter of law, that its negligence was not responsible for the damage to plaintiff's property. Therefore the motion for summary judgment must be denied.

As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in the opponent's proof but must affirmatively establish the merit of its claim or defense. (*Calderone v Town of Cortland*, 15 AD3d 602, 790 NYS2d 687 [2nd Dept. 2005]). In any event, even if defendant had met its burden, the affidavits of VERIZON employees Vincent Guarascio and Kevin Lau are sufficient to create a factual issue *vis a*

vis defendant's negligence which requires resolution by the trier of fact. Mr. Guarascio attests that he observed damage to the VERIZON terminal box and cable at the subject premises while it was undergoing reconstruction. Mr. Lau, who was present at the premises on or about September 3rd or 4th, 2004, noted that service cables to the building had been removed during the reconstruction process. It appears that, because of the removal, VERIZON had to place new lines into the building and replace a telephone pole and terminal.

With respect to plaintiff's cross motion seeking post note of issue discovery, the CPLR affords parties a right to full disclosure of all matter material and necessary in the prosecution or defense of an action. CPLR § 3101. The opportunity for disclosure, however, is not without limits. The Uniform Rules for Trial Courts (22 NYCRR) provides two (2) distinct methods for obtaining disclosure post note of issue (22 NYCRR § 202.21[d] and [e]; *see also, Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2nd Dept. 2000]), but neither is applicable in the case at bar.

Under NYCRR §202.21(e), a party may move to vacate a notice of issue upon the ground that the case is not ready for trial, but it must do so "[w]ithin 20 days after service of a notice of issue and certificate of readiness." Under that provision the movant need only demonstrate in what respect the case is not ready for trial. (*Mosley v Flavius*, 13 AD3d 346, 785 NYS2d 742 [2nd Dept. 2004]). Here, the note of issue and certificate of readiness were filed on or about January 22, 2009 and plaintiff's cross-motion for permission to depose Salvatore Sciarrino was not made until on or about June 12, 2009.

An alternate method of obtaining post-note of issue disclosure is found in 22 NYCRR §202.21(d). This subsection permits the Court to authorize additional discovery

"[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness" that would otherwise cause "substantial prejudice." Because this provision requires both unusual and unanticipated circumstances and substantial prejudice, it has been described as the "more stringent standard." Plaintiff has failed, however, to offer any evidence of unusual or unanticipated circumstances subsequent to the filing of the note of issue which would warrant the requested relief. Unusual or unanticipated circumstances are not found where the discovery sought could have been requested before the filing of the note of issue. (*Shroeder v IESI NY Corp.*, 24 AD3d 180, 805 NYS2d 79 [1st Dept. 2005]).

Plaintiff's counsel notified defendant's counsel, by letter dated December 17, 2008, that Frank Sciarrino, who was deposed on December 10, 2008, had no knowledge of the incident at issue herein and requested that dates be provided during the first two (2) weeks of January 2009, in which Salvatore Sciarrino would be available to testify at an examination before trial. Although apparently no response was forthcoming, plaintiff took no further action to secure Salvatore Sciarrino's deposition and proceeded instead, knowing full well that Salvatore Sciarrino had not been deposed, to file the note of issue and certificate of readiness. This is not a situation in which unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness.

While CPLR §3212(f) allows a Court, under certain circumstances, to deny a motion for summary judgment to permit a party opposing the motion to obtain further disclosure, a plaintiff waives the right to same where, as here, it files a note of issue and certificate of readiness while cognizant of an outstanding discovery request. Plaintiff's remedy with

regard to defendant's alleged failure to respond to its request to depose Salvatore Sciarrino was to make a motion pursuant to CPLR§§ 3214 or 3216 before filing the note of issue and certificate of readiness, a course of action plaintiff chose not to take. (*Iscowitz v County of Suffolk*, 54 AD3d 725, 864 NYS2d 79 [2nd Dept. 2008]; *Mekhev v City of New York*, 38 AD3d 376, 832 NYS2d 186 [1st Dept. 2007]).

Based on the foregoing, it is therefore

ORDERED, that defendant's motion for an order granting summary judgment dismissing the complaint is denied; and it is further

ORDERED, that plaintiff's cross-motion for post note of issue discovery is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 2, 2009

WILLIAM R. LaMARCA, J.S.C.

ENTERED

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