

Shih v Long Is. Power Auth.

2010 NY Slip Op 31693(U)

June 30, 2010

Supreme Court, Nassau County

Docket Number: 1601/07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

KINGSTON SHIH,

Plaintiff,

- against -

LONG ISLAND POWER AUTHORITY d/b/a
L.I.P.A, KETYSpan ELECTRIC SERVICES
LLC., CSC HOLDING, INC., CABLEIOSION
SYSTEMS CORPORATION, and VERIZON
NEW YORK INC.,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 1601/07

Motion Sequence No. 002, 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3, 4</u>
Replying Affidavits	_____
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The underlying personal injury action arises from a motor vehicle accident on November 1, 2005, at approximately 11:45 a.m., on northbound Franklin Avenue between Hamilton Place and Third Street, Village of Garden City, County of Nassau, State of New York. The plaintiff claims a utility pole, specifically Pole number 93, fell onto his motor vehicle, while he traveled on Franklin Avenue, and caused him to sustain personal injuries. This Court carefully reviewed and considered all of the papers submitted by the

parties with respect to this motion.

The defendants Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services, LLC move, under motion sequence number two, pursuant to CPLR 3212 for summary dismissing the complaint and all cross claims. The defense attorney points, in a December 11, 2009 affirmation supported by other moving papers, to the plaintiff's March 4, 2008 and April 27, 2009 deposition testimony, the August 26, 2008 deposition testimony of an emergency serviceman employed by National Grid, the May 5, 2009 deposition testimony of a National Grid operations supervisor in the systems operation distribution department in Hewlett, New York, as well as utility pole inspection reports, medical reports and other testimony. The defense attorney submits no reasonable interpretation of the facts would support a finding of liability against Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services, LLC. The defense attorney asserts there is no evidence Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services, LLC had actual or constructive notice of an allegedly defective condition regarding the subject pole. The defense attorney avers the plaintiff cannot maintain an action for property damage because his mother owned the subject motor vehicle, so that cause of action should be dismissed. The defense attorney contends the plaintiff's claimed personal injuries do not meet the statutory requirement of serious injury, so the complaint should be dismissed as a matter of law. The defense attorney notes the plaintiff's claims of neck, back and shoulder injuries, including bulging and

herniated cervical and lumbar discs, are not supported by medical proof showing a causal relationship between the medical findings and the November 1, 2005 accident, and the injuries are resolved, and not permanent. Dr. Frank Hudak conducted an orthopedic examination of the plaintiff on April 30, 2009. Dr. Hudak opined, after conducting range of motion testing, the plaintiff's post cervical sprain, left shoulder sprain thoracic and lumbosacral sprains were now resolved. Dr. Hudak found the plaintiff was not disabled, and capable of all daily living activities.

The plaintiff opposes the motion by the defendants Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services in a March 9, 2010 unsigned affirmation by plaintiff's counsel with other supporting papers. The plaintiff's attorney states there was no documentation of a post accident inspection of pole number 93, a post accident investigation about the cause of pole number 93 falling nor when that pole was discarded. The plaintiff's attorney also states no one from the construction unit who responded to the scene, and removed the broken pole was produced for deposition. The plaintiff's attorney contends the matter should proceed to trial on the issue of liability where the inspection of pole number 93 is an issue, and the liability for a falling utility pole can be predicated on *res ipsa loquitur*. The plaintiff's attorney avers the plaintiff claims property damage for non-factory installed equipment or aftermarket "add-ons" to the car of the plaintiff's mother which were not covered by the vehicle's collision insurance. The plaintiff's attorney contends the instrumentality which caused the plaintiff's injuries was not the

automobile but rather the defendants' utility pole striking the hood and top of the vehicle, so no-fault insurance thresholds are inapplicable. The plaintiff's attorney states, if no-fault insurance is applicable here, then the plaintiff sustained serious injury as defined by the law, and points to the May 13, 2009 neurological examination by Ronald Klinger, M.D., a neurologist, and Frank Hudak, M.D., an orthopedist, both designated by the defense. The plaintiff's attorney states neither plaintiff expert provide an opinion as to cause, and the injuries were not serious within the meaning of Insurance Law § 5102 (d). The plaintiff's attorney points to the March 5, 2010 report by Nizarali Visram, an expert for the plaintiff who is board certified in physical medicine and rehabilitation, and states Dr. Visram opined the November 1, 2005 accident was a competent producing cause of the plaintiff's injuries. Dr. Visram examined the plaintiff, performed various range of motion testing, and found the injuries sustained by the plaintiff are permanent in nature resulting in restriction of use and activity of the injured areas, and permanent limitation of the plaintiff's spine and peripheral nervous system. The plaintiff's attorney argues Dr. Visram rises the issue of whether as a result of the accident the plaintiff sustained medically determined injuries of a non-permanent nature which injuries prevented the plaintiff from performing substantially all the material acts which constitute the plaintiff's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence. The plaintiff's attorney also points to the March 8, 2010 report by Alexander Weingarten, M.D., an expert for the plaintiff who is board certified in

physical medicine and rehabilitation, and states Dr. Weingarten opined the November 1, 2005 accident was a competent producing cause of the plaintiff's injuries. Dr.

Weingarten examined the plaintiff, performed various testing and treatments, and found the injuries sustained by the plaintiff are permanent in nature resulting in restriction of use and activity of the injured areas, and permanent limitation of the plaintiff's neck and back. Dr. Weingarten stated the plaintiff stopped treatment when the plaintiff's no-fault benefits were denied because the plaintiff could not afford to pay for the treatment, but treated again when the plaintiff got private medical insurance coverage.

The defendant CSC Holdings, Inc. and Cablevision Systems Corporation, which the defense claims is CSC Holdings, LLC, formerly known as CSC Holdings, Inc., incorrectly sued as Cablevision Systems Corporation cross move, under motion sequence number three, pursuant to CPLR 3212 for summary dismissing the complaint and all cross claims. The defense attorney states, in a March 5, 2010 affirmation, there are no triable issues of fact. The defense attorney points out Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services, LLC admitted it, based upon the pleadings, owned the subject utility pole, and deposition testimony shows the reasons are unknown to the parties why that pole fell and the cause for it falling. The defense attorney adds this defendant joins and supports the lack of serious injury argument by the co-defendants, and relies upon the moving papers submitted by the co-defendants.

The plaintiff opposes the cross motion by the defendants CSC Holdings, Inc. and

Cablevision Systems Corporation in a March 21, 2010 affirmation by plaintiff's counsel with other supporting papers. The plaintiff's attorney contends the cross motion by the defendant CSC Holdings, LLC is untimely because the parties executed a so-ordered certification order on or about June 25, 2009, which required summary judgment to be filed within 90 days of the filing of the note of issue. The plaintiff's attorney points out the note of issue was filed on September 21, 2009, so summary judgment motions needed to be filed by December 21, 2009, but the cross motion was filed on March 5, 2010 without any reason or explanation provided by CSC Holdings, LLC. The plaintiff's attorney asserts the cross motion is insufficient since it consists solely of the defense attorney's affirmation, and without legal citation. The plaintiff's attorney avers an issue of fact exists regarding the responsibility of CSC Holdings, LLC for causing utility pole 93 to fall, and points to the testimony of Christopher Segur, an employee of Keyspan Electrical Services, LLC. Segur testified he believed the utility pole broke and fell because a southbound vehicle caught CSC Holdings, LLC's sagging wire that spanned Franklin Avenue or a northbound vehicle drove into the utility pole. The plaintiff's attorney maintains there is no evidence contradicting the plaintiff's version of the accident, and points to the plaintiff's testimony where he stated he did not strike the pole before it fell, and did not see nor hear any other vehicles hit that utility pole before it fell. The plaintiff's attorney notes, while Luis DeJesus, the construction supervisor for CSC Holdings, LLC in Nassau County testified, CSC Holdings, LLC lacked a post accident

investigation and failed to produce documents or knowledgeable witnesses. The plaintiff's attorney argues there is a question of fact regarding whether CSC Holdings, LLC exercised its duty of care with construction, installation, operation and maintenance of its cable lines, and points to evidence showing the middle portion of the utility pole snapped into two pieces near the top below the electric wires, and a couple of feet above the ground for no apparent reason. The plaintiff's attorney adds there is no evidence of the pole breaking from a motor vehicle striking it nor high winds or a major storm. The plaintiff's attorney declares *res ipsa loquitur* applies in such circumstances, and where there is the destruction or loss evidence, to wit utility pole 93, and the cable wire and strand in question. The plaintiff's attorney further argues the plaintiff has met the threshold requirements of Insurance Law § 5102 (d).

The attorney for the defendant CSC Holdings, LLC, formerly known as CSC Holdings, Inc., incorrectly sued as Cablevision Systems Corporation states, in a March 26, 2010 reply affirmation, the cross motion was timely, and these defendants seek relief nearly identical to that relief sought by Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services, LLC. The defense attorney for CSC Holdings, LLC states the cross motion may be considered by the Court. The defense attorney for CSC Holdings, LLC points out the cross motion by CSC Holdings, LLC is based upon evidentiary proof in admissible form, namely the parties' testimony attached to the motion by Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services, LLC.

The defense attorney for CSC Holdings, LLC contends the conclusions regarding the cause of the pole break reached by the representative for Long Island Power Authority d/b/a L.I.P.A. and Keyspan Electrical Services, LLC is speculation. The defense attorney for CSC Holdings, LLC asserts *res ipsa loquitur* is inapplicable where the instrumentality of the alleged incident is a utility pole. The defense attorney for CSC Holdings, LLC points out CSC Holdings, LLC did not own the utility pole number 93, and CSC Holdings, LLC was not in exclusive control of that pole.

The Second Department holds:

That branch of the plaintiff's cross motion which was for summary judgment on the issue of serious injury was made more than 60 days after the note of issue was filed and therefore was untimely (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]). However, an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2005]; *Boehme v A.P.P.L.E., A Program Planned for Life Enrichment*, 298 AD2d 540 [2002]; *Miranda v Devlin*, 260 AD2d 451 [1999]). In such circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see CPLR 3212 [a]*) to review the untimely motion or cross motion on the merits. Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (*see CPLR 3212 [b]*) *Grande v. Peteroy*, 39 A.D.3d 590, 592, 833 N.Y.S.2d 615 [2nd Dept, 2007].

Here, the circumstances regarding the plaintiff's opposition to the cross motion as untimely are analogous to the holding in *Grande v. Peteroy (supra)*, hence this Court will consider the cross motion, and decide it on its merits.

“Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination” (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber*

Supply Co., supra; see, Columbus Trust Co. v. Campolo, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

The Second Department holds liability for falling utility poles can be based on *res ipsa loquitur* (*see Guarracino v. Central Hudson Gas & Elec. Corp.*, 274 AD2d 551, 712 N.Y.S.2d 389 [2nd Dept, 2000]). The Second Department observed:

The elements of *res ipsa loquitur* are (1) the event is of a kind which ordinarily does not occur in the absence of someone's negligence, (2) it must be caused by an agency or instrumentality in the exclusive control of the defendant, and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*see, Ebanks v New York City Tr. Auth.*, 70 NY2d 621)

Guarracino v. Central Hudson Gas & Elec. Corp., 274 AD2d at 552.

Here, Long Island Power Authority d/b/a L.I.P.A., Keyspan Electrical Services, LLC and CSC Holdings, LLC established each of their *prima facie* entitlements to judgment as a matter of law by showing the plaintiff's claimed personal injuries do not meet the statutory requirement of serious injury under Insurance Law § 5102 (d), they had no actual or constructive notice of an allegedly defective condition regarding the subject pole, and there was no property damage to the plaintiff because the plaintiff's mother owned the subject motor vehicle. In opposition, the plaintiff has shown evidence on the issue of liability, to wit the plaintiff met the Ebanks tests regarding *res ipsa loquitur* that is, there is are material issues of fact as to liability against Long Island Power Authority

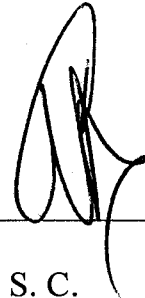
d/b/a L.I.P.A., Keyspan Electrical Services, LLC, and CSC Holdings, LLC with respect to the utility pole as to Long Island Power Authority d/b/a L.I.P.A., Keyspan Electrical Services, LLC, and the cable wire and strand as to CSC Holdings, LLC. The plaintiff has also shown there are material issues of fact as to damages regarding the plaintiff's claimed personal injuries under Insurance Law § 5102 (d). However, the plaintiff has not shown there are material issues of fact as to property damage for the plaintiff because the plaintiff's mother owned the subject motor vehicle, so that cause of action is dismissed.

Accordingly, the motion and cross motion are denied.

So ordered.

Dated: **June 30, 2010**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

JUL 02 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE