

McFadden v City of New York

2010 NY Slip Op 33742(U)

October 7, 2010

Supreme Court, New York County

Docket Number: 107291/07

Judge: Barbara Jaffe

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JAFFE

Index Number : 107291/2007

PART 5

MCFADDEN, RICHARD

vs
CITY OF NEW YORK

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

CALL 81

The following papers, numbered 1 to _____ were read on this motion to/for *summary judgment*

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

FILED

Cross-Motion: Yes No

OCT 12 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 10/7/11
OCT 07 2011

[Signature]
BARBARA JAFFE
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 5

-----X
RICHARD MCFADDEN,

Plaintiff,

-against-

THE CITY OF NEW YORK, TIME WARNER
CABLE INC., TIME WARNER NY CABLE LLC, and
GITTA ROTT,

Defendants.
-----X

TIME WARNER CABLE, INC. and TIME WARNER
NY CABLE LLC,

Third-Party Plaintiff,

-against-

HYLAN DATACOM & ELECTRICAL INC.,
INDIVIDUALLY and as successor in interest to
TRINITY COMMUNICATIONS CORPORATION, and
TRINITY COMMUNICATIONS CORPORATION,
Individually,

Third-Party Defendants.
-----X

BARBARA JAFFE, JSC:

For plaintiff:
Michael N. Manolakis, Esq.
Ferro, Kuba *et al.*
825 Veterans Highway
Happauge, NY 11788
631-581-9494

For Time Warner:
Daniel A. Alter, Esq.
Newman Myers *et al.*
14 Wall St.
New York, NY 10005-2101
212-619-4350

Index No. 107291/07

Motion Subm.: 7/26/11
Motion Seq. Nos.: 002, ...

DECISION & ORDER

Index No. 590974/08

FILED

OCT 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

For City:
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007
212-442-6851

For Hylan/Trinity:
Scott C. Perez, Esq.
Law Offices of Edward Garfinkel
12 Metrotech Center, 28th Fl.
Brooklyn, NY 11201
718-250-1100

By notice of motion dated November 3, 2010, defendant City moves pursuant to CPLR 3211(a)(7) and/or 3212 for an order dismissing the complaint and any cross claims against it. Plaintiff opposes.

By notice of motion dated March 30, 2011, defendants/third-party plaintiffs Time Warner Cable, Inc. and Time Warner NY Cable LLC (Time Warner) move for an order deeming so-ordered the stipulation of discontinuance executed by plaintiff and certain defendants, and pursuant to CPLR 3212 for an order dismissing all cross claims and counterclaims against them and granting them summary judgment on the third-party complaint as to their contractual and common law indemnification claims. Third-party defendants Hylan Datacom & Electrical Inc. and Trinity Communications Corporation (Hylan/Trinity) oppose and, by notice of cross motion dated May 2, 2011, move pursuant to CPLR 3212 for an order dismissing the third-party complaint. Time Warner opposes the cross motion.

By decision and order dated July 12, 2011, I granted Time Warner's motion to the extent of dismissing the main action against them, including all cross claims and counterclaims, and reserved decision on the motions related to the third-party action.

I. BACKGROUND

A. General background

By agreement dated December 18, 1996, Time Warner hired Trinity to perform certain work, and Trinity agreed to indemnify, defend, and hold harmless Time Warner against any "claims, demands, damages, costs and expenses (including, without limitation, reasonable attorneys' fees, court and other proceeding costs and all other costs incurred to enforce the indemnity granted in this Section)" arising from or related to Trinity's acts or omissions in the

performance of its work for Time Warner, except to the extent attributable to Time Warner's negligence. (Affirmation of Daniel A. Alter, Esq., dated Mar. 30, 2011 [Alter Aff.], Exh. H).

By assignment agreement dated February 4, 2003, Hylan assumed and agreed to perform, and abide by all the terms and conditions of the agreement between Trinity and Time Warner, arising on or after February 15, 2003. (*Id.*, Exh. I).

On February 23, 2006, plaintiff was allegedly injured when he tripped and fell on the sidewalk on East 129th Street between Fifth and Madison Avenues in Manhattan, adjacent to the building located at 2099 Fifth Avenue (premises). (Affirmation of Peter C. Lucas, ACC, dated Nov. 3, 2010 [Lucas Aff.], Exh. A).

B. Procedural background

On or about May 16, 2006, plaintiff served City with his notice of claim: (*Id.*). On or about May 22, 2007, plaintiff commenced the instant action by serving defendants with his summons and complaint. (*Id.*, Exh. B). City thereafter served its answer. (*Id.*, Exh. D).

On or about November 3, 2008, Time Warner commenced the third-party action, asserting claims for contractual and common law indemnification against Hylan/Trinity. (*Id.*, Exh. H). On or about January 21, 2009, Hylan/Trinity served its answer. (*Id.*, Exh. I).

At an examination before trial (EBT) held on August 14, 2009, Victor Flores, an employee of Time Warner, testified that on or about September 13, 2004 Hylan performed work for Time Warner on the sidewalk in front of 2032 Madison Avenue but performed no work pursuant to that particular project on any other portion of the sidewalk in the area. Flores also searched Time Warner's records for any work performed by or on behalf of Time Warner on East 129th and East 130th Streets between Fifth and Madison Avenues within the past ten years and

found no other relevant work records. (Alter Aff., Exh. E).

At an EBT held on June 17, 2010, Nadine Loggia, a Hylan employee, testified that Hylan performed only one work project for Time Warner, which consisted of work performed on September 13, 2004 in front of 2032 Madison Avenue. (*Id.*, Exh. G).

On June 18, 2010, plaintiff agreed to discontinue his claim against Hylan/Trinity, asserted in a separate action filed by him against Hylan/Trinity only in the Supreme Court, Bronx County. (Affirmation of Scott C. Perez, Esq., dated May 2, 2011 [Perez Aff.], Exh. C).

II. CITY'S MOTION

A. Contentions

City argues that it may not be held liable for the allegedly defective sidewalk on which plaintiff tripped as it did not own the premises abutting the sidewalk, relying on an affidavit from David R. Atik, in which he states that a search of City's Real Property Assessment Division database reflects that City did not own the premises on the accident date and that the premises was classified as a Building Class C3 (walk-up-apartments-four families), and not a one-, two-, or three-family solely residential property. (Lucas Aff., Exh. N). City also submits the affidavit of a City Title Examiner whose title search for the premises reveals that defendant Rott owned the premises as of July 26, 2006, and the deed reflecting same, recorded by the City on August 29, 2002. (*Id.*, Exh. O).

In opposition, plaintiff argues that City has not established, *prima facie*, that it does not own the premises, as Atik failed to submit any of the records he allegedly reviewed, and the deed is in inadmissible form. He also contends that City has failed to show that it had no prior notice of the defective condition of the sidewalk. (Affirmation of Michael N. Manolakis, Esq., dated

Feb. 18, 2011).

In reply, City observes that plaintiff submits no evidence showing that City owned the premises or contradicting City's affidavits. (Reply Affirmation, dated Mar. 31, 2011).

B. Analysis

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. (Admin. Code 7-210[c] [City liable for injury caused by failure to maintain sidewalks abutting "one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes . . ."]]). Therefore, after September 14, 2003, the effective date of the Sidewalk Law, the abutting property owner, not City, is generally liable for accidents caused by sidewalk defects. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, as City has established that it is not the abutting landowner and that the premises is not exempt, it has demonstrated, *prima facie*, that it may not be held liable for plaintiff's injuries. (See *Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [City entitled to dismissal of complaint as it did not own property on which plaintiff fell, and as property was vacant lot and thus not exempt pursuant to section 7-210]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009] [defendant established that property abutting sidewalk owned by corporate entity and not exempt]; see also *Forbes v Aaron*, 81 AD3d 876 [2d Dept 2011] [as premises was four-family multiple dwelling, liability for defective sidewalk shifted from City to abutting premises owner]).

As City may be held liable only if it owned the premises, whether or not it received prior

written notice of the defect is irrelevant. (*See eg Sondervan v City of New York*, 84 AD3d 625 [1st Dept 2011] [plaintiff required to show City had prior written notice of sidewalk defect notwithstanding City's ownership of abutting premises]). Plaintiff has thus failed to demonstrate that any triable issues remain as to City's liability.

III. THIRD-PARTY MOTIONS

A. Contentions

Time Warner seeks from Hylan/Trinity reimbursement for its costs and attorney fees expended in this action based on the contractual indemnification provision in the parties' agreement, asserting that there is no evidence that any work performed by or on behalf of Time Warner caused or contributed to plaintiff's accident. (Alter Aff.). Hylan/Trinity argue that as plaintiff discontinued his claim against them, and absent any evidence that they performed any work at the location of plaintiff's accident, there is no basis for finding that they are required to indemnify or defend Time Warner. (Perez Aff.).

In reply, Time Warner maintains that Hylan/Trinity's duty to defend arose when plaintiff alleged that his accident was caused by Hylan/Trinity's negligent acts or omissions. (Reply Affirmation, dated May 26, 2011).

B. Analysis

Absent evidence that Hylan/Trinity committed any act or omission in the performance of their work for Time Warner which caused or contributed to plaintiff's accident, Time Warner has failed to demonstrate that Hylan/Trinity's duty to indemnify it was triggered. Moreover, while a duty to defend is broader than a duty to indemnify and arises whenever the allegations in a complaint "suggest a reasonable possibility of coverage" (*BP Air Conditioning Corp. v One*

Beacon Ins. Group, 8 NY3d 708, 714 [2007] [duty to defend triggered by allegations in complaint]), plaintiff in this action does not allege that Hylan/Trinity's acts or omissions in the performance of their work for Time Warner caused or contributed to his accident and asserts no claims against them; rather, it was Time Warner that brought them in as third-party defendants. Thus, Hylan/Trinity's duty to defend Time Warner does not arise here. (*See eg Stellar Mech. Servs. of New York, Inc. v Merchants Ins. of New Hampshire*, 74 AD3d 948 [2d Dept 2010] [subcontractor's duty to defend contractor arose only upon service of amended complaint naming subcontractor as defendant as first complaint did not name subcontractor as defendant and contained no allegations against it]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint and any cross claims are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City Part and remove it from the Part 5 inventory. Plaintiff shall serve, within 20 days of the date of this order, a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158; it is further

ORDERED, that defendants/third-party plaintiffs Time Warner Cable, Inc. and Time Warner NY Cable LLC's motion for summary judgment on the third-party complaint is denied; and it is further

ORDERED, that third-party defendants Hylan Datacom & Electrical Inc. and Trinity Communications Corporation's cross motion to dismiss is granted, and the third-party complaint is dismissed and severed with costs and disbursements to third-party defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the clerk is directed to enter judgment accordingly.

FILED

ENTER:

OCT 12 2011


Barbara Jaffe, JSC

NEW YORK
COUNTY CLERK'S OFFICE

DATED: October 7, 2010
New York, New York

BARBARA JAFFE
S.C.