Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES PART 17

Justice

----------x

ANDREA WACHTER and HOWARD WACHTER,

Plaintiffs,

Index No.: 17149/08
Motion Date: 2/2/11
Motion Cal. No.: 40

-against-

THOMAS JEFFERSON OWNERS CORP., LEEMAR MANAGEMENT CORP., RCN CORPORATION, RCN TELECOM SERVICES, INC. and SORDONI SKANSKA, INC.,

Defendants.

----------x

SORDONI SKANSKA, INC.,

Third-Party Plaintiff,

Index No. 350529/10

-against-

MASTEC CONTRACTING COMPANY, INC., MASTEC NORTH AMERICA, INC., and MASTEC SERVICES COMPANY, INC.,

Third-Party Defendants,

----------x

The following papers numbered 1 to 48 read on this motion by defendants **THOMAS JEFFERSON OWNERS CORP. (**"Thomas**") and LEEMAR MANAGEMENT CORP. (**"Leemar**")** for an order granting the moving defendants summary judgment and dismissing the complaint and all cross-complaints as against them and for an order directing defendant RCN Telecom Services, Inc., s/h/a RCN Corporation to defend and indemnify defendants Jefferson and Leemar pursuant to the written agreement entered into between the parties; cross motion by plaintiffs for an order granting consolidation of Action No. 2 bearing Index # 15064/10 with the instant action bearing Index # 17419/08 for joint trial; cross motion by defendant **RCN CORPORATION and RCN TELECOM SERVICES, INC**. (collectively, "RCN") for an order directing defendant **SORDONI SKANSKA, INC.** ("Skanska") to indemnify RCN; and cross-motion by Skanska for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint and any cross-claims or counter-claims, as against Skanska.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1- 4
Affirmation in Opposition-Exhibits.....	5- 7
Affirmation in Reply.....	8 - 9
Notice of Cross-Motion-Affirmation-Exhibits.....	10- 13

Notice of Cross-Motion.....	14- 15
Affirmation in Reply and In Opposition-Exhibits.....	16- 18
Notice of Cross-Motion-Affirmation-Exhibits.....	19- 22
Affirmation in Partial Opposition-Exhibits.....	23-25
Plaintiff's Affirmation in Opposition-Exhibit.....	26-28
Affirmation in Partial Opposition-Exhibits.....	29-31
Sur Reply.....	32-33
Affirmation in Partial Opposition.....	34-35
Affirmation in Partial Opposition-Exhibit.....	36-38
Reply.....	39-40
Reply Affirmation.....	41-42
Plaintiff's Reply Affirmation.....	43-44
Affirmation in Opposition.....	45-46
Affirmation in Sur Reply.....	47-48

Upon foregoing papers it is ordered that this motion by Thomas and Leemar for an order granting them summary judgment and dismissing the complaint and all cross-complaints as against them and for an order directing defendant RCN to defend and indemnify Thomas and Leemar is denied in its entirety; the cross motion by plaintiffs for an order granting consolidation of Action No. 2 bearing Index # 15064/10 with the instant action bearing Index # 17419/08 for joint trial is denied; the cross motion by defendants RCN for an order directing defendant Skanska to indemnify RCN is denied; and cross-motion by Skanska for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint and any cross-claims or counter-claims, as against Skanska is denied, for the following reasons:

Plaintiffs commenced this action seeking to recover for personal injuries allegedly sustained by plaintiff Andrea Wachter on July 11, 2007 while she was walking on the sidewalk adjacent to the premises known as 69-11 Yellowstone Boulevard, Forest Hills, New York ("69-11"). Plaintiff Howard Wachter has brought a derivative action claiming loss of his wife's services as a result of the injuries she sustained in this accident. Defendant Thomas is the owner of these premises and Leemar is the building's managing agent. Plaintiff claims that the sidewalk was defective in containing a metal plate on an uneven, raised, and sunken portion and Thomas and Leemar had a special use of the sidewalk for cable facilities serving their building. RCN had a contract to provide cable services to 69-11 and it had contracted with co-defendant Skanska to perform the actual construction and installation work necessary to place a cable vault and run cable services into 69-11, and thereafter, restore the sidewalk to a proper condition for pedestrian and other regular usage. RCN was the owner of the metal plate and vault and was responsible to inspect the work that Skanska performed and to give its approval upon completion. Skanska, did not do the actual work, rather, it contracted the job to third-party defendants **MASTEC CONTRACTING COMPANY, INC., MASTEC NORTH AMERICA, INC., and MASTEC SERVICES COMPANY, INC** (collectively, "Mastic"). Skanska was supposed to have an employee present at the job site daily to oversee the work.

The Court shall first address the motion for summary judgment by Thomas and Leemar. They claim that plaintiff tripped over the vault cover where it meets the sidewalk and since

neither Thomas nor Leemar were involved in the work that created the vault and cover, liability cannot attach to them. They claim that the Administrative Code provisions Section 7-201 and 7-210 and 34 RCNY 2-07, relied upon plaintiffs to impose liability on Thomas and Leemar are inapposite. Section 7-210 imposes liability for defects in the sidewalks and since plaintiff slipped on the plate covering the vault, no liability attaches pursuant to this Code. Moreover, Thomas and Leemar claim that 34 RCNY 2-07 (b) (1) mandates that the owners of covers on a street are responsible for monitoring the condition of the covers and the area extending twelve inches outward from the perimeter of the cover. According to them, since plaintiff tripped within the twelve inch perimeter, liability cannot extend to the adjacent building owners.

Plaintiffs opposes this motion and claim that plaintiff's fall was the result of the defective sidewalk that surrounding the cover and vault and this area extended beyond the twelve inch perimeter. Plaintiffs point to the testimony of an employee of Thomas who stated he had observed mis-leveled concrete in the area around the vault and cover and it seemed to have been submerged due to installation. Plaintiffs also claim that Section 7-210 is applicable to the instant case .

Initially, this court is satisfied that defendants have made a prima facie showing of entitlement to judgment as a matter of law. They have submitted evidence that establishes that they neither created the condition nor had actual or constructive notice of the condition. They have also submitted sufficient evidence that plaintiff's injury was not caused by any dangerous condition related to the area outside the twelve inch perimeter around the cover and vault. The burden thus shifted to the opponent of this motion, to show that defendants created the condition or had actual or constructive knowledge of the hazardous condition which caused plaintiff to fall and that defendant had a reasonable time to correct the condition. *See*, Klor v Am Airlines, 305 AD2d 550 (2d Dept. 2003.) Moreover, the opponent has the burden of producing "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action...." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). Plaintiffs have successfully carried their burden.

Plaintiffs have raised a triable issue of fact as to whether or not Andrea Wachter fell within the twelve inch zone. They have also raised a triable issue of fact as to whether the sidewalk was mis-leveled and this created a dangerous or defective condition that caused the plaintiff's accident and whether defendant had actual or constructive notice of that condition. Cummings v. Cummings, 277 A.D.2d 34 (2d Dept 2000.) Napolitano v Dhingra, 249 AD2d 523 (2d Dept 1998.) Given the testimony and the condition of the sidewalk a jury would be able to infer from its condition that it was either created in the current condition, or such condition came into being over a sufficient length of time to have given defendant notice of the possibly dangerous condition. *See*, Degiacomo v Westchester County Healthcare Corp., 295 AD2d 395 (2d Dept 2002.)

Furthermore, there is an issue of fact as to whether this sidewalk cover and vault owned by RCN is part of the "sidewalk" for purposes of Administrative Code of the City of New York § 7-210, which requires owners of real property to maintain abutting sidewalks in a reasonably safe condition. Plaintiff's testimony establishes that she tripped and fell on a raised portion of

the public sidewalk surrounding a vault cover owned by RCN that was created to provide cable services to the adjacent premises owned by defendants Thomas and Leemar.

Rules of City of New York Department of Transportation [34 RCNY] § 2-07(b)(1) provides that "[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware". 34 RCNY 2-07(b)(2) requires that "[t]he owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating." Administrative Code § 7-210 generally imposes liability for injuries resulting from negligent sidewalk maintenance on the abutting property owners. 34 RCNY 2-07, however, imposes the duty of maintenance and repair of a sidewalk cover on the owner of the cover, which in this case is RCN. As found above, there is an issue of fact that the defective area of the sidewalk where plaintiff fell was outside the 12-inch zone that RCN is was required to repair pursuant to 34 RCNY 2-07. Accordingly, contrary to Thomas and Leemar's claims, there is an issue of fact as to the applicability of the statutes cited by plaintiff to impose liability on these defendants. Moreover, unlike the case of Storper v. Kobe Club, 76 A.D.3d 426 (1st Dep't 2010), the instant case involves the issue of a special use of the cover and vault and whether such use creates a situation in which it Administrative Code § 7-210 does supplant the provisions of 34 RCNY 2-07 and shifts the statutory obligation of the cover to the abutting property owners. *Compare, Id.* The Court finds that to resolve this issue it is necessary to allow this matter to proceed to trial. Consequently, the branch of the motion seeking an order requiring RCN to indemnify Thomas and Leemar, is denied since there is an issue of fact as to whether Thomas and Leemar failed to properly maintain the sidewalk. This precludes indemnification pursuant to the parties' agreement. Accordingly, for the reasons set forth, the motion by defendants Thomas and Leemar is denied in its entirety.

The cross-motion by plaintiffs to consolidate is denied. Plaintiffs have submitted the summonses and complaints from the two actions they seek to be discovered and claim they arise from the same accident and circumstances. However, plaintiffs fail to provide any excuse as to the delay for seeking to consolidate these actions, or the delay in bringing the second action. Also, plaintiffs have failed to discuss the fact that Action number one is ready for trial and on the Court's trial calendar while the second action has not completed discovery and there is no indication as to when it will be ready for trial.

When actions involving a common question of law or fact are pending before a court, the court, upon motion, … may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay" (CPLR 602 [a]). A motion to consolidate is directed to the sound discretion of the court, and the court is given wide latitude in the exercise thereof. Mideal Homes Corp. v. L & C Concrete Work, Inc., 90 A.D.2d 789 (2d Dep't 1982.) Consolidation is generally favored in the interest of judicial economy and ease of decision making where cases present common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a

substantial right. In the instant action, this Court finds that it would be an inappropriate exercise of discretion to order consolidation since the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of the first action. Abrams v Port Auth. Trans-Hudson Corp., 1 AD3d 118, 119, (1st Dept 2003). See also, Ahmed v C.D. Kobsons, Inc., 73 A.D.3d 440 (1st Dep't 2010.) Accordingly, the motion to consolidate is denied.

The cross-motion by RCN for an order directing defendant Skanska to indemnify RCN is denied. RCN has failed to submit the contractual provision regarding indemnification and any basis for such relief to be granted. In any event, there is an issue of fact as to whether Skanska or RCN were responsible for the condition of the cover and the vault. Accordingly, the motion is denied.

The cross-motion by Skanska for summary judgment is denied. This motion has been filed in violation of the Order of Justice Martin E. Ritholtz, dated July 23, 2010, which required that all motions for summary judgment to be made returnable no later than October 19, 2010. Skanska's cross-motion was made returnable on January 26, 2011, more than three months late. Moreover, Skanska has not articulated any good cause reason for the delay in filing this cross-motion. Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 (2004.) Brill v City of New York, 2 NY3d 648, 652 (2004.) Court-ordered time frames are not options, they are requirements, to be taken seriously by the parties. Too many hours of the courts, are taken up with deadlines that are simply ignored. Skanska does not dispute that its motion for summary judgment was made more than three months after the court-ordered time frame, and offers no excuse for its failure to comply with that Order. Furthermore, contrary to Skanska's contention, the issues raised on its motion are not nearly identical to the issues raised on the co-defendants' timely motion for summary judgment dismissing the complaint insofar as asserted against them. Tapia v Prudential Richard Albert Realtors, 2010 NY Slip Op 9123 (2d Dep't 2010.) Accordingly, the cross-motion by Skanska is denied.

Dated: February 7, 2011

ORIN R. KITZES, J.S.C.