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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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CHARLES AND GINA MASTANDREA,

Plaintiff(s),

-against-

LONG ISLAND POWER AUTHORITY,

Defendant(s).

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Index No. 13480/08

Motion Submitted: 3/17/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Motion by defendant Long Island Power Authority ("LIPA") for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint as against it is granted.

Plaintiffs' cross-motion for an order of preclusion has been withdrawn.

On July 29, 2009, plaintiffs allegedly sustained property damage at their residence located at 619 Smith Street, Franklin Square, New York.

On the date of the incident, a lightening strike caused an electrical wire to fall onto plaintiffs' property while still energized.

Plaintiffs allege that LIPA was negligent in failing to timely respond to a request to de-energize the downed electrical line, causing further damage to plaintiffs' property.

Plaintiffs commenced this action on July 15, 2008 through service of a summons and verified complaint. On November 5, 2008, LIPA appeared through service of a verified answer. On December 4, 2008, plaintiffs served a verified bill of particulars. On May 17, 2010, a certification order was issued, which stated that all motions for summary judgment must be filed within 90 days of the filing of the Note of Issue. Since the Note of Issue was filed on August 12, 2010, this motion for summary judgment is timely.

LIPA moves for summary judgment dismissing the complaint on the grounds that LIPA's response to the plaintiffs' request to de-energize a downed power line was appropriate and timely. In support thereof, LIPA relies upon the following: a fully executed transcript of testimony of William Kranmas, a Distribution System Operator for National Grid; a fully executed transcript of testimony of John Carr, an electric service emergency specialist employed by LIPA; an affidavit of George Ello, a Manager in the Systems Operations area of National Grid Electric Services, LLC; and internal LIPA records and certified documents received form the Nassau County Fire Communications Bureau ("Fire Comm"). LIPA concludes that the deposition testimony, affidavit and records from the Fire Comm support its position that LIPA's response to a request to de-energize a downed power line was appropriate and timely.

In opposition to this motion, plaintiffs assert that questions of fact exist as to the reasonableness of LIPA's actions or inactions, the timing of its response to the notification of the fire and the de-energization of the line, and whether LIPA followed the procedures, policies and/or guidelines concerning the de-energization of the appropriate circuits and power lines.

In response thereto, LIPA acknowledges that it had a duty to the public at large and to the firefighters, to wit, the duty to safely de-energize the downed line at issue as quickly as possible and that LIPA "undertook the duty to do so in a safe, reasonable and timely manner."

Mr. Kranmas testified that on the date of the incident, he received a call from Fire Comm alerting him that there was an electrical wire down near a home located at 619 Smith Street in Franklin Square, New York, and that there was a house fire at the location and the downed power line needed to be de-energized. The call was received by LIPA at 1306, or

1:06 p.m. Upon receiving the call from Fire Comm, Mr. Kranmas directed acting foreman, John Carr to immediately proceed to the location of the downed line and fire.

Mr. Carr arrived at the scene of the incident within ten (10) minutes. Upon arriving at the scene, Mr. Carr identified the downed power line that needed to be de-energized. Mr. Carr called Mr. William Kranmas and notified him of the proper location of the downed electrical line. He made the call to Mr. Kranmas three (3) to five (5) minutes after he arrived at the scene. Mr. Kranmas then determined that the circuit that needed to be de-energized was circuit number 2AB519. Originally, the Fire Comm had notified Mr. Kranmas that the circuit that needed to be de-energized was circuit number 2AB524. The line was de-energized remotely from the office in Hewlett.

Mr. Carr then had to verify that the line was de-energized. In order to do so, he needed to visually inspect the switch to confirm that it was open and had to test the downed wire. He walked one block from the location of the switch, and confirmed that the switch was, in fact, open. He then walked back to the scene and tested the downed wire, which was de-energized, with a hand held testing device.

After confirming that the line had been de-energized by visually inspecting the switch and testing the downed line for voltage, Mr. Carr notified the Fire Chief, who was at the location of the downed line, that the line was de-energized and the area was safe. From the time that Mr. Carr was notified of the situation to the time he arrived at the scene was approximately fifteen (15) to twenty (20) minutes.

The Fire Comm Inquiry Alarm Log Record and time line confirm that LIPA was first notified of the incident at 1309 or 1:09 p.m. The Grid was shut down at 1327 or 1:27 p.m., just eighteen (18) minutes later. The shut down was confirmed by LIPA at 1339 or 1:39 p.m.

It was within thirty (30) minutes from the time the initial call was received by LIPA that the incident command at the scene was advised that the downed power line was de-energized.

Mr. Ello concludes, based on his review of the uncontroverted facts concerning LIPA's response to the incident in question, that LIPA's response to the request made by the Fire Comm and the incident commander at the scene, was appropriate and reasonable, was consistent with LIPA's procedures and protocols, and was consistent with the safe operation of an electrical distribution system.

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence

to demonstrate the absence of any material issues of fact (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (***Mastrangelo v. Manning***, 17 A.D.3d 326, 793 N.Y.S.2d 94 (2d Dept., 2005); ***Roberts v. Carl Fenichel Community Servs., Inc.***, 13 A.D.3d 511, 786 N.Y.S.2d 823 [2d Dept., 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see* ***Kriz v. Schum***, 75 N.Y.2d 25, 549 N.E.2d 1155, 550 N.Y.S.2d 584 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (***Rudnitsky v. Robbins***, 191 A.D.2d 488, 489, 594 N.Y.S.2d 354 [2d Dept., 1993]).

The elements of common-law negligence are a duty owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach of that duty constituted a proximate cause of the injury (***Ruiz v. Griffin***, 71 A.D.3d 1112, 898 N.Y.S.2d 590 [2d Dept., 2010; *see* ***Ingrassia v. Lividikos***, 54 A.D.3d 721, 864 N.Y.S.2d 449 (2d Dept., 2008); ***Vetrone v. Ha Di Corp.***, 22 A.D.3d 835, 803 N.Y.S.2d 156 (2d Dept., 2005); ***Gordon v. Muchnick***, 180 A.D.2d 715, 579 N.Y.S.2d 745 [2d Dept., 1992]). "[T]he scope of the duty owed by the defendant is defined by the risk of harm reasonably to be perceived" (***Sanchez v. State of New York***, 99 N.Y.2d 247, 252, 784 N.E.2d 675, 754 N.Y.S.2d 621 (2002); *see* ***Palsgraf v. Long Island Railroad Co.***, 248 N.Y. 339, 344, 162 N.E. 99 (1928); ***Ingrassia v. Lividikos, supra***; ***Demshick v. Community Housing Management Corp.***, 34 A.D.3d 518, 529, 824 N.Y.S.2d 166 [2d Dept., 2006]; ***Vetrone v. Ha Di Corp., supra***; ***Ruiz v. Griffin, supra***).

LIPA has made a *prima facie* showing of entitlement to summary judgment dismissing the complaint by submitting the deposition testimony of Messrs. Kranmas and Carr, the certified Fire Department Records and the affidavit of Mr. George Ello. Consequently, the burden shifts to plaintiffs to present evidence in admissible form sufficient to raise an issue of fact. (***Perl v. Meher***, 74 A.D.3d 930, 902 N.Y.S.2d 632 (2d Dept., 2010); ***Murray v. Hirsch***, 58 A.D.3d 701, 871 N.Y.S.2d 673 [2d Dept., 2009]).

Contrary to plaintiffs' contention, they have not raised an issue of fact as to whether LIPA responded in an appropriate or timely manner under the circumstances existing.

In opposition, plaintiffs submitted their attorney's affirmation, which contains unsubstantiated assertions and conclusions that LIPA acted improperly and that LIPA breached its duty of care. "An attorney's affirmation, which is the sole opposition to a motion for summary judgment and relies on the same evidence that was submitted in support of the motion fails to raise a triable issue of fact." (***Odi v. Lifetouch, Inc.***, 35 A.D.3d 420, 825 N.Y.S.2d 712 [2d Dept., 2006]). Notably, plaintiffs have not submitted an expert affidavit contradicting the timing of the calls received, the actual response by LIPA

representatives and the reasonableness of LIPA's actions. (*See,* ***Frost v. Long Island Power Authority***, 2010 NY Slip Op 32171U, 2010 N.Y. Misc. Lexis 3835).

In view of the foregoing, the motion is granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: May 3, 2011
Mineola, N.Y.

J. S. C.
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