**Rado v Verizon Communications, Inc.**

2011 NY Slip Op 32100(U)

July 7, 2011

Supreme Court, Suffolk County

Docket Number: 1995/2010

Judge: Joseph Farneti

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[* 1]

SHORT FORM ORDER

INDEX NO. 1995/2010

SUPREME COURT - STATE OF NEW YORK
**I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

**PRESENT:**

**HON. JOSEPH FARNETI**
**Acting Justice Supreme Court**

GISELA RADO,

Plaintiff,

-against-

VERIZON COMMUNICATIONS, INC., ALL COUNTY PAVING CORP., A. JAMES DEBRUIN & SONS, LLP, HAWKEYE CONSTRUCTION INC., COMMANDER ELECTRIC, INC., BUDIN CONTRACTING CORP., GRANT PARK CONSTRUCTION CO. INC. and LOCKWOOD, KESSLER & BARTLETT, INC.,

Defendants.

**ORIG. RETURN DATE: AUGUST 11, 2010**
**FINAL SUBMISSION DATE: NOVEMBER 18, 2010**
**MTN. SEQ. #: 002**
**MOTION: MG**

**ORIG. RETURN DATE: AUGUST 11, 2010**
**FINAL SUBMISSION DATE: NOVEMBER 18, 2010**
**MTN. SEQ. #: 003**
**CROSS-MOTION: XMG**

**ORIG. RETURN DATE: SEPTEMBER 16, 2010**
**FINAL SUBMISSION DATE: NOVEMBER 18, 2010**
**MTN. SEQ. #: 004**
**CROSS-MOTION: XMG**

**ORIG. RETURN DATE: OCTOBER 14, 2010**
**FINAL SUBMISSION DATE: NOVEMBER 18, 2010**
**MTN. SEQ. #: 005**
**CROSS-MOTION: XMD**

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Upon the following papers numbered 1 to 18 read on these motions and cross-motions FOR SUMMARY JUDGMENT AND TO AMEND PLEADINGS. Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Notice of Cross-motion and supporting papers 7-9; Memorandum of Law 10; Notice of Cross-motion and supporting papers 11-13; Affirmation in Support and in Opposition and supporting papers 14, 15; Replying Affirmation 16; Replying Affidavit and supporting papers 17, 18; it is,

**ORDERED** that this motion (#002) by defendant, VERIZON COMMUNICATIONS, INC. ("Verizon"), for an Order, pursuant to CPLR 3212, dismissing the complaint and any cross-claims as asserted against Verizon, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this cross-motion (#003) by defendant, LOCKWOOD, KESSLER & BARTLETT, INC. ("Lockwood"), for an Order, pursuant to CPLR 3212, dismissing plaintiff's complaint, together with any cross-claims asserted against Lockwood, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this cross-motion (#004) by defendant, WELSBACH ELECTRIC CORP. OF L.I. s/h/a BUDIN CONTRACTING CORP. ("Welsbach") for an Order, pursuant to CPLR 3212, granting summary judgment in favor of Welsbach dismissing the complaint and any cross-claims asserted against Welsbach, on the grounds that there exists no triable issue of material fact regarding the liability of Welsbach, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this cross-motion (#005) by plaintiff, GISELA RADO, for an Order, pursuant to CPLR 3025 (b), 306-b and 2004, granting plaintiff leave to serve an amended complaint herein, extending the time to serve the amended summons and amended complaint upon defendants, including the proposed additional defendant, Verizon New York, Inc., for a period of 120 days after the entry of this Order, or in the alternative, deeming same served upon the defendants, is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

This action was commenced by plaintiff on January 13, 2010, to recover damages for personal injuries she allegedly sustained as a result of a trip and fall accident that occurred on January 18, 2007, while she was a pedestrian crossing Deer Park Avenue (a/k/a Route 231), in North Babylon, New York.

Plaintiff alleges negligence against Verizon in the ownership, maintenance, operation, supervision and control of the subject roadway. However, Verizon alleges that it has no ownership interest in any telephone, utility poles, manhole facilities or equipment in the State of New York and, more particularly in Suffolk County. Verizon further alleges that defendant "VERIZON COMMUNICATIONS, INC." does not own, operate, control, manage, inspect, repair or maintain any facilities or equipment anywhere, as VERIZON COMMUNICATIONS, INC. is merely a holding company that holds stock in a number of companies, and conducts no other business. As such, Verizon seeks summary judgment dismissing plaintiff's complaint and any cross-claims asserted against Verizon. In support thereof, Verizon has submitted, among other things, an affidavit of its assistant corporate secretary.

Lockwood has also moved for summary judgment, alleging that Lockwood, an engineering firm, had no involvement with any project performed on Deer Park Avenue at any time, including the time frame surrounding plaintiff's accident. In support thereof, Lockwood has submitted, among other things, an affidavit of its general counsel who avers that he caused an internal search to be performed at Lockwood to see if any information and/or documentation could be located to determine whether Lockwood had any involvement in the subject accident. Said search allegedly did not reveal any involvement.

Welsbach has similarly moved for summary judgment dismissing plaintiff's complaint and any cross-claims against it, alleging that Welsbach did not perform any work at the location of plaintiff's accident. Welsbach contends that while it submitted bids to the Town of Babylon in 2005 and 2006 for contracts to perform certain upgrades and/or improvements to portions of Route 231 in North Babylon, New York, Welsbach was not awarded any of those contracts. In

support thereof, Welsbach has submitted, among other things, an affidavit of its president and chief executive officer.

In opposition to the motions, counsel for plaintiff alleges that Verizon, and/or its affiliated entities, sought and obtained several permits to perform work on Deer Park Avenue in the vicinity of the subject location in connection with the installation of telecommunications cable. Thus, plaintiff argues that triable issues of fact exist regarding Verizon's involvement in that construction project. Further, plaintiff seeks to amend the complaint herein solely to add a new party defendant, i.e., Verizon New York Inc., "in order to protect plaintiff's rights in the event that this Court were to deem VERIZON COMMUNICATIONS and VERIZON NEW YORK two separate entities."

Plaintiff argues that Lockwood has failed to make a *prima facie* showing of entitlement to summary judgment as a matter of law, as the affidavit of its general counsel was not based upon personal knowledge. In addition, plaintiff alleges that pursuant to the "Major Construction Inspection Requirements Agreement" issued on September 25, 2001, Lockwood was identified as the entity responsible for performing inspections for Verizon's project on Deer Park Avenue.

Plaintiff similarly argues that Welsbach has failed to make a *prima facie* showing of entitlement to summary judgment as a matter of law, as the affidavit of its president was not based upon personal knowledge. Furthermore, plaintiff indicates that documentation obtained from the Department of Transportation indicates that Welsbach was involved in road work in the vicinity of the subject accident.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that the moving defendants have made *prima facie* showings of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). The burden then shifted to plaintiff to establish, by competent evidence in admissible form, the existence of material issues of fact that would warrant a trial with respect to these defendants. Here, plaintiff has failed to do so. Plaintiff has submitted an affirmation of counsel in opposition to the instant motions, but has failed to submit an affidavit of someone with personal knowledge of the essential facts to demonstrate the existence of any material issues of fact that would preclude the granting of summary judgment to the moving defendants. Counsel's affirmation in opposition, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to defeat a motion for summary judgment (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]).

Plaintiff criticizes the affidavits submitted in support of defendants' motions for summary judgment as "self-serving" or "equivocal" and insufficient to make a *prima facie* showing of entitlement to judgment as a matter of law. However, each of the moving defendants has submitted an affidavit of a principal containing specific factual allegations based upon personal knowledge. Verizon argues that this entity is not the proper defendant; Lockwood argues that although there is a reference to Lockwood as the inspector for Verizon's project, Lockwood never actually undertook such role; and Welsbach argues that although plaintiff has submitted a document purporting to show that Welsbach performed work in the subject area, Welsbach alleges that it completed such work in 1985, over twenty-five (25) years before plaintiff's accident.

In addition, although plaintiff urges a denial of the motions, speculating as to the moving defendants' involvement herein, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion (*see Arbizu v REM Transp.*, 20 AD3d 375 [2005]; *Kershis v City of New York*, 303 AD2d 643 [2003]; *Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537 [2002]). Moreover,

it is not appropriate to subject the moving defendants to the time and expense of preparing a defense to this action and participating in numerous depositions so that plaintiff can then sort out who is ultimately responsible for her injuries (*see Schwartzman v Wertz*, 153 Misc 2d 187 [Sup Ct, NY County 1991], *affd* 179 AD2d 540 [1992]; *see also Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co.*, 157 Misc 2d 198 [Sup Ct, N.Y. County 1993]).

In view of the foregoing, these motions by Verizon, Lockwood and Welsbach for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against these defendants are **GRANTED**.

With respect to plaintiff's cross-motion to amend her complaint to add "Verizon New York Inc.," the Court notes that the statute of limitations has now run on plaintiff's claim against Verizon New York, Inc., and that Verizon has alleged that VERIZON COMMUNICATIONS, INC. and Verizon New York Inc. are not vicariously liable for the acts of the other or "united in interest." Therefore, the Court finds that plaintiff may not rely on the relation back doctrine to now sue Verizon New York, Inc. (*see* CPLR 203 [b]; *Rinzler v Jafco Assocs.*, 21 AD3d 360 [2005]; *Scoma v Doe*, 2 AD3d 432 [2003]; *Desiderio v Rubin*, 234 AD2d 581 [1996]; *Capital Dimensions v Oberman Co.*, 104 AD2d 432 [1984]). Further, even if the Court considered the application under CPLR 305 (c) it would be denied, as an amendment to correct a misnomer will be permitted only if the Court has acquired jurisdiction over the intended but misnamed defendant, and provided that the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect and would not be prejudiced by allowing the amendment (*see Smith v Giuffre Hyundai, Ltd.*, 60 AD3d 1040 [2009]; *Smith v Garo Enters., Inc.*, 60 AD3d 751 [2009]; *Holster v Ross*, 45 AD3d 640 [2007]; *Pugliese v Paneorama Italian Bakery Corp.*, 243 AD2d 548 [1997]). Here, the Court has not acquired jurisdiction over Verizon New York Inc.

Accordingly, plaintiff's cross-motion to amend her complaint to add Verizon New York Inc. as an additional defendant herein is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

**Dated: July 7, 2011**

**HON. JOSEPH FARNETI**
**Acting Justice Supreme Court**

_____ **FINAL DISPOSITION**     __X__ **NON-FINAL DISPOSITION**