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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA J.S.C. Justice

PART 19

Index Number : 104864/2010
VERIZON NEW YORK
vs.
SKANSKA MECHANICAL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 104864/2010

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is DETERMINED IN ACCORDANCE WITH THE ACCOMPANYING DECISION/ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/15/12

SALIANN SCARPULLA, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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VERIZON NEW YORK, INC.,

Plaintiff,

Index Number: 104864/10
Submission Date: 8/1/12

- against -

DECISION and ORDER

SKANSKA MECHANICAL AND STRUCTURAL INC.,

Defendant.

---------- X

For Plaintiff:
Pillinger Miller Tarallo, LLP
570 Taxter Road, Suite 275
Elmsford, NY 10523
914-703-6300

For Defendant:
Fabiani Cohen & Hall, LLP
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212-644-4420

Papers considered in review of this motion for summary judgment/cross-motion to amend caption:

Notice of Motion/Affirm. of Counsel in Supp.....1
Affirm. in Opp. to Defendant's Mot/Notice of Cross-Motion 2
Reply Affirm. in Supp and Opp. to Plaintiff's Cross-Motion.....3

HON SALIANN SCARPULLA, J.:

In this action to recover for property damage, defendant Skanska Mechanical and Structural, Inc., formerly known as Gottlieb Skanska, Inc. ("Skanska Mechanical") moves for summary judgment dismissing plaintiff Verizon New York, Inc.'s ("Verizon") complaint pursuant to CPLR 3212. Verizon cross-moves to amend the caption to name Skanska USA Civil Northeast, Inc., formerly known as Slattery Skanska, Inc. ("Skanska Civil") as the named defendant in this action pursuant to CPLR 3025 and 2001. Verizon does not oppose Skanska Mechanical's motion for summary judgment.

On April 14, 2010, Verizon commenced this suit against Skanska Mechanical alleging two causes of action for negligence and trespass. Verizon alleges that Skanska Mechanical negligently damaged its underground cables at the northeast corner of Church Street and Dey Street on May 28, 2008. Verizon claims that Skanska Mechanical damaged the cables by negligently operating its equipment, negligently excavating, and failing to observe cable markings. Verizon also alleges that Skanska Mechanical trespassed on the underground cables.

At his deposition, Verizon's local manager, Michael Arcati ("Arcati"), testified that he inspected the damaged cables on May 28, 2008. According to Arcati, the damaged cables were found in a manhole ten feet underground Church and Dey Streets. Arcati explained that "the manhole was dismantled" as part of a large municipal project and the surrounding area had been "ripped up from street to street." Arcati found the cables "hanging by various means, most of it was by yellow rope." Arcati opined that the cables were damaged because they had been moved by the company working at the site. Arcati testified that "Skanska" was working at the site, but he was not sure which entity.

Skanska Mechanical's manager, Bruce Molinari ("Molinari"), testified at his deposition that his company was working on the Dey Street Concourse subway project in May 2008. Skanska Mechanical was a subcontractor to Skanska Civil, the general contractor of the project. Molinari testified that, in early May 2008, Skanska Mechanical placed small steel girders underneath Church and Dey streets "from fifty feet deep to ten

feet deep." During the week of May 21, Skanska Mechanical installed grout stop angles along the R/W line, underneath Church Street. These grout stop angles were used to "fill in the space between the girder and the [concrete] slab" for the subway track.

According to Molinari, on May 28, 2008, Skanska Mechanical "continued with the grout stop angles at the R/W, and then worked at Fulton Street." Skanska Civil's 5/28/08 Daily Report also stated that Skanska Mechanical (then known as Gottlieb) "installed angle grout stop at concourse level E/W girders" on the "R/W" line. Molinari stated that he did not encounter any Verizon cables while working on the project. Molinari also testified that Skanska Mechanical did not perform any excavation work on the project, and that the excavation work had been performed by Skanska Civil prior to Skanska Mechanical's installation of the small steel girders.

In its motion for summary judgment, Skanska Mechanical argues that Verizon's complaint should be dismissed because: (1) Skanska Mechanical did not work in the area of Church and Dey Streets on May 28, 2008, and Skanska Mechanical did not come in contact with the underground cables because it does not perform any drilling or excavation work; and (2) no triable issues of fact exist.

Verizon does not oppose Skanska Mechanical's motion for summary judgment, but instead cross-moves to amend the caption to name Skanska Civil as the named defendant in this action. In support of its cross-motion, Verizon argues that: (1) Skanska

Civil was aware of this lawsuit and will not be prejudiced if named in the complaint; and (2) Verizon stated a *prima facie* case against Skanska Civil.

In opposition to Verizon's cross-motion, Skanska Mechanical argues that: (1) Verizon's claims against Skanska Civil are barred by the statute of limitations; and (2) Verizon is not entitled to use the relation back doctrine to bring claims against Skanska Civil because it is not united in interest with Skanska Mechanical.

Skanska Mechanical submits an affidavit from Arnold Kirsch ("Kirsch"), an officer, who attests that Skanska Mechanical and Skanska Civil have different corporate officers. In another affidavit, Timothy Klein ("Klein"), Skanska Civil's Risk Manager, states that Skanska Mechanical and Skanska Civil had different corporate officers and principal places of business on the date of the alleged injury. At his deposition, Molinari testified that Skanska Mechanical and Skanska Civil were separate entities with different offices and employees, but the two entities had the same owners and principals.

Discussion

1. Motion for Summary Judgment

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to

demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In a negligence action, the plaintiff must show that: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; (3) which caused; (4) the plaintiff's injury. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981). In a trespass to chattels action, the plaintiff must show that the defendant intentionally and wrongfully intruded or interfered with the plaintiff's personal property. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487 (1983).

Based on the record before me, I find that Skanska Mechanical made a *prima facie* showing of entitlement to judgment as a matter of law. Skanska Mechanical offered sufficient evidence to show that it was working at a different location on the date of plaintiff's injury, not at Church and Dey Streets, and therefore could not have negligently damaged or trespassed Verizon's cables. Molinari testified that, on May 28, 2008, Skanska Mechanical installed angle grout stops on the R/W line and then worked at Fulton Street. Skanska Civil's 05/28/08 Daily Report also shows that Skanska Mechanical installed angle grout stops on the R/W line on that date. No evidence in the record suggests that Skanska Mechanical was at Church and Dey Streets on May 28.

Moreover, evidence in the record indicates that Skanska Mechanical did not come in contact with Verizon's cables. The affidavits of Kirsch and Klein state that Skanska Mechanical did not perform any underground excavation work, and Molinari stated that

the excavation work was performed by Skanska Civil. Molinari also testified that he did not encounter any Verizon cables while Skanska Mechanical was working on the project.

The burden now shifts to Verizon to demonstrate a triable issue of fact. Here, Verizon did not oppose Skanska Mechanical's motion for summary judgment, and therefore failed to raise any triable issues of fact.

Accordingly, the defendant Skanska Mechanical's motion for summary judgment dismissing Verizon's complaint is granted.

2. Cross-Motion to Amend Caption

CPLR §3025(b) provides that a party may amend a pleading at any time by leave of court. If an amendment is sought, leave must be freely granted absent prejudice to the opposing party. *Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28, 29 (1st Dep't 2001).

To recover damages for injury to property, a plaintiff must commence an action within the three-year statute of limitations period. CPLR § 214. In instances where the statute of limitations has expired, CPLR § 203(b) "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes" (referred to as the "relation back doctrine"). *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995).

A plaintiff must satisfy three conditions to use the relation back doctrine: (1) the claims against both defendants must arise out of the same transaction or occurrence; (2) the new defendant must be united in interest with the original defendant; and (3) the

new defendant knew or should have known that, but for plaintiff's mistake about the identity of the proper party, the action would have been brought against him or her. *Buran*, 87 N.Y.2d at 173.

To satisfy the second condition, the plaintiff must show that the defendants are united in interest through a "relationship between the parties giving rise to the vicarious liability of one for the conduct of the other." *Regina v. Broadway-Bronx Motel Co.*, 23 A.D.3d 255, 255 (1st Dep't 2005). The determination of whether the defendants are united in interest is a question of law. *Connell v. Hayden*, 83 A.D.2d 30, 43 (2d Dep't 1981).

Here, Verizon failed to commence its claims against Skanska Civil within the relevant statute of limitations period. The statute of limitations expired on May 28, 2011, three years after the date of the alleged property damage. Thus, in order to bring its claims against Skanska Civil, Verizon must show that these claims relate back to its claims against Skanska Mechanical.

Based on the record before me, I find that Verizon has failed to show that the relation back doctrine applies to its claims against Skanska Civil. While Verizon's claims against Skanska Civil arise out of the same occurrence, there is no evidence to suggest that Skanska Civil and Skanska Mechanical are united in interest such that vicarious liability exists between the two entities. Instead, the record indicates that Skanska Civil

and Skanska Mechanical are distinct corporate entities with different officers, employees, and principal places of business.

In its cross-motion, Verizon argues that Skanska Civil and Skanska Mechanical are united in interest because both entities have the same process agent registered with the New York Secretary of State, and as a result, Skanska Civil was apprised of the lawsuit. However, service of process on a shared agent is not sufficient to establish that two entities are united in interest, even when service of process may have given notice to the new defendant. *See Desiderio v. Rubin*, 234 A.D.2d 581, 583 (2nd Dep't 1996).

Moreover, although Molinari's testimony suggests that a parent-subsidiary relationship may exist between Skanska Civil and Skanska Mechanical because they share the same owners and principals, a parent-subsidiary relationship does not give rise to vicarious liability absent a showing that the parent corporation exerts sufficient control over the subsidiary to disregard the subsidiary's corporate independence. *Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (1980); *Horowitz v. Aetna Life Ins.*, 148 A.D.2d 584, 586 (2d Dep't 1989). The existence of a contractor-subcontractor relationship between two entities is also not sufficient to establish vicarious liability. *Kleeman v. Rheingold*, 81 N.Y.2d 270, 272 (1993).

Accordingly, the plaintiff Verizon's cross-motion to amend the caption of its complaint to name Skanska Civil as the named defendant is denied.

In accordance with the foregoing, it is

ORDERED that defendant Skanska Mechanical's motion for summary judgment dismissing Verizon's complaint pursuant to CPLR 3212 is granted; and it is further

ORDERED that plaintiff Verizon's cross-motion to amend the caption of its complaint to name Skanska Civil as the named defendant is denied.

This constitutes the decision and order of this Court.

Dated: New York, New York
November 15, 2012

ENTER:

Saliann Scarpulla, J.S.C.