[* 1]

SCANNED ON 4/15/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA PART 19

Justice

Index Number : 113700/2009
VERIZON NEW YORK
vs.
CINALTA CONSTRUCTION
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

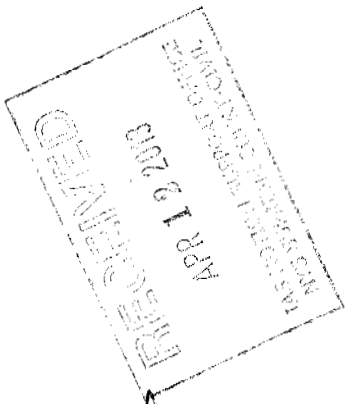
decided per the memorandum decision dated 4/9/13
which disposes of motion sequence(s) no.

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

FILED

APR 15 2013

NEW YORK
COUNTY CLERK'S OFFICE



Dated: 4/10/13

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

[* 2]

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

---------- X

VERIZON NEW YORK, INC.,

Plaintiff,

- against -

CITNALTA CONSTRUCTION,

Defendant.

---------- X

CITNALTA CONSTRUCTION,

Third-Party Plaintiff,

-against-

EMPIRE CITY SUBWAY COMPANY LIMITED and
FELIX ASSOCIATES, LLC

Third-Party Defendants.

---------- X

Index Number: 113700/09
Submission Date: 11/14/12

DECISION and ORDER

Index Number: 590160/12

For Plaintiff:
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White Plains, NY 10601

For Third-Party Defendant Felix Associates:
Marshall Dennehey Warner Coleman & Goggin
425 Eagle Rock Avenue, Suite 302
Roseland, NJ 07068

Third-Party Defendant Empire City Subway:
Conway, Farrell, Curtin & Kelly P.C.
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New York, NY 10005

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

Notice of Motion/Affirm. of Counsel in Supp.....1
Hoffberg Affirm. in Opp. to Motion and Cross-Motion..... 2
Fink Reply Affirm. in Supp. of Motion.....3
Notice of Cross-Motion/Affirm. of Counsel.....4
Fink Affirm. in Partial Opp. to Cross-Motion.....5
Salvo Reply Affirm. in Supp. of Cross-Motion.....6, 7

HON SALIANN SCARPULLA, J.:

In this action to recover for property damage, defendant Citnalta Construction ("Citnalta") moves for summary judgment dismissing plaintiff Verizon New York, Inc.'s ("Verizon") complaint pursuant to CPLR § 3212. Third-party defendant Felix Associates, LLC ("Felix") cross-moves for dismissal of the third-party complaint pursuant to CPLR §§ 3212 and 3211(a)(7).

On September 16, 2009, Verizon commenced this suit against Citnalta alleging two causes of action for negligence and trespass. Verizon alleges that Citnalta negligently damaged its telecommunications cable located at the northwest corner of Cortland and Broadway on or about June 4, 2007. Verizon claims that Citnalta damaged the cable by negligently operating its equipment, negligently excavating, and failing to provide a "mark-out" notice prior to commencing its excavation activities.

On February 12, 2012, Citnalta commenced a third-party action against Empire City Subway Company Limited ("ECS") and Felix for contribution and common law indemnification. Citnalta also alleged a contractual indemnification claim against Felix.

Background

A. The Cable

Verizon's local manager, Michael Arcati ("Arcati"), testified at his deposition that the damaged cable was discovered on Cortland Street and Broadway, in a large excavated area under construction for the Fulton Street subway station. Arcati testified that when he

inspected the cable, he observed that the original iron pipe conduit surrounding the cable had been removed. Arcati also observed that the lead sheath covering the cable had "multiple cuts" in it – ranging from one to twelve inches in length.

Arcati testified that the cable was damaged because the multiple cuts in the lead sheath allowed water to penetrate the sheath and damage the conductors. Arcati opined that the cuts in the lead sheath were inadvertently created by "ringing and ripping" – a process by which conduits are removed from Verizon cables.[1] The "ringing and ripping" process involves ringing the conduit with a circle, and then making a horizontal cut to split up and remove the conduit from the cable.

Arcati explained that conduits are removed in order to move cables during an excavation. After his inspection, Arcati completed a report stating that the cable damage occurred because the "[c]able sheath [was] cut in multiple spots." The report also contained a comment stating that "ECS was the damager, Cable was damage while riping (sic) an iron pipe for the MTA."

Arcati further testified that Citnalta was working in the area where the cable was damaged on June 4, 2007, and that Citnalta possessed permits for the entire street. Aracti also testified that, in early June, a "marking out" notice was not necessary "because the entire street was excavated and the location of the cables was definitely known." Arcati

[1] The parties also refer to this process as "ripping and rigging", removing conduits, or removing iron pipe.

testified that he did not know whether Citnalta removed the conduit from the damaged cable.

B. The Construction Project

1. Citnalta

Citnalta's superintendent, Victor Ferrante, testified that Citnalta performed construction work for the Fulton Street subway station under a contract with the MTA. Ferrante testified that Citnalta excavated the area near Cortland and Broadway from approximately January to June 2007.

Ferrante testified that during the excavation, Citnalta installed a shoring system by driving "piles into the ground to support the excavation and all the utilities." According to Ferrante, Citnalta began restoring the excavated area and removing the shoring system in early June, which included removing devices that supported the Verizon cables in the area. Ferrante testified that at this time, some of the Verizon cables were exposed without conduits. Ferrante also testified that the conduits were removed because some of the cables were "found damaged and some as we moved them they fell apart."

Ferrante further testified that Citnalta also removed damaged concrete ducts "that got split and we take it apart and wrap it with PVC split ducts." Ferrante testified that Citnalta did not charge ECS for removing conduits, but that it was part of the contract with the MTA. At a later point in his deposition, Ferrante testified, "I would not remove a conduit. A pipe itself. I never remove a pipe. The conduit was in a concrete duct." He

also testified that "I don't think Verizon had concrete ducts and I would not take the conduit out of a pipe."

2. ECS

According to Arcati, ECS is a subsidiary of Verizon, which generally has "a plant inspector overlooking any construction jobs that involve Verizon cables." Arcati testified that "ECS is responsible for all the manholes and conduits in the Verizon footprint of Manhattan." Arcati testified that ECS generally performs ringing and ripping work.

Ferrante testified that ECS oversaw the Verizon utilities throughout the excavation. Ferrante testified that, at some point between April and June, Citnalta stopped its excavation work so that ECS could move and raise the Verizon cables in the area of Cortland and Broadway, which involved removing conduits from the cables. Ferrante testified that ECS is the only company that performs ringing and ripping work.

3. Felix

Ferrante testified that Citnalta subcontracted the utility work for the project to Felix. Citnalta submits a copy of its subcontract with Felix, dated February 7, 2005, which states that Felix shall provide "all tools, equipment, labor and material to furnish and install all utility work as per plans, including . . . ECS telephone work, excavation, shoring, sheeting, existing utility support outside cofferdams . . . concrete manholes and catch basins, manhole covers, ductile iron pipe, concrete pipe, concrete pipe cradles and encasements. Removal of existing site piping."

The subcontract between Citnalta and Felix also contains an indemnification provision, which states that Felix's obligation to indemnify Citnalta "shall extend only to the percentage of negligence of Subcontractor [Felix]."

Ferrante also testified that Felix was working on the M-14 manhole, a fourteen foot manhole for Con Edison in approximately late May or early June.

C. Instant Action

1. Motion for Summary Judgment

In its motion for summary judgment, Citnalta argues that Verizon's complaint should be dismissed because: (1) Citnalta did not perform any ringing and ripping work that caused damage to the cable, and that it was ECS that performed this type of work that damaged the cable; and (2) Citnalta's failure to "mark out" the area near Cortland and Broadway did not cause the accident. Citnalta also argues that Verizon should be liable for costs, attorneys' fees, and sanctions because Verizon acted in bad faith in commencing a frivolous action.

In opposition, Verizon argues that: (1) a triable issue of fact exists as to whether Citnalta or Felix damaged the cable; and (2) Verizon should not be liable for costs, attorneys' fees, or sanctions because a triable issue of fact exists.

Verizon argues that Citnalta was hired by ECS to perform the ringing and ripping work that caused damage to the cable. Verizon submits two affidavits from Thomas Mark and Marc Soto that state "Verizon was informed that third-party defendant in this action, EMPIRE CITY SUBWAY COMPANY LIMITED hired Citnalta Construction to perform

certain work" at the northwest corner of Cortland and Broadway. Verizon also argues that this motion is premature because neither Felix nor ECS have testified.

In reply, Citnalta submits an affidavit from Ferrante stating that Citnalta was not hired by ECS to perform utility work, including ringing and ripping work. Ferrante stated that "Verizon and ECS were present daily on site and worked exclusively with third-party defendant Felix Associates, LLC ('Felix') with respect to their utilities." Citnalta argues that it was either ECS or Felix that removed the conduit from the cable.

2. Cross-Motion for Summary Judgment

In its cross-motion for summary judgment, Felix argues that Citnalta's third-party complaint should be dismissed because Felix did not perform any work in the area where the cable was damaged. Felix argues that, on June 4, 2007, it was working on Con Edison utilities on Maiden Lane, and therefore could not have damaged the Verizon cable.

In opposition, Citnalta argues that a triable issue of fact exists as to whether Felix performed the work that caused damage to the cable. Citnalta argues that Felix was working in the vicinity where the cables were damaged on or about June 4, 2007. Citnalta submits a copy of Felix's invoice for June 3, 2007, which states that Felix performed work to "excavate and offset the pipes to make room for manhole" at the location of Maiden Lane between Broadway and Liberty Place.

Discussion

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).

1. Motion for Summary Judgment

A. Negligence and Trespass

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 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).

Here, I find that Citnalta made a *prima facie* showing of entitlement to judgment as a matter of law dismissing Verizon's complaint. The parties do not dispute that the cable was damaged by the multiple cuts to the lead sheath. Citnalta presented evidence that it did not cut the lead sheath because it did not remove conduits as part of its work. Ferrante testified that it was ECS/Verizon that cut and removed the conduits, not Citnalta.

The burden now shifts to Verizon to raise a triable issue of fact. Here, I find that Verizon raises a triable issue of fact as to whether Citnalta removed the conduit from Verizon's cable or performed any work that created the cuts in the lead sheath. Verizon presents Ferrante's testimony that, in early June 2007, several conduits were removed because some of Verizon's cables "were found damaged and some as we moved them they fell apart." Ferrante further testified that Citnalta did not charge ECS for removing conduits, but that it was part of the contract with the MTA. Verizon also submits affidavits from Thomas Mark and Marc Soto stating that ECS hired Citnalta to perform work in the Cortland and Broadway area. Based on the testimony and affidavits submitted, I find that triable issues of fact exist to defeat Citnalta's summary judgment motion.

Accordingly, the defendant Citnalta's motion for summary judgment dismissing Verizon's complaint is denied.

B. Sanctions

Citnalta also moves for costs, attorneys' fees, and sanctions against Verizon pursuant to CPLR § 8303-a and 22 NYCRR § 130-1.1. Under CPLR § 8303-a, the court may find an action to be frivolous if the plaintiff continued the action in bad faith to delay resolution, harass, or to maliciously injure an adversary, or if the action is without any basis in law or fact. CPLR § 8303-a(c). Under 22 NYCRR § 130-1.1, the court may impose financial sanctions upon any party who engages in frivolous conduct. *Llantin v. Doe*, 30 A.D.3d 292, 293 (1st Dep't 2006).

Here, I find that Verizon did not engage in frivolous conduct by maintaining this action against Citnalta. There is no evidence that Verizon continued to litigate against Citnalta in bad faith simply to delay resolution of the action, harass, or to maliciously injure Citnalta.

Accordingly, the defendant Citnalta's motion for costs, attorneys' fees, and sanctions is denied.

2. Cross-Motion for Summary Judgment

A. Contribution and Indemnification

Felix cross-moves for summary judgment dismissing Citnalta's third-party complaint for contribution and indemnification. Felix argues that the third-party complaint should be dismissed because Felix was not working at the site where the cables were damaged on June 4, 2007.

A claim for contribution arises when "two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person." *Smith v. Sapienza*, 52 N.Y.2d 82, 87 (1981). The critical requirement of a contribution claim is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." *Nassau Roofing & Sheet Metal Co. v. Facilities Dev.*, 71 N.Y.2d 599, 603 (1988).

To prove an indemnification claim, the movant must show that it maintains a right to "shift the entire loss" to another party based on an express contract or implied

indemnification. *Bellevue S. Assoc. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 296 (1991). Implied or common law indemnification must be predicated on a theory of vicarious liability and may be imposed "upon those actively at fault in bringing about the injury." *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 375 (2011).

Here, I find that Felix demonstrated its entitlement to judgment as a matter of law dismissing Citnalta's third-party complaint for contribution and indemnification. Felix offered sufficient evidence to show that it did not damage or trespass Verizon's cable because Felix was working at a different location on June 4, 2007, not at Cortland and Broadway. Ferrante testified that Felix was working on a Con Edison manhole on Maiden Lane in late May or early June. Felix's invoices also show that Felix was working on Con Edison utilities on Maiden Lane, between Broadway and Liberty Place, throughout the week of June 4, 2007.

The burden now shifts to Citnalta to raise a triable issue of fact. Here, I find that Citnalta failed to present any evidence that Felix performed any work in the area of Broadway and Cortlandt on or about June 4, 2007. In accordance with my finding that Felix did not damage or trespass the cable, Felix cannot be liable to Citnalta for contribution or indemnification as a matter of law.

Accordingly, the third-party defendant Felix's motion for summary judgment dismissing Citnalta's third-party complaint is granted.

B. Sanctions

Felix also moves for sanctions against Citnalta pursuant to CPLR § 8303-a and 22 NYCRR § 130-1.1. Here, I find that Citnalta did not engage in frivolous conduct by commencing and maintaining its third-party action against Felix. There is no evidence that Citnalta continued to litigate against Felix in bad faith simply to delay resolution of the action or to harass or maliciously injure Felix. *Llantin v. Doe*, 30 A.D.3d at 293.

Accordingly, the third-party defendant Felix's cross-motion for costs, attorneys' fees, and sanctions is denied.

In accordance with the foregoing, it is

ORDERED that defendant Citnalta Construction's motion for summary judgment dismissing Verizon's complaint pursuant to CPLR § 3212 is denied; and it is further

ORDERED that defendant Citnalta Construction's motion seeking costs, attorneys' fees, and sanctions from Verizon pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1 is denied; and it is further

ORDERED that third-party defendant Felix Associates, LLC's cross-motion for summary judgment dismissing Citnalta Construction's third-party complaint pursuant to CPLR § 3212 is granted; and it is further

ORDERED that Citnalta Construction's third-party complaint is severed and dismissed as to third-party defendant Felix Associates, LLC, and is continued as to the remaining third-party defendant Empire City Subway Company Limited; and it is further

ORDERED that third-party defendant Felix Associates, LLC's motion seeking costs, attorneys' fees, and sanctions from Citnalta Construction pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1 is denied; and it is further

ORDERED that the Clerk is directed lo enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 9 , 2013

ENTER:

Saliann Scarpulla, J.S.C.