

Kaminer v City of New York

2014 NY Slip Op 30861(U)

April 3, 2014

Sup Ct, New York County

Docket Number: 113852/10

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
STACEY KAMINER and DARREN WITTWER,

Plaintiffs,

Index No. 113852/10

Decision and Order

- against -

THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION, TIME
WARNER ENTERTAINMENT COMPANY, L.P.,
VERIZON NEW YORK INC., T. MORIARTY &
SONS, INC. and EMPIRE CITY SUBWAY
COMPANY (LIMITED),

Defendants.

FILED

APR 07 2014

COUNTY CLERK'S OFFICE
NEW YORK

-----X
VERIZON NEW YORK INC. and EMPIRE CITY
SUBWAY COMPANY (LIMITED),

Third-Party Plaintiffs,

Index No. 590021/11

- against -

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

-----X
TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Second Third-Party Plaintiff,

Index No. 590177/11

-----X
TRINITY COMMUNICATION CORP. and HYLAN
DATACOM & ELECTRICAL INC., individually and as
Successor in interest to TRINITY COMMUNICATION
CORP.,

Second Third-Party Defendants.

HON. MICHAEL B. STALLMAN, J.:

[* 3]

Motion sequence numbers 004, 005, 006, 007 and 008 are consolidated for disposition.

Plaintiff Stacey Kaminer (plaintiff) sues defendants for injuries in this alleged trip-and-fall case. Plaintiff Darren Wittwer asserts a derivative action.

In motion sequence number 004, the New York City Transit Authority (NYCTA) moves for an order granting summary judgment dismissing the amended verified complaint (the complaint) and all cross claims against NYCTA.

In motion sequence number 005, Verizon New York Inc. (Verizon) moves for an order granting summary judgment in its favor and dismissing the complaint and all cross claims against Verizon.

In motion sequence number 006, Nico Asphalt Paving, Inc. (Nico Asphalt) and Empire City Subway Company (Limited) (ECS) move for an order granting summary judgment in their favor and dismissing the complaint and all cross claims and counterclaims against ECS.

In motion sequence number 007, Time Warner Cable, Inc. (Time Warner Cable or Time Warner) moves for an order granting: (1) summary judgment dismissing the complaint and all cross claims and counterclaims against it; and (2) summary judgment on Time Warner Cable's claims against third-party defendant Hylan Datacom & Electrical Inc. (Hylan) for contractual and common-law

[4]
indemnification. Hylan cross-moves for an order granting summary judgment dismissing Time Warner Cable's third-party complaint and all cross claims against Hylan.

In motion sequence number 008, the City of New York (the City) moves for an order granting summary judgment in its favor and dismissing the complaint and the cross claims asserted against it.

Background

Plaintiff contends that she sustained injuries on May 31, 2010, as a result of an allegedly defective portion of the roadway, which had a pothole or a deep depression. Plaintiff claims that all of the defendants were negligent in creating the defect, failing to repair the street, or in otherwise failing to make the street safe. In her bill of particulars, plaintiff asserted that the defect was a "broken, depressed, cracked, sunken and uneven pavement in the street, approximately 14" wide by 7" deep, located within the white crosswalk in the middle of the intersection of East 78th Street and Lexington Avenue" in Manhattan (Shahabian affirmation in opposition, exhibit B, ¶ 4). Plaintiff testified that on the day of the incident, she was crossing the street, with "a sea of people," from the southeast corner of East 78th Street, adjacent to Lexington Avenue, heading north, when, approximately halfway across the street, she tripped and fell after her foot entered

[*5]

a pothole that was approximately eight inches deep and 12 inches in diameter, with gravel at the bottom (Coffey affirmation [motion sequence number 004], exhibit H, Kaminer tr [September 23, 2010] at 9, 17-20, 32, 33, 35; exhibit I, Kaminer tr [December 5, 2011] at 32). Plaintiff initialed a photograph of the subject defect, indicating that she fell extremely close to the white crosswalk line that is closest to Lexington Avenue, between a round manhole cover and a rectangular one further north (*id.*, exhibit I, Kaminer tr [December 5, 2011] at 42-45; Shahabian affirmation in opposition, exhibit C). Plaintiff filed a note of issue on May 6, 2013.

Discussion

The standards for summary judgment are well-settled.

“On a motion for summary judgment facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers”

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks, citations and emphasis omitted]).

1. NYCTA's Motion for Summary Judgment (Motion Sequence Number 004).

NYCTA argues that it is entitled to summary judgment because plaintiff testified that she fell in the roadway, and specifically depicted the area as in a crosswalk, but NYCTA does not own, maintain or operate public streets or roadways and owes no duty of care to plaintiff because plaintiff was not on property controlled or maintained by NYCTA. To meet its prima facie burden on the motion, NYCTA submits plaintiff's testimony as to where she fell in the roadway, and NYCTA's engineer's testimony that NYCTA does not control, maintain or own that part of the roadway. NYCTA cites to sections 383 and 2903 (b) & (c) of the New York City Charter to demonstrate that the scope of its duty does not include the maintenance and repair of New York City public streets.

In opposition, plaintiff argues that NYCTA has not met its prima facie burden because it has not demonstrated that it did not create the defective roadway. However, in this pothole case, the Court disagrees. Pursuant to § 383 of the New York City Charter, public streets are the inalienable property of the City, and "[t]he responsibility for the maintenance, repair, and creation of the roadway surface lies with the defendant City of New York, not the NYCTA" (*Tanzer v City of New York*, 41 AD3d 582, 582 [2d Dept 2007]; *Cioe v Petrocelli Elec. Co., Inc.*,

33 AD3d 377, 378 [1st Dept 2006]). Plaintiff testified that she fell in a pothole or deep depression in the street while crossing, but does not assert that any property, facilities or personnel of NYCTA were involved, and has not made any nonconclusory allegation as to NYCTA's involvement in the creation of a pothole, or explained how this would have occurred. In addition, the record is devoid of any indicia of NYCTA's involvement. For these reasons, NYCTA's motion is granted.

2. Verizon's Motion for Summary Judgment (Motion Sequence Number 005).

To meet its summary judgment burden, defendant Verizon points to the deposition testimony of Mr. Dmitriy Surkov, that he worked for the New York City Department of Transportation Litigation Services Unit, and that his search for roadway work permits for the two-year period prior to and on the date of the incident revealed no street opening permits for Verizon or ECS (John affirmation, exhibit F at 53-54). Verizon also submits the affidavit of Mr. Thomas DeMarzo, an area manager for Manhattan from Verizon, who avers that a permit that was issued to Verizon only grants permission to open and enter the manhole cover in the intersection, but not to perform roadway construction or repair work, and that Verizon does not perform any roadway construction or repair work, but that if

[* 8]

Verizon needed work it would be performed by ECS. Verizon also points to ECS's search for records, discussed in motion sequence number 006 below, and maintains that these records demonstrate that ECS did not perform work where plaintiff fell.

In opposition, plaintiff argues that Verizon has not met its burden on this motion because it has not demonstrated that its own records show that it did not perform work. This argument is unpersuasive as Verizon has submitted undisputed admissible evidence demonstrating that it does not perform work itself, and, consequently, that Verizon did not create the defect of which plaintiff complains. Plaintiff also does not dispute Verizon's showing or assertions that ECS's records do not demonstrate that work was performed by ECS where plaintiff fell.

Without citation to authority, plaintiff contends that Verizon's reliance on the City's search for only two years of records of work permits is insufficient where the City has 10 years of records, and the pothole may have existed for years. This argument is unpersuasive, as it amounts to no more than speculation that a longer search might yield relevant evidence, without an evidentiary basis in support. Furthermore, plaintiff filed a certificate of readiness, certifying that discovery was complete, and did not move for a longer record search before doing

[*9]

so. It is well known that summary judgment cannot be avoided by a claim that additional discovery is needed without an evidentiary basis establishing that the discovery sought will produce relevant evidence (*Cioe*, 33 AD3d at 378, citing *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]). As plaintiff makes no other arguments in opposition to the motion, and does not raise a triable factual issue for trial, Verizon's motion is granted.

3. Nico Asphalt and ECS's Motion for Summary Judgment (Motion Sequence Number 006).

Third-party defendant Nico Asphalt and defendant ECS seek summary judgment dismissing the complaint. To meet their summary judgment burden, these defendants provide the deposition testimony of Mr. Calvin Gordon of ECS, a specialist in ECS's legal group, that he conducted a search of ECS's records and found no records of work done where plaintiff fell for the date of the accident and two years prior. They also provide the testimony of Mr. John Denegall, a superintendent at Nico Asphalt, that Nico Asphalt works for Verizon or Con Edison, and replaces asphalt after Con Edison or ECS makes cuts in the asphalt. Denegall further stated that he performed a search of records in Nico Asphalt's possession concerning the accident location and found none for the date of the accident and two years prior.

In opposition, plaintiff argues that these defendants have not met their burden because the records searches that they performed were for only two years, and that the limited search should be accompanied by an affidavit or testimony that the defendants did not retain work records for longer than two years prior to the date of the incident. For the reasons previously discussed, this argument is not persuasive. Plaintiff does not raise a triable factual issue to challenge ECS and Nico Asphalt's showing and, consequently, they are entitled to summary judgment dismissing the complaint against ECS.

4. Time Warner Cables's Motion for Summary Judgment (Motion Sequence Number 007) and Hylan's Cross Motion for Summary Judgment.

A. Time Warner Cable moves for summary judgment dismissing the complaint and all cross claims against it.

Time Warner Cable argues that it is entitled to summary judgment because:

(1) third-party defendant Hylan's work in installing a vault was not performed in the area where plaintiff fell; (2) Hylan was an independent contractor and Time Warner Cable is not liable for its work; (3) Time Warner did not have actual or constructive notice of a defect; and (4) pursuant to 34 RCNY § 2-11 (e) (16) (ii), Time Warner cannot be liable for plaintiff's injuries.

In support of Time Warner Cable's contention that its work was not performed in the area where plaintiff fell, Time Warner provides the testimony of

its employee, Mr. Luis Lorenzi, a technician in Time Warner Cable's survey and design department, that he searched Time Warner Cable's files for the accident site and only located documents relating to original installation of a vault, on the sidewalk, on the northeast side of East 78th street in August 1998 (Winter affirmation, exhibit E at 15). Lorenzi testified that Hylan was the subcontractor that performed this work for Time Warner Cable (*id.*).¹ Mr. Lorenzi also testified that a photograph of the crosswalk did not depict any condition indicating work done by Hylan (*id.* at 16), and that, after the 1998 work, there was no other work performed by or on behalf of Hylan or Time Warner at the crosswalk. Time Warner Cable also submits an "as-built" drawing, prepared upon completion of the 1998 work, which formed the basis for Lorenzi's testimony about that work (*id.* at 14-16). The as-built drawing shows that work was begun on the east side of the crosswalk going toward a manhole cover that was below the area where plaintiff fell, and then veered north and east, away from the western portion of the crosswalk (Gimeno affirmation, exhibit B). Plaintiff indicated, on a picture of the accident site, that she fell north of the manhole cover, on the western side of the crosswalk, and immediately adjacent to, but within, the western white crosswalk

¹ For convenience, "Hylan" generally will be used to refer to Trinity Communications Corporation (Trinity), Hylan's predecessor in interest for the contract with Time Warner that is denominated below, with a 2003 assignment agreement, as "the Agreement."

[* 12]

boundary line, above the point at which the as-built drawing indicates that Hylan's work had already veered northeast (*id.* at exhibit C; Shahabian affirmation, exhibit C). This supports Hylan and Time Warner Cable's contention that 1998 work was not performed in the same area of the crosswalk where plaintiff fell. Plaintiff does not contend otherwise.

To support its argument that it cannot be held liable for the negligence of its subcontractor, Hylan, Time Warner Cable submits a copy of its December 18, 1996 Cable Television System Construction Agreement, and a February 4, 2003 Assignment Agreement between Time Warner Cable and Hylan (together, the Agreement). The Agreement demonstrates that Time Warner Cable retained Hylan's predecessor, Trinity, on an "as required" basis to perform work in connection with Time Warner Cable's business of providing cable and fiber optic services (Winter affirmation, exhibit H at 1). The Agreement, assigned to Hylan in 2003, states: (1) that Hylan "is an independent contractor, solely responsible for the performance of the Work in an effective, safe, and lawful manner"; (2) that there is no agency, partnership or employer-employee, principal-agent or joint venture relationship between the contracting parties; and (3) that Time Warner Cable "shall have no liability whatsoever for either the obligations of [Hylan] or the actions of the Contractor's agents, representatives or employees" thereunder

[*13]

(*id.*). Time Warner Cable also provides the testimony of Nadine Loggia, an expediter, who has been with Hylan (and before that Trinity) since 1998. Loggia testified that the Agreement was effective in May 2010, when plaintiff fell, and that Hylan performed the 1998 work.

In opposition, plaintiff argues that despite Time Warner Cable's assertion that its search did not reveal any complaints, Lorenzi's testimony indicates that he did not perform a search for records regarding complaints made to Time Warner. In reply, Time Warner notes this argument ignores its discovery responses that establish that Time Warner was not in possession of complaints and performed no work relatable to the subject condition, and that Lorenzi searched back to 1998. Lorenzi also submits an affidavit in which he avers that if a complaint about Time Warner Cable's underground facilities, or the area which surrounds them in Manhattan, had been forwarded to Time Warner Cable, it would be forwarded to his department and included in the files he searched prior to being deposed, but was not therein. Lorenzi states that he understood the deposition question posed to him as asking whether he made inquiries outside of his department, and that his response was not intended to imply that a complaint about the roadway condition in the area where plaintiff fell would not have been placed in the file that he searched, if such a complaint had been received at Time Warner.

The general rule is that one who hires an independent contractor is not liable for that contractor's negligent acts (*see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]). An exception to this general rule may apply where the hiring party:

“(1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer” (*id.*).

“[S]ummary judgment is appropriate where the evidence on the issue of control of the method and means of the work presents no conflict” (*Concord Vil. Owners, Inc. v Trinity Communications Corp.*, 61 AD3d 410, 411 [1st Dept 2009]).

The Agreement establishes that Hylan was an independent contractor during the performance of its work for Time Warner. Plaintiff has not raised a triable factual issue to demonstrate otherwise, or demonstrated, or even asserted,² that any of the exceptions to the general rule concerning liability for an independent contractor applies here. In addition, plaintiff provides no evidence to demonstrate and does not assert that the work performed in 1998 was performed where plaintiff fell, or affected that area. Consequently, plaintiff's claim and all cross claims against Time Warner Cable are dismissed.

² Plaintiff did not assert a claim against Hylan.

- B. Time Warner Cable moves for summary judgment on its third-party claims against Hylan for contractual and common-law indemnification.

The Agreement provides that:

“[c]ontractor shall indemnify, defend and hold harmless [Time Warner Cable] . . . from: claims, demands, damages, costs and expenses (including, without limitation, reasonable attorneys' fees, court and other proceeding costs and all other costs incurred to enforce the indemnity granted in this Section), losses, liabilities, causes of action at law or in equity (including, without limitation, injury to or death of any person(s) and damage to or destruction of any property) threatened, brought or instituted, arising out of or in any way connected with the acts or omissions of [Hylan] or its employees . . . in the performance of the work or rising out of or in any way connected with a breach by [Hylan] of any covenant contained in this agreement, except to the extent attributable to the negligence of [Time Warner Cable] or [Time Warner Cable's] agents, representatives or employees”

(Winter affirmation, exhibit H at 6).

It is well established that “[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). “A non-insurer’s “duty to defend is not broader than its duty to indemnify” (*Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept 2013]; see *Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613, 613 [1st Dept 2010]).

While Time Warner Cable's position is that Hylan's 1998 work was not implicated in plaintiff's accident, Time Warner argues that the indemnification provision is broad and applies because it is the fact that a claim was made, and not Hylan's negligence, that triggers Hylan's duty to defend, with no showing as to Hylan's negligence required. Time Warner contends that the provision is triggered because plaintiff's cause of action for personal injury arose out of and is connected to Hylan's work. In support, Time Warner relies on Loggia's testimony that the previously discussed as-built drawing, depicting the 1998 work by Hylan, confirmed that Hylan completed this work for Time Warner Cable, and that the work was performed pursuant to the Agreement. Time Warner maintains that this work formed the basis for its presence in this suit, and that, under the indemnification provision, Hylan is excused from its contractual duty to defend and indemnify Time Warner Cable only to the extent that negligence is attributable to Time Warner Cable (Winter affirmation at 14). Time Warner Cable relies on the holding in *Espinal v City of New York* (107 AD3d 411, 412 [1st Dept 2013]), which concerns the same indemnification provision at issue here. *Espinal* is discussed below.

In opposition, Hylan relies on Loggia and Lorenzi's testimony and the as-built drawing, as evidence that Hylan's work was performed in a different area of

the crosswalk. Hylan states that plaintiff testified that she fell in a hole, which is not of the nature of a street cut that would have been made by Hylan, and that the work was completed almost twelve years before her accident, with no evidence that other work was performed by or on behalf of Hylan or Time Warner Cable at the crosswalk. Hylan argues that it had no duty to maintain the street openings beyond the three or five-year period set forth in 34 RCNY § 2-11 (e) (16) (ii).³ Hylan also maintains that it appears that there was more recent work done, offering, in support, the testimony of Nico Asphalt's employee, Denegall,⁴ who, after reviewing photographs of the area, testified that it was his impression was that there was road work done in the area that would have been performed by or on behalf of the City. Hylan maintains that it has demonstrated that it did not create the condition that allegedly caused plaintiff's accident, which did not arise out of, and was not connected to, Hylan's work, and that Time Warner Cable's takes this same position.

Hylan argues that the plain language of the indemnification provision indicates that it has a narrow application, and that if the provision had been

³ 34 RCNY § 2-11 (e) (16) (ii) provides that "[p]ermittees shall be responsible for permanent restoration and maintenance of street openings and excavations for a period of three years on unprotected streets, and up to five years on protected streets commencing on the restoration completion date. This period shall be the guarantee period."

⁴ Denegall stated that his opinion was based on his knowledge of how the City performs road work and that the roadway belongs to the City.

intended to provide indemnity for claims made based on the alleged work of Trinity, regardless of actual factual basis, then Time Warner Cable could have left out that part of the provision that states, “arising out of or in any way connected with the acts or omission of the contractor in the performance of its work,” or could have added language that specifically indicated that indemnity was intended irrespective of the merit of a claim.

In reply, Time Warner Cable maintains that, as in *Espinal* (107 AD3d 411), the indemnification provision is triggered if Hylan’s work forms the basis for Time Warner Cable’s presence in this action. Time Warner notes that Hylan does not dispute that plaintiff’s claim arises out of Hylan’s work, but merely disagrees with the First Department’s determination.

In *Espinal*, the Appellate Division determined that it was the fact that the plaintiff’s claim implicated work performed by Hylan that triggered the application of the indemnification clause, even though the plaintiff’s injury was not caused, or contributed to, by Hylan’s work. Specifically, the First Department stated that the “[p]laintiff’s basis for naming Time Warner as a defendant was the permit that the Department of Transportation issued to Time Warner to perform work at the subject intersection, and it is undisputed that Hylan performed that work” (*id.* at 412). In other words, the First Department determined that the

indemnification provision was triggered because plaintiff's claim or allegations against Time Warner were based on the work that Hylan had performed, even though Hylan's work was not actually involved in the plaintiff's injury or accident.

Here, it is also undisputed that Hylan performed work in the same intersection where plaintiff's accident occurred, and Hylan does not dispute that it was this work that formed the basis of plaintiff's claim against Time Warner Cable.⁵ Instead, Hylan disagrees with the Appellate Division's determination and reasoning in *Espinal*, and states that this case is factually dissimilar. Without a doubt, there is a greater span of time between when the work was done in this case, 1998, and the plaintiff's fall in 2010. However, there was also a lapse of time in *Espinal* of over three years (record on appeal in *Espinal* [107 AD3d 411] at 36, 400-401), and the language of the indemnification provision does not contain a temporal limitation. Hylan does not otherwise distinguish this case from *Espinal*, and this court is bound by this direct precedent from the First Department

⁵ While in *Espinal*, the Appellate Division determined that there was a nexus between the plaintiff's claim and the work performed, in that the plaintiff's allegations were based on permits issued for work, here, Hylan does not dispute that the plaintiff sued Time Warner because of Hylan's work. The *Espinal* court's broad interpretation of the indemnification provision, as triggered based on a plaintiff's allegations, may have significant, and perhaps unanticipated, economic ramifications for Hylan, as well as for others that are bound by similar indemnification clauses, in instances where a subcontractor has performed work for a contractor, and a plaintiff brings a suit against the contractor, despite the subcontractor's work having no significant nexus to the plaintiff's accident or injury.

concerning the same contractual provision, and is not free to ignore or disregard the determination. Consequently, Time Warner is entitled to contractual indemnification.

Time Warner Cable argues it is also entitled to common-law indemnification from Hylan, because the Agreement demonstrates that Hylan had control of the work of its own employees and because Hylan supervised the work. Hylan opposes, arguing that if Time Warner Cable is found negligent here, it is not entitled to common-law indemnification, and that if it is not found liable, then there is nothing for which to indemnify.

“Common-law indemnification is predicated on vicarious liability without actual fault” on the part of the indemnitee (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotation marks and citation omitted]). “To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work” (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]). Time Warner Cable has not been held liable to the injured party by virtue of an obligation imposed by law upon it, as it has not been held liable. “Absent liability, vicarious or otherwise, there is no basis

for indemnification” (*Nieves-Hoque v 680 Broadway, LLC*, 99 AD3d 536, 537 [1st Dept 2012] [court erred in granting owner common-law indemnification against decedent's employer as, prior to the grant of indemnification, owner's motion for summary judgment dismissing plaintiff's complaint on the ground that there was no non-speculative basis for liability had been granted]). Accordingly, Time Warner Cable's motion for common-law indemnification is denied.

- C. Hylan moves for summary judgment dismissing Time Warner's third-party complaint and all cross claims against it.

Hylan's motion to dismiss Time Warner Cable's claim for contractual indemnification is denied as Time Warner has prevailed on this claim. However, in accordance with the determination above concerning Time Warner Cable's claim for common-law indemnification, this claim must against Hylan is dismissed.

Hylan moves to dismiss Time Warner Cable's contribution claim. The right to 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” (*Garrett v Holiday Inns*, 58 NY2d 253, 258 [1983] [internal quotation marks and citation omitted]). “The critical requirement for apportionment by contribution under CPLR article 14 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”

(*Charles v William Hird & Co., Inc.*, 102 AD3d 907, 908 [2d Dept 2013], quoting *Raquet v Braun*, 90 NY2d 177, 183 [1997]). As plaintiff's complaint has been dismissed against Time Warner Cable, there is no basis for contribution from Hylan. Time Warner Cable does not oppose the motion, and this claim is dismissed.

Hylan's motion for summary judgment dismissing Time Warner Cable's claim for failure to procure insurance is also unopposed and granted. The Agreement required Hylan to procure a comprehensive general liability insurance policy for Time Warner Cable from a company acceptable to Time Warner. Hylan provides copies of the pages of a general liability insurance policy, which was in effect on the date of plaintiff's accident. This policy contains an additional insured endorsement in which the term "insured" is amended in the policy to include any organization which Hylan became obligated to include as an additional insured by a contract requiring Hylan to furnish the type of insurance provided for by the policy, for liability arising out of Hylan's operations or premises (Gimeno affirmation, exhibit E [last page]). Time Warner Cable does not assert that the involved insurance company was not acceptable to it and Hylan's submissions reveal that Time Warner Cable instituted a declaratory judgment action in this court in which its position is that the policy provides

coverage. Consequently, this claim is dismissed.⁶

5. The City's Motion for Summary Judgment (Motion Sequence Number 008).

The City maintains that the complaint and all cross claims against the City should be dismissed because plaintiff has failed to demonstrate that the City had prior written notice of the defect as is required under Section 2-201 (c) (2) of the Administrative Code of the City of New York (Section 2-201 (c) (2)). Section 2-201 (c) (2) provides that, to maintain an action against the City for personal injury arising out of a street condition, the claimant must demonstrate prior written notice of the alleged defect (*Schleif v City of New York*, 60 AD3d 926, 927-928 [2d Dept 2009]). There are exceptions to the this rule, as “[t]he prior written notice requirement will be obviated . . . if the plaintiff establishes that a special use resulted in a special benefit to the locality or that the municipality affirmatively created the defect by performing work that *immediately* resulted in the existence of a dangerous condition” (*id.* [“Even if a municipality performs negligent pothole repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable”]; *Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Torres v City of New York*, 39 AD3d 438, 438 [1st Dept

⁶ This is not a determination that the policy provides coverage, which is the subject of the declaratory judgment action.

2007]).

In support of its motion, the City provides the affidavit of Mr. Sean Williams of the City's Department of Transportation, who avers that he performed a record search for the day of, and two years prior to, the incident, relating to the area where plaintiff fell, which revealed no records demonstrating that the City or its contractors performed work where plaintiff fell. The City also provides the affidavit of Ms. Margaret Pendarvis who states that various records, including hard copy permits and permit applications and Gang Sheets, night-time crews, sidewalk correspondence and Office of Construction, Mitigation and Coordination records were destroyed by Hurricane Sandy.

The City also points to a copy of the Big Apple Map and a legend or key for the map, exchanged by the City during discovery, for the incident location.

“Big Apple is a corporation established by the New York State Trial Lawyers Association for the purpose of giving notices in compliance with the Pothole Law. It does so through maps on which coded symbols are entered to represent defects. For example, a straight line is used for a raised or uneven portion of a sidewalk, a circle for a hole or hazardous depression, a line with a triangle at each end for an extended section of cracks and holes in a sidewalk, and so forth”

(D'Onofrio v City of New York, 11 NY3d 581, 584 [2008] [determining that map was not sufficient notice to City where it did not indicate same defect or location

of defect]).⁷ The City argues that the map does not show a defect in the crosswalk where plaintiff fell, and, therefore, is not notice of a depression in the crosswalk, as the presence of marks in other areas of the map, or marks indicating different types of conditions, are not sufficient to demonstrate notice.

Plaintiff opposes the motion, asserting that the City has failed to meet its summary judgment burden to demonstrate that it lacked prior written notice of, or created, the defect. Plaintiff contends that the Big Apple Map and its key serve as prior written notice to the City of defective conditions, and that Section 7-201 (c) (2) does not set forth requirements for specificity of the notice. Plaintiff further contends that disputes regarding the precise location of the alleged defect, and whether it is designated on the map, constitute triable factual issues, and that there is a triable factual issue as to whether several defective conditions are noted at the location where plaintiff tripped. Particularly, plaintiff states that map symbols indicate defects, including a hole or hazardous depression, or pothole or other hazard, or broken misaligned, uneven curb and extended sections of the same, at the location where plaintiff fell.

The City provides a newspaper article which indicates that the Big Apple

⁷ Production of the map ceased after 2003, when section 7-210 of the Administrative Code of the City of New York City “shifted responsibility for sidewalk defects generally to the owners of abutting property” (*Gardner v City of New York*, 2013 NY Slip Op 32438[U], *3 n 2 [Sup Ct, NY County 2013]).

Map was no longer published since 2003; yet, it was held as recently as 2013, that “[a] Big Apple map submitted to the Department of Transportation may serve as prior written notice of a defective condition” (*Chia v City of New York*, 109 AD3d 865, 866 [2d Dept 2013]; *Vega v 103 Thayer St., LLC*, 105 AD3d 405, 405 [1st Dept 2013] [“City failed to make a prima facie showing of entitlement to judgment as a matter of law, because the markings on the Big Apple map it submitted in support of its cross motion raise an issue of fact as to whether it had prior written notice of the alleged defect”]). Moreover, factual disputes regarding the precise location of the alleged defect and whether it is designated on the map, generally should be resolved by the trier of fact (*see Perez v City of New York*, 110 AD3d 777, 778-779 [2d Dept 2013]), unless the defect shown is clearly different from that claimed (*D’Onofrio*, 11 NY3d at 585).

The City has not definitively demonstrated that the markings in the map, more clearly shown on the enlarged copy submitted by plaintiff (Shahabian affirmation, exhibit E), which includes a square symbol for a pothole, did not provide the required notice of the defect of which plaintiff complains, and a triable factual issue remains as to whether or not the City had prior written notice of the specific alleged defect. In light of this triable factual issue, it is unnecessary to reach plaintiff’s arguments that the City’s two-year search is inadequate in light of

the fact that it has ten years of records, or that the City has not met its burden where it submits an affidavit stating that certain records were destroyed as a result of Hurricane Sandy.

The City argues that plaintiff has not established an exception to the prior written notice requirement of Section 7-201 (c) (2), because there is no evidence that the City performed repairs where plaintiff fell. Even if this is so, plaintiff has still raised a triable factual issue as to whether or not the City had notice of the specific dangerous condition alleged by the plaintiff that the City allegedly failed to remedy. Regarding the City's argument about an exception, however, plaintiff does not allege a special use exception and the City points to the undisputed fact that it had not been issued work permits during the two-year period prior to the accident. Though, as plaintiff points out, Nico Asphalt's witness, Denegall, testified that it was his impression, after review of a photograph of the intersection, that the road had been milled and paved by the City, the record is devoid of evidence that raises a triable factual issue as to whether the alleged defect was the product of work done by the City that immediately resulted in a dangerous condition, as would be required to demonstrate an issue as to the exception to the prior written notice requirement (*see Oboler*, 8 NY3d at 890 [exception to the written notice requirement did not apply where "plaintiff

presented no evidence of who last repaved this section of the roadway before the accident, when any such work may have been carried out, or the condition of the asphalt abutting the manhole cover immediately after any such resurfacing”]).

The Court notes that an alleged correlation of a symbol on the most recent Big Apple map with the approximate location and description of the instant alleged street defect might not alone conclusively demonstrate that the City had prior written notice. NYC Administrative Code Section 7-201 requires that the City have prior written notice of the exact defective condition that plaintiff alleges existed on the accident date. Thus, the specific defect alleged to have caused the accident must be shown to be depicted on the Big Apple map. Evidence of intervening repair or resurfacing would be relevant to argue the contrary proposition, i.e., that the accident-related defect was a different, newer defect, albeit a similar type in an equivalent place, but one that occurred after the filing of the map. Given the age of the Big Apple map, and the years that elapsed between its filing and the instant occurrence, the map raises more questions than it answers. However, these are questions for trial. It is for the trial court, not the motion court, to determine whether the trial evidence is sufficient to present a jury issue.

Conclusion

Accordingly, it is hereby

ORDERED that defendant the New York City Transit Authority's motion for summary judgment dismissing the amended verified complaint and cross claims (motion sequence number 004) is granted and the complaint and cross claims are severed and dismissed as against said defendant with costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgement accordingly; and it is further

ORDERED that defendant Verizon New York Inc.'s motion for summary judgment dismissing the amended verified complaint and cross-claims (motion sequence number 005) is granted and the complaint and cross claims are severed and dismissed as against said defendant with costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgement accordingly; and it is further

ORDERED that defendants Nico Asphalt Paving, Inc. and Empire City Subway Company (Limited)'s motion for summary judgment dismissing the amended verified complaint and cross claims against defendant Empire City Subway Company (Limited) (motion sequence number 006) is granted and the complaint and cross claims are severed and dismissed as against said defendant

with costs and disbursements as taxed by the Clerk, and the Clerk is directed to enter judgement accordingly; and it is further.

ORDERED that defendant Time Warner Cable, Inc.'s motion for summary judgment dismissing plaintiff's amended verified complaint and all cross claims and counter claims and for summary judgment on Time Warner Cable Inc.'s claims for common-law and contractual indemnification against Hylan Datacom & Electrical Inc. (motion sequence number 007) is granted to the extent that the complaint and all cross claims against Time Warner Cable, Inc. are dismissed and Time Warner Cable, Inc. is granted partial summary judgment as to liability in its favor on that portion of the first cause of action of its third-party complaint against Hylan Datacom & Electrical Inc. for contractual indemnification and is otherwise denied; and it is further


ORDERED that third-party defendant Hylan Datacom & Electrical Inc.'s cross motion for summary judgment dismissing Time Warner Cable, Inc.'s third-party complaint and all cross claims against (motion sequence number 007) it is granted to the extent that Time Warner Cable, Inc.'s claims for common-law indemnification, contribution and failure to procure insurance are dismissed and is otherwise denied; and it is further

ORDERED that defendant The City of New York's motion for summary

dismissing the complaint and cross claims (motion sequence number 008) is denied.

Dated: April 3, 2014
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED

APR 07 2014

COUNTY CLERK'S OFFICE
NEW YORK