

Pepitone v Consolidated Edison Co. of N.Y.
2014 NY Slip Op 31751(U)
July 2, 2014
Sup Ct, New York County
Docket Number: 109977
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: _____
Justice _____

PART 47

Index Number : 109977/2010
PEPIPTONE, EDWARD

INDEX NO. _____

vs
CONSOLIDATED EDISON

MOTION DATE _____

Sequence Number : 008

MOTION SEQ. NO. 008

SUMMARY JUDGMENT

The following papers, numbered 1 to 2, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed hereto decision

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

FILED

JUL 08 2014

NEW YORK
COUNTY CLERK'S OFFICE

G
GEOFFREY D. WRIGHT
AJSC

Dated: 7/2/14

_____, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

-----X
EDWARD PEPITONE,

Plaintiff-Petitioner(s),

-against-

CONSOLIDATED EDISON COMPANY OF
NEW YORK, VERIZON NEW YORK, INC., and
TIME WARNER ENTERTAINMENT,

Defendant-Respondent(s),
-----X

Index #10997710

Motion Cal. #

Motion Seq. #

DECISION/ORDER

Pursuant To Present:

Hon. Geoffrey Wright

Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion for Summary Judgment.

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	3
Other (Cross-motion) & Exhibits Annexed	
Supporting Affirmation	

FILED

JUL 08 2014

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: Defendant Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable s/h/a Time Warner Entertainment ("Time Warner") moves for an Order for summary judgment pursuant to CPLR 3212 dismissing Plaintiff, Edward Pepitone ("Plaintiff") claims and all cross claims with prejudice. For the reasons discussed below, the motion is granted..

On March 18, 2010, Plaintiff was driving his 1995 Ford Escort approximately 30 miles per hour on Narrows Road South between Oder Avenue and Targee Street. Just as he passed Targee Street, he claims he felt a "really hard Jerk," at which point his car became airborne for a bit, veered right and landed on the front driver's side coming to a skid on all four wheels. He claims that a cable or wire caused the accident which resulted in serious personal injuries to the

[* 3]
Plaintiff.

In their motion, Time Warner argues; (1) that there is no evidence Time Warner owed a duty of care to Plaintiff because there is no evidence the wire belonged to Time Warner Cable (2) Time Warner cannot be held liable for Plaintiff's accident because it did not cause or create the alleged condition and had no notice the alleged condition existed, (3) where there are several possible causes of Plaintiff's injuries, one of more which is not the responsibility of defendants, the Plaintiff cannot recover from the defendants and Plaintiff's action must be dismissed.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law demonstrating the absence of material issues of fact. (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 501 N.E.2d 572(1986). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (Zuckerman v City of New York, 49 NY2d 557 (1980).

During Plaintiff's deposition he testified that after the accident he walked to the back of his car where he saw a steel braided cable coming through his bumper which he describes as silver gray approximately forty feet of cable in a coil beyond his car. The cable was wrapped around the passenger rear wheel of his car, with some of it on the ground and part of it wrapped around a nearby guard rail.

On January 25, 2011, Vito Aglio, an employee of con Ed, was produced for a deposition. He was called to the location after his supervisor received a call of a wire in the road. When he went to the location he observed a 20-30 foot unattached steel cable with frayed ends laying between the guardrail and a piece of strand wire hanging off a utility pole at Narrows Road South and Targee Street. He testified that the cable was actually a messenger cable, which are used to support utility wires. The utility pole at the corner of Narrows and Targee had various attachments and cable to it. He described them as "Con Edison cables and phone cables. I'm not sure. I think it had Fire Department also. Possibly cable T.V." After spending approximately 20 minutes at the location he came to an assumption that it looked like it was a Verizon messenger cable that was hanging since Verizon cables were supported off the messenger.

James McCue was produced for a deposition on behalf of Verizon on January 17, 2012. He was a lineman and supervisor lineman who was very familiar with the types of wires on utility poles. He inspected the area where the accident occurred on Narrows Road South between Targee and Oder Avenue on August 15, 2011 and like Aglio found a piece of strand wire hanging off a utility pole at Narrows Road South and Targee Street. Based on his inspection he determined it was a Time Warner messenger strand hanging off the pole at Targee and Narrows Road South and that that particular messenger strand was used to support Time Warner cable on the utility pole corner of Narrows Road South and Oder.

Michael Schwab, a Construction Supervisor was produced as a witness for a deposition on behalf of Time Warner. In preparation for his deposition, he visited the accident location. He looked at three utility poles in the vicinity of Targee and Narrows Road South. The poles he saw in the area were Con Ed poles with con Ed electric wires and also Time Warner strand wires. He inspected the location of the accident and looked at three utility poles in the vicinity of Targee and Narrows Road South. He confirmed Time Warner had no notice of a piece of wire at the location or of any risk posed by the loose cable line. In addition, he stated in a sworn affidavit that he conducted a search of Time Warner's records for any construction work orders, all call-ins and complaints relative to loose or downed cable wires in the area of Plaintiff's accident and found no such records.

Lastly, Erfren Aldover was produced as a witness on behalf of Verizon pursuant to a Court order and Time Warner's request. He testified he was familiar with the area and confirmed that his Verizon Department would be responsible for maintaining Verizon equipment in the general area. In addition, he reviewed relevant Verizon business records and surveys and conducted a site visit to the location. He confirmed that Verizon maintained no facilities or equipment in the area including no Verizon-owned utility poles, wires or cables on Narrows Road South between Targee Street and Oder Avenue. He provided an affidavit in which he concluded that the wires Plaintiff claims stuck his car were not owned, controlled or maintained by Verizon. In addition, he confirmed that Verizon maintained no facilities on narrows road South running from Targee to Oder.

In their opposition Plaintiff argues that based on the deposition testimony, the lowest wire on the subject pole is a Time Warner cable distribution wire and that Time Warner concedes that they owned the guy/strand wires located on the utility poles at the subject location. Contrary to Plaintiff's claims, this Court sees no such evidence in the record that Time Warner is conceding ownership of the detached wire. Plaintiff argues that on December 18 through December 20, 2009 a category two snowstorm took place in the northeast. They allege that the wire was downed at some point during this storm and that Time Warner had no protocol or policy in place in which, in the event of a storm, Time Warner would go to a location where it has wires to determine if its wires were down. Plaintiff argues that the only way Time Warner would know is if customers experienced service or cable outages. Additionally, they argue it was foreseeable that a snowstorm could cause a downed wire. Plaintiff argues there was no system in place to inspect the strand wires on the poles. Robert Ulsen, a non-party witness and a co-worker of the Plaintiff, testified during an EBT that he saw a loose cable on Narrows Road South on a couple of occasions claiming after the December 2009 snowstorm. He stated that sometimes it was on the side of the road and other times in the roadway. He testified he never told anyone or complained about the wire.

While there are questions as to whether Time Warner owned the wire which caused the incident, there is nothing in the records that proves Time Warner caused, created or had notice of the condition. The owner of a premises may be held liable for an accident caused by a dangerous condition on the property if the plaintiff can demonstrate that the owner created the

condition or had actual or constructive notice of it (Hauptner v Laurel Dev., LLC, 65 AD3d 900, 902, 885 NYS2d 68 [2009]). An owner can be deemed to have constructive notice of a dangerous condition if it is visible and apparent, and if the condition existed for enough time before the accident to permit the owner's employees to discover and remedy the problem (Gordon v American Museum of Natural History, 67 NY2d 836, 837, 492 NE2d 774, 501 NYS2d 646 [1986]).

The deposition testimony in the record only serves to bolster Time Warner's claims that they had neither actual or constructive notice. Indeed, during the the EBT of non-party witness Robert Ulsen, he testified he saw the wire but never complained to anyone. There is nothing in the record that shows how long the wire was detached or that Time Warner had notice. Time Warner has attested it has no record of receipt of any notice or complaint and Plaintiff has offered nothing to the contrary. Moreover, it appears the downed wire did not cause a cable or service outage.

Accordingly, the motion for summary judgment pursuant to CPLR 3212 by co-defendant Time Warner is granted. This constitutes the Decision and Order of the Court.

FILED
JUL 08 2014
NEW YORK
COUNTY CLERK'S OFFICE


GEOFFREY D. WRIGHT
A.J.S.C.

Dated: July 2, 2014

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court