Vallejo-Bayas v Time Warner Cable, Inc.
2015 NY Slip Op 30751(U)
April 13, 2015
Sup Ct, Queens County
Docket Number: 16871/12
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

MAURICIO J. VALLEJO-BAYAS,	Index No. 16871/12
Plaintiff,	Motion Date November 19, 2014
- against-	
TIME WARNER CABLE, INC., NEW YORK CITY TRANSIT AUTHORITY, and VERIZON NEW YORK INC.,	Motion Cal. No. 188, 189, 190
Defendants.	Motion Seq. No. 3, 4, 5

The following papers numbered 1 to 39 read on this motion by defendant, New York City Transit Authority (NYCTA), for an order pursuant to CPLR 3212, granting summary judgment on the ground that plaintiff did not sustain "serious injury" pursuant to Insurance Law § 5102 [d], motion by defendant, Verizon New York, Inc. (Verizon), to dismiss all claims and cross claims against it and motion by defendant, Time Warner Cable, Inc. (Time Warner), for summary judgment in its favor pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits............................	1-12
Affirmation in Opposition - Exhibits....................................	13-31
Reply Affirmation..	32-39

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff seeks to recover for personal injuries sustained on December 8, 2009, when a NYCTA bus traveling on a roadway caught a low hanging telecommunications cable wire and caused it to strike plaintiff, a pedestrian, in the back of the head, while he was standing in front of premises located at 95-11 222nd Street, Queens, New York. Plaintiff alleges that the cable wire was owned and/or maintained by Time Warner and/or Verizon. NYCTA moves to dismiss the complaint, alleging that plaintiff's injuries do not satisfy the threshold requirement of Insurance Law 5102(d), for "serious injury." Time Warner and Verizon each separately move for summary judgment in their respective favor on the ground that they did not create the condition at issue nor did they have actual or constructive notice of the same. Plaintiff opposes all motions.

Facts

Plaintiff testified at his examination before trial, that shortly before the accident occurred on December 8, 2009, he observed a bundle of cable wires knocked down on his property. As he attempted to call 911 to report the downed cable, a transit bus drove past, coming into contact with the cable wire, causing it to spring up and hit plaintiff in the back of the head. Plaintiff did not know how long the cable was on the ground before the accident, nor did he know whether the cable belonged to Time Warner or Verizon.

Mark Rowley testified on behalf of Verizon. At the time of the accident, his duties included reviewing records. A search of records performed by Rowley revealed that Verizon was not in the area on the date of the accident or at any time just before the accident. According to Verizon, if it had performed work in the area, a document to reflect that work was done would have been prepared. Rowley testified that after a complaint is called in, a technician would be dispatched. After the technician performs his work, he or she calls the dispatch center and they prepare a report which is then entered into the system detailing the work performed and that would close the complaint.

A photograph was introduced to Rowley during his deposition. He identified the object in the photograph as cable wire with a clamp. Based on Rowley's experience, he concluded that the clamp attached to the subject wire was not a Verizon clamp. There were records indicating that Verizon was called to the scene a few weeks after the subject accident. However, Rowley testified that the work performed by the technician revealed that the downed cable wire was not a Verizon item. A records search conducted by Verizon further revealed that Verizon was not in the area on the date of the accident or just prior to that date.

Nigel Wilkie, operations manager for Time Warner, was also shown the photograph of the cable wire during his examination before trial and he confirmed that the clamp was part of the Time Warner wires and that the clamp was of the type used by Time Warner to secure drop wire/facilities shown in another photograph taken of the accident scene. Wilkie conceded that both clamps depicted in the photographs were used to secure Time Warner equipment.

Time Warner further conducted a five-year search for plaintiff's premises at 95-11 222nd Street. The records indicate that seven days after plaintiff's accident, Time Warner visited the site and noted that the wires that were knocked from across the street and lying on the ground at the accident site applied exclusively to its' wires. Wilkie testified that the entry indicating that the wires were "knocked up" indicated that something had struck the wires; and the other entry in the records indicated that Time Warner repaired the wires knocked to the ground. Time Warner had no knowledge as to whether Verizon's wires were going across 222nd Street at a proper height on or before the date of the subject accident.

Motion by NYCTA

The motion by NYCTA to dismiss the complaint on the ground that plaintiff did not sustain a "serious injury" is denied. The Comprehensive Motor Vehicle Insurance Reparations Act, commonly referred to as the No–Fault Law, as codified in Article 51 of the Insurance Law, was enacted in 1973 primarily to ensure prompt compensation to auto accident victims without regard to fault, to reduce the burden on the courts, and to provide premium savings to New York motorists (*see Matter of Medical Socy. of State of N.Y. v Serio,* 100 NY2d 854, 860 [2003]). Insurance Law § 5104 provides that there shall be no right of recovery for personal injuries arising out of negligence in the use or operation of a motor vehicle within the state, except in the case of "serious injury" or for basic economic loss. The purposes of the "No–Fault" Law are "to remove the vast majority of claims arising from vehicular accidents from the sphere of common-law tort litigation, and to establish a quick, sure and efficient system for obtaining compensation for economic loss suffered as a result of such accidents ... They reflect the Legislature's intent to draw a line between motor vehicle accidents and all other types of torts and to remove only the former from the domain of common-law tort litigation" (*Walton v Lumbermens Mut. Cas. Co.,* 88 NY2d 211, 214 [1996] [citations omitted]). "The vehicle must be a proximate cause of the injury before the absolute liability imposed by the statute arises. Any other rule would permit recovery for claims based on back strains, slip-and-fall injuries, and other similar injuries occurring while the vehicle is being used but which are wholly unrelated to its use" (*id.* at 215). To be a proximate cause of the injury, the use of the motor vehicle must be closely related to the injury (*see Zaccari v Progressive Northwestern Ins. Co.,* 35 AD3d 597, 599 [2d Dept 2006]; *Elite Ambulette Corp. v All City Ins. Co.,* 293 AD2d 643 [2002]). Also, the injury must result from the intrinsic nature of the motor vehicle as such, and the use of the vehicle must do more than merely contribute to the condition which produced it (*see Zaccari,* 35 AD3d at 600 [2d Dept 2006]; *Republic Long Is., Inc. v Andrew J. Vanacore, Inc.,* 29 AD3d 665 [2d Dept 2006]; *Duroseau v Town of Hempstead,* 117 AD2d 579 [2d Dept 1986]). "As *Walton* and its progeny make abundantly clear is that the motor vehicle itself be the instrumentality which produces the injuries" (*Cividanes v City of New York,* 95 AD3d 1, 7 [1st Dept 2012]). The injuries must result from the intrinsic nature of the motor vehicle as such and the use of the automobile must do more than merely contribute to the condition which produced it (*see Republic Long Is., Inc. v Andrew J. Vanacore, Inc.,* 29 AD3d 665, 666 [2d Dept 2006]; *see also Ely v Pierce,* 302 AD2d 489 [2d Dept 2003]). The court thus holds that liability for the injuries sustained from a cord being struck by a bus and thereupon striking the plaintiff is more properly addressed outside the area of the No–Fault Law (*see Toolsie v New York City Transit Authority,* 55 AD3d 476 [1st Dept 2008] [triable issue of fact existed regarding whether, by stopping the bus several feet from the curb, defendant breached its duty to plaintiff to stop the bus at a place from which she could safely disembark]; *see also Malawer v New York City Transit Authority,* 6 NY3d 800 [2006]). Thus, the issue of whether plaintiff sustained a "serious injury" is not pertinent to the question of liability in this case.

Accordingly, the motion by the NYCTA is denied.

Motion by Time Warner

At the outset, plaintiff is not required to establish that he sustained a "serious injury" in the subject accident as he did not allege any negligence on the part of Time Warner (or Verizon), in the use or operation of a motor vehicle, as pertaining to these defendants. Instead, the allegations against these defendants relate to premises liability. Therefore these defendants do not qualify as "covered" persons within the meaning of Insurance Law §§ 5102 (j) and 5104 (a) (*Bright v Village of Great Neck Estates,* 54 AD3d 704 [2d Dept 2008]).

In moving for dismissal, Time Warner submits that plaintiff cannot establish that it created or had notice of the alleged dangerous condition. However, while the ultimate burden of proof at trial will fall upon the plaintiff, a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form (*see Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). The ultimate burden of proof after trial plays no part in the assessment of whether there are relevant factual issues presented on a motion for summary judgment (*see generally Jacobsen v New York City Health & Hosps. Corp.,* 22 NY3d 824 [2014]). On a summary judgment motion, a moving defendant does not meet its burden of affirmatively establishing its entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its claim or defense (*Collado v Jiacono*, 2015 N.Y. Slip Op. 02443; *see Marielisa R. v Wolman Rink Operations, LLC,* 94 AD3d 963 [2d Dept 2012]; *Rubistello v Bartolini Landscaping, Inc.,* 87 AD3d 1003, 1005 [2d Dept 2011]; *Shafi v Motta,* 73 AD3d 729, 730 [2d Dept 2010]; *Pace v International Bus. Mach. Corp.,* 248 AD2d 690 [2d Dept 1998]).

Specifically, in a premises liability case, the defendant property owner who moves for summary judgment has the initial burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence (*see Quinones v Federated Dept. Stores, Inc.,* 92 AD3d 931 [2d Dept 2012]; *Sheehan v J.J. Stevens & Co., Inc.,* 39 AD3d 622 [2d Dept 2007]; *Loiacono v Stuyvesant Bagels, Inc.,* 29 AD3d 537 [2d Dept 2006]; *Austin v Lambert,* 275 AD2d 333 [2d Dept 2000]). To provide constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History,* 67 NY2d 836, 837 [1986]). Here, there is evidence in the record that Time Warner installed cable at the subject area in or around May, 2009. Time Warner failed to submit any evidence, aside from its self-serving and conclusory remarks, to demonstrate when the subject cable was last inspected prior to the accident (*see Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 599 [2d Dept 2010]). In fact, Time Warner failed to establish, *prima facie*, that it maintained its premises in a reasonably safe condition and that it did not create the alleged defective condition or have actual or constructive notice of it (*see Minor v 1265 Morrison, LLC,* 96 AD3d 1024 [2d Dept 2012]; *Alexander v. New York City Hous. Auth.,* 89 AD3d 969 [2d Dept 2011]; *Hoffman v United Methodist Church,* 76 AD3d 541 [2d Dept 2010];

cf. Sheehan v J.J. Stevens & Co., Inc., 39 AD3d 622 [2d Dept 2007]).

Accordingly, the motion by Time Warner for summary judgment dismissing the complaint is denied.

Motion by Verizon

Verizon moves for summary judgment on the ground that it did not own or control the cable wire that struck plaintiff on the date in question. In fact, the proof establishes that the subject wire belonged to co-defendant, Time Warner. In addition, Verizon argues that a record search failed to reveal any work performed by Verizon at the subject accident site.

In support, Verizon relies, *inter alia*, on the deposition testimony of Mark Rowley, establishing unequivocally that Verizon did not own, install, maintain or control the wire which struck plaintiff. Nor is there any evidence that it was contractually obligated to maintain the subject wire. Accordingly, it owed no duty of care to plaintiff with regard to the cable wire which struck him (*see Impenna v City of New York*, 256 AD2d 551 [2d Dept 1988]; *see also Smith v Guiffre Hyundai, Ltd.*, 60 AD3d 1040, 1042 [2d Dept 2009]). In addition, there is no proof that Verizon performed any work at the subject location which may have caused the dangerous condition to exist (*see Cibener v City of New York*, 268 AD2d 334 [1st Dept 2000]). Inasmuch as plaintiff's opposition papers are predicated upon speculations and/or unsubstantiated allegations regarding Verizon's involvement with the either the site or the wire which purportedly struck plaintiff (*see Zuckerman v City of New York*, 49 NY2d at 562), Verizon's motion for summary judgment dismissing the complaint and all cross claims against it is warranted in this case.

Conclusion

The motion by the NYCTA to dismiss the complaint on the ground that plaintiff did not sustain a "serious injury" in the subject accident, is denied.

The motion by Time Warner for summary judgment in its favor is denied.

The motion by Verizon for summary judgment in its favor is granted.

Dated: April 13, 2015

DARRELL L. GAVRIN, J.S.C.