

Matias v City of New York

2015 NY Slip Op 31976(U)

October 23, 2015

Supreme Court, New York County

Docket Number: 150999/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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EVELYN MATIAS,

Plaintiff,

-against-

Index No. 150999/2012

DECISION/ORDER

THE CITY OF NEW YORK, THE NEW YORK EYE
AND EAR INFIRMARY, TIME WARNER CABLE, INC.
and HYLAN DATACOM & ELECTRICAL INC.,

Defendants.

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TIME WARNER ENTERTAINMENT COMPANY, L.P.
d/b/a TIME WARNER CABLE s/h/a TIME WARNER
CABLE, INC.,

Third-Party Plaintiff,

-against-

Index No. 590320/2013

HYLAN DATACOM & ELECTRICAL INC.,

Third-Party Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2,3,4
Affidavits in Opposition.....	5,6,7
Replying Affidavits.....	8,9,10
Exhibits.....	11

Plaintiff Evelyn Matias commenced the instant action seeking to collect damages for personal injuries she allegedly sustained when she fell on a sidewalk. Defendant Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable s/h/a Time Warner Cable, Inc. ("Time

Warner”) now moves for an Order pursuant to 22 NYCRR § 202.21(e) vacating the Note of Issue filed herein. Defendant New York Eye and Ear Infirmary (“NYEEI”) cross-moves for the same relief. Additionally, defendants Time Warner, NYEEI and Hylan Datacom & Electrical, Inc. (“Hylan”) separately move for summary judgment. Further, both plaintiff and Time Warner separately move for an Order granting them leave to serve an amended complaint and third-party complaint, respectively, to clarify that they are suing defendant Hylan individually and as successor in interest to Trinity Communication Corp. (“Trinity”). For the reasons set forth below, the motion and cross-motion to vacate the NOI are denied; Time Warner and plaintiff’s motions for leave to amend are granted; Time Warner’s motion for summary judgment is granted; NYEEI’s motion for summary judgment is denied; and Hylan’s motion for summary judgment is denied.

The relevant facts and procedural history are as follows. Plaintiff Evelyn Matias alleges that she slipped and fell on January 21, 2011 while she was walking on the sidewalk in front of the Second Avenue entrance to the New York Eye and Ear Infirmary. Specifically, plaintiff testified at her deposition that she slipped on snow first, and then she tripped when her foot got caught on something. Plaintiff identified a “sidewalk box” or “sidewalk vault” located on the sidewalk as the object that she tripped on in the photographs presented to her at her deposition. It is undisputed that there was a total of 4.2 inches of snowfall on the day of the accident. Further, according to the meteorological report from that day, 4.2 inches of snow had finished falling at 7 a.m., approximately 15 hours prior to plaintiff’s accident. As a result of the fall, plaintiff sustained injuries to her right ankle.

Defendant NYEEI owns the building that abuts the sidewalk where plaintiff’s accident

occurred. Sometime in 1995, defendant Time Warner installed the sidewalk box at the subject location. Specifically, Time Warner subcontracted the installation of such sidewalk box to Hylan's predecessor in interest Trinity. Sometime prior to plaintiff's accident, Hylan assumed the subcontract. An employee appearing on behalf of Time Warner testified that should there ever be a complaint made regarding damage or a hazard associated with a sidewalk box, a "trunk crew" would be dispatched to inspect the condition, a work order would be drafted should the condition require a remedy and the work order would be sent to Hylan "to correct the problem." The employee further testified that between 1995 and January 21, 2011, the day of plaintiff's accident, there are no records indicating that Time Warner was informed of any condition or defect which needed to be addressed at the subject location.

On or about May 11, 2011, plaintiff commenced this action against the City of New York (the "City"), NYEEI and Time Warner asserting a claim for negligence. Thereafter, Time Warner commenced a third-party action against its subcontractor Hylan asserting claims for contractual and common law indemnity, contribution and breach of contract for failure to procure insurance coverage. Plaintiff then filed and served a supplemental summons and amended complaint making Hylan a direct defendant. By decision dated September 16, 2015, the Honorable Margaret A. Chan granted the City's motion for summary judgment dismissing all claims and cross-claims asserted against it in this action. The action was subsequently transferred to this part, including the pending motion sequences 006, 007, 009, 010, 011 and 012.

As an initial matter, plaintiff and Time Warner's motions for an Order granting them leave to amend the complaint and third-party complaint to re-characterize the third-party defendant to include its predecessor-in-interest Trinity is granted without opposition.

However, Time Warner's motion and NYEEI's cross-motion for an Order pursuant to 22 NYCRR § 202.21(e) vacating the note of issue is denied. 22 NYCRR § 202.21(e) provides: "[W]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

Here, Time Warner and NYEEI's motions to vacate the note of issue is denied as they have failed to make a showing that this case is not ready for trial. Time Warner and NYEEI contend that the note of issue should be vacated in light of recently discovered prior claims by the plaintiff that were not previously disclosed by the plaintiff. However, the court finds this contention to be without merit. As an initial matter, defendants' papers in support of their motions are completely devoid of an explanation as to why or how they "only recently" learned that plaintiff had allegedly commenced three prior lawsuits in which she brought claims for personal injuries. Discovery in this matter has been ongoing for approximately three years. Anytime in that three years, either defendant could have asked plaintiff about any personal injury actions she may have previously commenced. However, defendants apparently failed to do so. Thus, they cannot now seek to vacate the note of issue based on evidence that they could have easily discovered well before the filing of the note of issue. Moreover, neither Time Warner nor NYEEI have presented any evidence that plaintiff in the three cases identified by them is in fact the plaintiff in this case. Indeed, plaintiff's attorney's office called each and every one of the plaintiff's attorneys on record for each of the alleged prior actions and confirmed that the dates

of birth for each of those plaintiffs are different. Thus, on the record before it, the court finds no basis to vacate the note of issue.

Additionally, defendant Hylan's motion for summary judgment is denied on the ground that it is untimely. Pursuant to Justice Chan's local rules, all dispositive motions had to be made within sixty days of the filing of the note of issue. Plaintiff filed her note of issue on March 20, 2015. Therefore, parties had until May 19, 2015 to serve a motion for summary judgment. However, Hylan did not make its motion until July 17, 2015, almost two months late. Although Hylan labels its motion as a "cross-motion," perhaps in an attempt to circumvent the sixty day rule, it was not filed as a cross-motion to any timely filed summary judgment motion. Rather, Hylan's motion is a completely separate motion sequence number, which was filed after Time Warner's motion for summary judgment was submitted. Moreover, Hylan has failed to submit any reply papers establishing good cause why this court should excuse its lateness. Thus, as the motion was filed well past the sixty day limit, the motion is untimely and must be denied.

The court now turns to the remaining motions for summary judgment. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, Time Warner's motion for an Order granting it summary judgment

dismissing all claims and cross-claims asserted against it and granting it summary judgment against Hylan for contractual indemnification is granted as Time Warner has made a *prima facie* showing of its right to such relief and there is no opposition thereto.

However, defendant NYEEI's motion for summary judgment dismissing all claims and cross-claims asserted against it in this action is denied as NYEEI has failed to make a *prima facie* showing that it acted reasonably in maintaining the sidewalk on the day of the accident and that it lacked notice of the snowy condition plaintiff alleges attributed to her fall. It is well-settled that testimony of someone with no personal knowledge of any snow removal efforts taken on the day of the accident is not probative of the care actually exercised by the defendant on that date or whether defendant lacked actual or constructive notice of the condition. *See De La Cruz v. Lettera Sign & Elec. Co.*, 77 A.D.3d 566 (1st Dept 2010). Here, NYEEI relies on the deposition testimony of Gerry Gaspard ("Gaspard"), NYEEI's current Assistant Director of Housekeeping, who testified as to NYEEI's snow and ice removal practice at the time of the accident. However, it is undisputed that Gaspard was not employed by NYEEI at that time. Thus, as he has no personal knowledge of the snow removal procedures used by NYEEI on the day of the accident, if any, his testimony is insufficient to establish that NYEEI acted reasonably on the day of the accident or that NYEEI did not have actual or constructive notice of the snowy condition on the sidewalk.

However, NYEEI is entitled to summary judgment dismissing plaintiff's negligence claim to the extent that it is based on the sidewalk box as it is undisputed that NYEEI did not own or have a duty to maintain the sidewalk box.

Accordingly, based on the foregoing, the motion and cross-motion to vacate the NOI are

denied; Time Warner and plaintiff's motions for leave to amend are granted; Time Warner's motion for summary judgment is granted; NYEEI's motion for summary judgment is denied; and Hylan's motion for summary judgment is denied. It is hereby

ORDERED that all claims and cross-claims asserted against Time Warner are hereby dismissed; and it is further

ORDERED that Time Warner is entitled to contractual indemnification from Hylan; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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EVELYN MATIAS,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK EYE
AND EAR INFIRMARY, TIME WARNER CABLE, INC.
and HYLAN DATACOM & ELECTRICAL INC.,
individually and as successor in interest to TRINITY
COMMUNICATION CORP.,

Defendants.

-----X

TIME WARNER ENTERTAINMENT COMPANY, L.P.
d/b/a TIME WARNER CABLE s/h/a TIME WARNER
CABLE, INC.,

Third-Party Plaintiff,

-against-

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

Third-Party Defendant.

