

Montanez v New York State Elec. & Gas

2015 NY Slip Op 32810(U)

March 26, 2015

Supreme Court, Sullivan County

Docket Number: 2509-2012

Judge: Mark M. Meddaugh

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At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on November 21, 2014

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN**

-----X

**HENRY MONTANEZ and
RANDY MONTANEZ,**

Plaintiffs,

-against-

**DECISION/ORDER
Index # 2509-2012
RJI # 52-33810-2013**

NEW YORK STATE ELECTRIC AND GAS,

Defendant.

-----X

**Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court**

**Appearances: Cozen O'Connor
By: Jeffrey L. Nash, Esq.
Attorneys for the Plaintiff
1900 Market Street
Philadelphia, PA 19103**

**The Wolford Law Firm, LLP
By: James S. Wolford, Esq. and
Lea T. Nacca, Esq.
Attorneys for the Defendant
600 Reynolds Arcade Building
16 East Main Street
Rochester, NY 14614**

MEDDAUGH, J.:

The Defendant, New York State Electric and Gas (NYSEG) has applied to this Court for an Order pursuant to CPLR 3212, granting summary judgment to the Defendant dismissing the complaint.

This action arises out of a fire at the Plaintiffs' premises¹, which was first reported at

¹The Plaintiff's property is part of a 31-acre property known as Three Friends Farm, reportedly consisting of six residential properties, bordered by Swinging Bridge Road to the West and Starlight Drive to east.

approximately 11:30 p.m., on August 28, 2011. The essential facts underlying this proceeding are not in dispute. The fire was caused when a power line, bearing 4,800 volts of electricity, was severed from the utility pole at approximately 5:00 a.m. on the morning of August 28, 2011. The downed wire came into contact with the ground approximately 275 feet from the Plaintiffs' house, where it came into contact with electrical wires that had serviced the Plaintiff's sprinkler system. The wires were housed in PVC piping which was laying above ground, and had been installed approximately 15 years earlier, and although they were no longer in use, they remained connected to the Plaintiff's house. The contact with the downed power line caused the sprinkler system wiring to become energized with high voltage, which then fed into the premises' equipment and wiring, causing a fire which burned the subject premises to the ground. The fire was first reported at approximately 11:30 p.m. on the evening of August 28, 2011.

The Plaintiff has alleged five separate causes of action: first, in negligence; second, for breach of implied and express warranties; third, in strict liability for ultra-hazardous activities; fourth, in strict liability for ultra-hazardous products; and fifth, for breach of contract.

The Defendant's attorney argues in his affidavit in support of the instant motion that, as a matter of law, on the issue of negligence, the Defendant owed no legal duty to the Plaintiffs to prevent a fire at their residence, which was 275 feet away from NYSEG's downed power line. It is claimed that the fire was not a reasonably foreseeable risk associated with a downed power line located in an undeveloped, wooded area. Rather, it is claimed that the fire was the result of the negligent and illegal installation of an unburied sprinkler electrical line in NYSEG's easement, of which NYSEG had no notice. It was pointed out that Hurricane Irene was in progress on August 28, 2011, and that the Defendant was required to prioritize its responses to the numerous reports of power outages and downed lines.

Defendant's counsel further argues that the second, third, fourth and fifth causes of action

must be dismissed on the basis of a lack of probable cause, because NYSEG's tariff prevents any causes of action to be asserted against it, other than in negligence, based upon the alleged failure to maintain or repair power lines, and because electricity is neither a "product" or a "good" for the purposes of strict products liability or breach of warranty claims. The Plaintiffs have conceded to the dismissal of these claims and, therefore, only the cause of action in negligence remains.

The Defendant presented an affidavit from one of its expert witnesses, Thomas Boehly, Ph.D., who opined on the causation of the fire, concluding that the fire was caused by the downed power line coming into contact with an exposed domestic power line, below NYSEG's power line and within its easement, of which NYSEG had no notice.

Dr. Boehly indicated that the evidence established that the downed power line had come into contact with a PVC pipe lying on the ground in the wooded area, which held electrical wiring for a sprinkler system pump. The downed power line burned through the PVC pipe, which energized the aluminum electrical wires within, and caused thousands of volts of electricity to feed into the electrical system of the Plaintiff's residence, causing the fire. The PVC piping for the wiring for the sprinkler system was buried approximately 10 inches underground as it traversed the Plaintiff's lawn, but in the woods, the piping was not buried and was installed on top of the ground.

The sprinkler system, including the exposed PVC piping had been installed in 1996 and was abandoned several years before the fire, but the wiring remained in place and connected to the subject residence. At the time of the fire, the piping was allegedly covered with heavy brush, leaves and other ground cover, and was not observed by Herb Weiss, the father of Plaintiff Randi Montanez, who was a fellow property owner at the Three Friends Farm. Mr. Weiss did testify, however, that he was aware that there was a "sprinkler cable in the NYSEG easement

prior to the fire” (Ex. 14, Weiss Transcript p. 23). It is argued that, as a result of the line being obscured by ground cover, NYSEG would not have discovered the sprinkler line upon any reasonable inspection of its easement. The Plaintiff has further argued in its reply memorandum of law that, even if it had observed the PVC pipe lying on the ground during a routine inspection of the easement and its power line, such observation would not have provided it with notice that there were electrical wires housed inside the pipe, or that it then ran partially underground and was connected to the Plaintiffs’ house.

It is alleged that the above-surface installation of an electrical line was in violation of Section 300-5 of the National Electric Code, which requires that wiring, without concrete encasement or other approved raceways, to be buried at least 18 inches underground. It is also alleged that Section 110-27(b) and 347(c) of the National Electric Code prohibit the use of PVC to hold electrical conduit in any event, as the PVC is “subject to physical damage.”

Dr. Boehly asserts that the high voltage downed line created sufficient heat to melt the PVC piping, the insulation of the sprinkler system electrical line, and the aluminum sprinkler system wiring.

Dr. Boehly further opined that the structure fire, 275 feet from the downed line, was not a normal foreseeable consequence of a downed power line in an undeveloped forest, and that the normal foreseeable risk would be damage to trees, shrubs or other natural matter in the surrounding area, or that a person coming to investigate the cause of a power outage would come in contact with the downed line. NYSEG had positioned a “wire guard” at the scene, who is an employee who monitors the downed line to keep people away from it until it can be addressed by the utility company.

Finally, the Defendant provided an affidavit from Debra Drake, a Supervisor of Property Management with NYSEG, who indicated that NYSEG has no record of granting its consent to

the installation of a sprinkler system line in its easement.

In opposition, the Plaintiffs provided an affidavit from Thomas Conlan, CEI, who identifies himself as a Master Licensed Electrician and Certified Electrical inspector, and he indicates that he conducted an electrical inspection into the origin and cause of the fire at issue herein. He asserts, as result of his inspections of the property following the fire², that the PVC piping was clearly open and apparently visible.

In addition, Mr. Conlan provided two photographs to indicate that NYSEG had specifically modified the first pole on Three Friends Farm, which was near to Starlight Drive, Pole # 87, to provide easy and quick access to terminate the electric service to the Three Friends Farm, including to the power line that was severed on August 28, 2011.

In Mr. Conlan's attached report in which he concluded that the fire was caused by the failure of NYSEG to attend to a primary high voltage distribution wire that fell to the ground, for a period of time of between 7 and 18 ½ hours, which then caused the high voltage to energize the sprinkler system wiring back to the Plaintiff's house, where it then energized the entire house causing it to burn to the ground.

The Plaintiffs also provided an affidavit from John P. McNulty, CFEL, CFII, as an expert in fire investigations caused by electrical failure. He indicates that at the time the power line was downed, Hurricane Irene was approaching Sullivan County, with average wind speeds of only 21.9 mph, and gusts of up to 33.4 mph. It is asserted that the downed high voltage electrical line, which remained energized, created a dangerous and very hazardous condition which threatened imminent danger to persons and property at the farm.

It is further asserted by Mr. McNulty that the vegetation within the utility easement was

²In his report accompanying his affidavit, he indicates that he inspected the property on November 1, 2011, December 14, 2011, and July 26, 2012.

overgrown and tree branches were entwined in the high voltage lines traversing the property, in violation of NYSEG's standards for vegetation control within its easements, which requires that trees be cut back at least 15 feet from the center line of the easement.

Mr. McNulty concludes that NYSEG failed to respond in a reasonable, proper and prudent manner by failing to respond for more than 17 hours to this dangerous and hazardous condition, and that the Defendant should have elevated this situation to a priority status and de-energized the line.

He also asserts that the Line Guard was meaningless and ineffective, she was not called to the scene for more than 8 hours, and that during that time the public had access to the high voltage wire on the Starlight Drive side of the Three Friends Farm property.

Plaintiffs' counsel first argues, in his memorandum of law, that the power line was not in a remote wooded area, but ran through the heart of an active residential community, and that the downed wire presented an imminent threat to persons and property. It is further alleged that the first pole on the Three Friends Farm was specifically modified to allow NYSEG to quickly terminate electrical service in the event of a dangerous condition.

It is next alleged that the wire was downed because of the Defendant's failure to trim back the trees in the easement in accordance with its own safety standards, and that there had been eight prior incidents of severed transmission lines at the same location, as evidenced by the number of splices in the line (citing Ex. 27, Sanchuk Transcript at p. 26).

The Plaintiffs also argues that the Defendant knew or should have known that a PVC pipe was laying on the ground in the easement, and it is further argued that the Defendant did not produce any fact witnesses as to the lack of visibility of the PVC pipe on the ground prior to the fire. It is asserted that an employee of NYSEG, Richard Buddenhagen, testified at deposition that utility poles are inspected once a year, in addition to the evidence that the line has been spliced

on least eight prior occasions, as evidence that NYSEG should have noticed the pipe lying on the ground.

It is next argued that the Defendant failed to properly respond for more than 17 hours to the report of downed power line. The Plaintiffs asserts that, despite Hurricane Irene being in progress, the Defendant should have prioritized their response and de-energized the line at pole #87. It is claimed that the weather records indicate that wind gusts were below 30 mph for most of the day of the fire, and conditions were not so onerous as to prevent this step.

It is further argued that the Line Guard, Nancy Fisher, did not arrive until the afternoon, where she sat in her truck at the entrance to the Farm, doing little, if anything to prevent residents from accessing the downed wire. Ms. Fisher was unable to report back to NYSEG about the wire sparking at ground level because her phone was not working.³ It is also alleged that Ms. Fisher was a meter reader in Ithaca and received only two hours of videotaped training as a Line Guard.

The Plaintiffs argue that triable issues of fact exist that preclude summary judgment dismissing the complaint, specifically, whether the fire was a foreseeable consequence of the Defendant's negligence, and whether the negligence proximately caused the Plaintiffs' injury. It is asserted that the Defendant was negligent in failing to de-energize the downed line for 17 hours, that its negligence was the proximate cause of the fire, and that a question of fact exists as to whether the fire was reasonably foreseeable.

The Plaintiffs indicate that the fire was a foreseeable consequence of the Defendant allowing the extreme hazard of a downed power line to remain energized for seventeen hours, presenting a hazard to the public and to property. The Plaintiffs argue that the Defendant's

³There are references in some of the attachments to the Plaintiff's papers indicating that both the land lines and the cell phone service was down in Sullivan County as a result of the storm (see, e.g, Exhibit 20).

reliance on *Amica Mut. Ins. Co. v Town of Vestal*, 191 A.D.2d 916, 594 N.Y.S.2d 918 [3d Dept., 1993] is misplaced, as that case did not involve any claim of negligence on the part of NYSEG after the power line in that case was downed.

The Plaintiffs also argue that the Defendant has failed to establish as a matter of law that its negligence was not the proximate cause of the fire. It is claimed that the Defendant has not proven any intervening cause which severs the causal link between its negligence and the fire.

In reply, the Defendant presented an affidavit from Robert Hallock, a Supervisor of Substation Operations for NYSEG, who indicates that he was NYSEG's Liberty Division Operations Chief for Hurricane Irene. He indicated that the first calls of downed power lines and power outages started coming in at approximately 11:59 p.m. on August 27, 2011, and that they received more than 5,000 calls during the next twenty-four hours of power outages and downed lines in Sullivan County. By 7:30 a.m., when NYSEG received the call about the downed line at issue herein, it had already received 1,127 calls and a state of emergency had been declared in Sullivan County. He indicates that of those calls, the highest priority is given to fire departments, hospitals, nursing homes, emergency shelters, and other special care facilities. High Priority is the given to calls involving a public hazard or any other hazardous condition, such as a downed wire in a road or in a highly populated area.

Conclusions of Law

In the case at bar, the essential facts of the accident are generally undisputed, that the Plaintiffs' house was destroyed by fire when a 4,800 power line came down on a sprinkler system electrical line which was installed in the Defendant's right of way, and without actual notice to, or consent from, the Defendant. It was not installed in accordance with the National Electric Code, and was arguably contrary to the terms of the right-of-way which prohibits the erection of any structure. The contact between the downed power line and the sprinkler line was

approximately 275 feet from the Defendant's house, in a wooded undeveloped area, although adjacent to the Three Friends Farm development.

The parties are also in agreement that the issues presented on this motion are whether the fire was a foreseeable consequence of the Defendant's negligence, if any, and whether such negligence, if any, proximately caused the Plaintiffs' injury.

It is well established that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see, Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 487 N.Y.S.2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v. Prospect Hosp., supra at 324, citing to Zuckerman v. City of New York, supra at 562).

In order to establish a prima facie case of negligence, the Plaintiffs must demonstrate that the Defendant owed a duty to them, the extent or scope of such duty, whether the Defendant breached that duty, and that such breach was a proximate cause of the injuries sustained (Evarts v. Pyro Engineering, Inc., 985 N.Y.S.2d 179, 181, 117 A.D.3d 1148, 1150 [3 Dept., 2014]).

It is well established that utility companies have an affirmative duty to exercise reasonable care in the operation and maintenance of power lines (Miner v. Long Is. Light. Co., 40 N.Y.2d 372, 378, 386 N.Y.S.2d 842 [1976]). It has also been held, where an electric company has knowledge that one of its transmission lines has fallen, broken or sagged, it has a duty to

promptly shut off the power to the damaged transmission line or to make the necessary repairs with the dispatch required in light of the danger to public safety (*see*, PJI 2:205, *citing Russell v. New York State Elec. & Gas Corp.*, 93 N.Y.S.2d 3, 8, 276 A.D. 44 [3 Dept. 1949], *aff'd* 301 N.Y. 593, 93 N.E.2d 493 [1950]).

In the case at bar, it is the scope and extent of that duty which is at issue. It is an elementary tenet of New York law that the “[r]isk reasonably to be perceived defines the duty to be obeyed” (*Palsgraf v Long Is. R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99 [1928]). In *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 377, 379 [1997], the Court of Appeals explains that when analyzing questions regarding the scope of an alleged tortfeasor’s duty, the courts may look to whether the Plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks. The foreseeability of risk is an essential element of a fault-based negligence cause of action, and a Defendant shall be found at fault only when the injury producing occurrence is one that could have been anticipated (*id.* at p. 583).

The Plaintiffs herein has argued that it need not establish that the precise manner in which their injury occurred, or the extent of the injuries was foreseeable, in order to establish the foreseeability component of their negligence claim (*citing to Derdarian v Felix Contr. Corp.*, 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166 [1980] and *Evarts v. Pyro Engineering, Inc.*, *supra.*). The *Di Ponzio* Court clarified, however, that this often cited rule, does not mean that a careless act should lead to liability even though the injury producing accident occurred in an unexpected manner. Rather, the Court noted (*supra.* at p. 380) that

“[C]onduct shall be considered negligent when it tends to subject another to an unreasonable risk of harm arising from one or more particular foreseeable hazards (Restatement [Second], of Torts § 281, at 6). When the person is harmed by an occurrence resulting from one of those hazards, the negligent actor may be held liable. In contrast, where the harm was caused by an occurrence that was not part of the risk or recognized hazard involved in the actor’s conduct, the actor is not liable.”

In Morris v. Troy Sav. Bank, 302 N.Y.S.2d 51, 53, 32 A.D.2d 237 [3 Dept., 1969]), the Third Department held that “[t]he fundamental basis of liability for actionable negligence is the reasonable foreseeability of the risk, the ability reasonably to anticipate the risk; every possible accident due to unusual and reasonably unforeseeable combinations of circumstances is not included; reasonable foresight is required but not prophetic vision.”

In the case at bar, the Court finds that the chain of events which caused the fire at the Plaintiff’s house was not a foreseeable hazard that the Defendant had a duty to prevent. The Defendant was surely charged with the obligation to protect against a member of the public coming into contact with downed wire while it remained energized (*see, e.g., Russell v. New York State Elec. & Gas Corp.*, 276 A.D. 44, 93 N.Y.S.2d 3 [3 Dept. 1949]; Keith v. Payne 164 A.D. 642, 150 N.Y.S. 37 [3 Dept. 1914]; Hebert v. Hudson River Electric Co., 136 A.D. 107, 120 N.Y.S. 672 [3 Dept. 1909]), but this duty would not extend to ensuring that the line did not come into contact with an electric line improperly installed in the Defendant’s easement, in an undeveloped wooden area, without the Defendant’s consent and without actual notice to them (Amica Mut. Ins. Co. v. Town of Vestal, 191 A.D.2d 916, 594 N.Y.S.2d 918 [3 Dept., 1993]).

In determining the scope of an alleged tortfeasor’s duty, the Court must also consider the facts and circumstances in which the duty question arises (Di Ponzio v. Riordan, *supra.* at p 583), which analysis shall be driven not only by logic and science, but by considerations of public policy (Waters v. New York City Housing Authority, 69 N.Y.2d 225, 229, 513 N.Y.S.2d 356 [1987]); De Angelis v. Lutheran Medical Center, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 627 [1983]).

In the case at bar, at the time that the power line was downed, the Defendant was responding to the damage caused to the power grid as a result of Hurricane Irene passing through

the area. The Defendant has established that during the twenty-four hours of August 28, 2011, its Liberty Division had received more than 5,000 calls regarding downed lines and power outages, including 1,127 calls by the time that the power outage at Three Friends Farm was reported. The Defendant has asserted that its response to these calls needed to be prioritized to hospitals, nursing homes, fire departments, and to issues of public safety, e.g., where there was a downed power line on a public street. Under these circumstances, the Court finds that the Defendant did not breach its duty to the Defendant in failing to de-energize the line before the fire was discovered at the Plaintiff's house. Even assuming that the Defendant had a duty to prophetically predict the scenario leading to the fire (see, Morris v. Troy Sav. Bank, 32 A.D.2d 237, 302 N.Y.S.2d 51 [3 Dept., 1969]), the Court finds that any such duty would be limited by the circumstances existing on that date with regard to the damage caused by Hurricane Irene.

Finally, in an action for negligence, even if the Defendant is found to have a duty, and there was a breach of that duty, it must also be shown that the Defendant's negligence was a proximate cause of the Plaintiff's injuries and, to do so, the negligence must be a substantial cause of the events which produced the injury (Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 169 [1980]). In analyzing the issue of proximate cause, it has been held that the negligence complained of must have caused the occurrence of the accident from which the injuries flowed, not merely set the occasion for, or facilitated its occurrence (Lee v. New York City Housing Authority, 803 N.Y.S.2d 538, 542, 25 A.D.3d 214, 219 [1 Dept., 2005]). In cases addressing proximate cause, the issue often involves an analysis of whether an intervening cause, or a new and independent cause, resulted in the injury, which was an unforeseeable consequence of defendant's initial negligent act (Ventricelli v. Kinney System Rent A Car, Inc., 45 N.Y.2d 950, 383 N.E.2d 1149 [1978]; Sheehan v. City of New York

40 N.Y.2d 496, 354 N.E.2d 832 [1976]; Scott v. Mead, 132 A.D.2d 755, 517 N.Y.S.2d 320 [3 Dept.,1987]).

In the case at bar, the Court finds that the Defendant has demonstrated the absence of any triable issue of fact as to whether the fire at the Plaintiff's residence was a foreseeable consequence of its conduct, and that it was the improper above-ground installation of the electrical conduit in NYSEG's easement that caused the fire.

Wherefore, based on the foregoing, the Court shall grant the Defendant's motion for summary judgment, and it is hereby

ORDERED that the Defendant is granted summary judgment, pursuant to CPLR 3212, dismissing all causes of action in the Plaintiff's complaint dated September 7, 2012.

This memorandum shall constitute the Decision and Order of this Court. The original Decision and Order, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Order does not relieve counsel from the obligation to serve a copy of this order, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: March 24, 2015
Monticello, New York

ENTER:

Mark M. Meddaugh

HON. MARK M. MEDDAUGH
Acting J.S.C.

ORIGINAL

Papers Considered:

1. Notice of Motion, dated September 26, 2011
2. Attorney Affidavit of James S. Wolford, Esq., sworn to September 26, 2014
3. Affidavit of Thomas Boehly, Ph.D., sworn to September 3, 2014
4. Affidavit of Debra Drake, sworn to September 22, 2014
5. Memorandum of Law in Support, dated September 26, 2014
6. Attorney Affidavit in Opposition of Jeffrey L. Nash, Esq., sworn to November 7, 2014
7. Affidavit of John P. McNulty, CFEI, CFII, sworn to November 7, 2014
8. Affidavit of Thomas Conlan, CEI, sworn to November 7, 2014
9. Plaintiff's Memorandum of Law in Opposition, dated November 7, 2014
10. Reply Affidavit of Robert Hallock, sr., sworn to November 19, 2014