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| <b>Comerford v City of New York</b>  |
| 2016 NY Slip Op 30247(U)   |
| January 13, 2016   |
| Supreme Court, Bronx County  |
| Docket Number: 304598/12   |
| Judge: Eddie J. McShan   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

MICHAEL COMERFORD,

*Plaintiff,*

-against-

CITY OF NEW YORK, ABACUS HOLDING INC.,  
NEW CHINA PALACE CHINESE RESTAURANT (NY),  
INC., CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC. AND VERIZON COMMUNICATIONS, INC.,

*Defendants.*

**DECISION AND ORDER**

Index No. 304598/12

**Present:**  
**Hon. EDDIE J. MCSHAN**

The following Papers Numbered: 1 to 20 were read on this motion for summary judgment.

| No  | on Calendar of | PAPERS NUMBERED |
|---|----------------|-----------------|
| Notice of Motion-Order to Show Cause-Exhibits and Affirmation Annexed -----               |                | <u>1 - 12</u>   |
| Answering Affidavit, Amended Cross-Motion and Exhibits- (Oral Argument and Exhibit) ----- |                | <u>13 - 20</u>  |
| Replying Affirmation and Exhibits -----   |                |                 |
| Other -----   |                |                 |

Before this Court is Defendant Verizon Communications, Inc.'s ("Verizon") motion seeking an order granting them summary judgment and dismissal of the action. Plaintiff commenced the instant action on May 24, 2012 against the City of New York, Abacus Holding Inc., New China Palace Chinese Restaurant (NY), Inc. and Consolidated Edison Company of New York, Inc. ("ConEd"), to recover damages for personal injuries he allegedly sustained as a result of a trip and fall accident that occurred at 1593 Hollywood Avenue (a/k/a 3012-3014 Middletown Road) in Bronx, New York. Upon information learned through discovery, Plaintiff made an application for permission to amend his complaint to include Verizon Communications, Inc. ("Verizon") as a defendant. On April 21, 2014, the Honorable Judge Danziger granted the unopposed motion.

Verizon asserts that it is entitled to a judgment as a matter of law because Plaintiff has failed to establish a basis for maintaining a claim against it. Verizon argues that it owed no duty of care to the Plaintiff because it never had ownership, control or special use of the property where the alleged unsafe condition existed resulting in Plaintiff's accident. Verizon contends that as a holding company, it neither provides nor offers any type of service or goods to the general public. Verizon

insists it has never owned, maintained, and/or operated any telecom or communications facilities within or underneath any private or public roadway, including any utility poles in the City of New York. Verizon alleges that it has never performed or employed anyone to perform the installation, repairs or maintenance of any utility and/or telecommunication facilities, including utility poles in the City of New York. Relying on *Rado v Verizon Communications* (2011 W.L. 3419462 [NY Supp. 2011]) and *Nergon Torres v Verizon Communications, Inc.* (478 F3d 19 [US Ct. of Appeals, 1<sup>st</sup> Circuit 2008]), Verizon argues it has been sued in error because as a holding company, they are an improper party.

In support of its summary judgment motion, Verizon includes an affidavit of its Claims Counsel, James K. O'Neill. Mr. O'Neill establishes his personal knowledge of Verizon's organizational structure and activities by virtue of his employment and information contained in Verizon's business records made and maintained in the usual course of its business. Mr. O'Neill avers that as a holding company, Verizon Communications, Inc., has never offered goods or services to the public, owned or maintained public or private roadways, owned or maintained utility facilities communication within or underneath any public or private roadways, or owned any real property. Mr. O'Neill acknowledges that Verizon Communications, Inc. is a holding company to a number of subsidiary corporations, but denies that it has "performed or engaged in actual work performed by any of its subsidiary corporations." He further denies that Verizon Communications, Inc. employed any individuals to perform any work on any equipment or facilities, namely at or near the location of Plaintiff's alleged accident.

A party moving for summary judgment bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, providing sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). The moving party's evidence, most importantly, must be in admissible form (*Friends of Animals, Inc. v Associate Fur Manufacturers, Inc.*, 46 NY2d 1065 [1979]). The nonmoving party must establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute

(*Zuckerman v City of New York*, 49 NY2d 492 [1980]). The nonmoving party cannot provide conclusory allegations of fact or law to defeat a summary judgment application (*Century Center Ltd. v Davis*, 100 AD2d 564 [2d Dept 1984]). In considering whether to grant a summary judgment motion, a “drastic remedy” in this State, this court looks to find issues rather than to determine them, and to evaluate whether the alleged factual issues are genuine or lack substance (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 394 [1957]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

The Court finds that Verizon has established a *prima facie* showing of entitlement to a judgment as a matter of law (*Winegrad*, 64 NY2d 851). The Court finds on this record that Mr. O’Neill made a *prima facie* showing that Verizon’s structure as strictly a holding company may not have caused the alleged defect which subsequently resulted in Plaintiff’s alleged accident. Mr. O’Neill established that the holding company does not offer goods or services to the public, own or maintain public or private roadways, own or maintain utility facilities communication within or underneath any public or private roadways, or own any real property to consequently cause Plaintiff’s alleged accident. He also made a *prima facie* showing that Verizon has not “performed or engaged in actual work performed by any of its [holding company’s] subsidiary corporations.” The burden now shifts to the Plaintiff to establish, by admissible evidence, the existence of a factual issue requiring a trial to determine the dispute (*See Zuckerman*, 49 NY2d 557).

Plaintiff opposes Verizon’s summary judgment motion and notes that it impleaded Verizon after the defendant, Consolidated Edison (“ConEd”), identified the pole in question as being owned by Verizon. Plaintiff argues that Verizon’s alleged structure as a holding company is not dispositive. Relying on *Corsello v Verizon New York Inc.*, Plaintiff insists that a holding company can own and control subsidiaries to the extent of itself being held liable (21 Misc 3d 1116[A] [Sup Ct 2008]). Plaintiff notes that Mr. O’Neill’s affidavit does not mention whether Verizon Communications, Inc. owns other Verizon subsidiaries which may own and maintain the pole in question. Plaintiff contends that Verizon Communications, Inc. owns and controls several subsidiaries, including Verizon New

York, Inc., both of which allegedly share the same principal executive office. Plaintiff alleges that Verizon has failed to provide any discovery, and now seeks an order dismissing the instant action despite having information exclusively within its knowledge. Plaintiff requests that that this motion not be entertained until the latter appears for a deposition scheduled for June 28, 2015 pursuant to a Compliance Conference Order dated March 17, 2015.

The Court finds that the Plaintiff has tentatively rebutted Verizon's *prima facie* showing of entitlement to judgment as a matter of law. Plaintiff asserts that it impleaded Verizon only after the defendant ConEd identified the pole in question as being owned by Verizon. Plaintiff alleges that Verizon has failed to provide any discovery, and notes that Verizon is scheduled for a deposition on June 28, 2015 pursuant to the Compliance Conference Order dated March 17, 2015. Based on Plaintiff's contentions, the Court cannot determine whether Verizon Communications, Inc. exercises dominion or control over a subsidiary which either owns, maintains or operates the pole in question (*Serrano v New York Times Co., Inc.*, 19 AD3d 577 [2d Dept 2005]). Accordingly, Verizon Communications, Inc.'s motion for summary judgment is denied without prejudice, with leave to renew upon completion of discovery. Verizon Communications, Inc. may renew its application if it is determined that it exercises no dominion or control over a subsidiary which may own, maintain, or operate the property in question.

In light of the foregoing, it is hereby

**ORDERED AND ADJUDGED** that the Plaintiff's summary judgment motion is hereby denied with leave to renew upon completion of discovery between Plaintiff and Verizon Communications, Inc.

The foregoing shall constitute the decision and order of this Court.

Dated: January 13, 2016

  
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 A.J.S.C.