

Gillard v Sedgwick Hous. Dev. Fund Co. Inc.

2017 NY Slip Op 30377(U)

January 17, 2017

Supreme Court, Bronx County

Docket Number: 300739/2012

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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DERRICK GILLARD,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 300739/2012

SEDGWICK HOUSING DEVELOPMENT FUND
COMPANY INC., STARRETT DEVELOPMENT, LLC.,
JOY CONSTRUCTION CORP., RIVERVIEW
REDEVELOPMENT COMPANY, L.P., CABLE
SYSTEMS NEW YORK CITY CORPORATION,
VERIZON NEW YORK, INC., JEK
COMMUNICATIONS, INC. and HIGH CALIBER
CONSTRUCTION, INC.,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated July 19, 2016 of defendant Verizon New York Inc. and the affirmation, affidavit, and exhibits submitted in support thereof (Motion Sequence # 5); the affirmation in opposition dated August 17, 2016 of defendant High Caliber Construction, Inc. and the exhibit submitted therewith; the notice of motion dated August 25, 2016 of defendant JEK Communications, Inc. and the affirmation, affidavit, exhibits and memorandum of law submitted in support thereof (Motion Sequence # 6); the affirmation in opposition dated November 4, 2016 of defendant High Caliber Construction, Inc. and the affidavit and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated December 1, 2016 and the exhibits submitted therewith; the reply affirmation dated January 5, 2017 of defendant JEK Communications, Inc.; the notice of motion dated August 26, 2016 of defendant Cablevision Systems New York City Corporation i/s/h/a Cable Systems New York City Corporation and the affirmation and exhibits submitted in support thereof (Motion Sequence # 7); the affirmation in partial opposition dated November 2, 2016 of defendant JEK

Communications, Inc.; plaintiff's affirmation in opposition dated December 1, 2016 and the exhibits submitted therewith; the reply affirmation dated January 9, 2017 of defendant Cablevision Systems New York City Corporation i/s/h/a Cable Systems New York City Corporation; and due deliberation; the court finds:

Plaintiff commenced this action to recover damages for injuries sustained on July 13, 2011 when he fell on the sidewalk abutting a new building under construction at 1610 Sedgwick Avenue (the "Building"). In May 2011, defendants Cablevision Systems New York City Corporation i/s/h/a Cable Systems New York City Corporation ("Cablevision"), through its contractor JEK Communications, Inc. ("JEK"), and Verizon New York, Inc. ("Verizon"), through its contractor High Caliber Construction, Inc. ("High Caliber"), installed underground pipes or conduits beneath the sidewalk from utility pole 71 to the Building. In separate motions, Verizon, Cablevision and JEK move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and all cross-claims.. Verizon also moves on its cross-claims for contractual and common-law indemnification and for breach of contract against High Caliber. Cablevision moves on its cross-claim for contractual indemnification against JEK and on its cross-claim for common-law indemnification and contribution against all defendants. Because the motions involve common questions of law and fact, they are consolidated for disposition.

Plaintiff testified that he fell on a black patch on the sidewalk that had not been properly filled. The condition was a 2-inch wide by 3-inch high raised lip that crossed the width of the sidewalk. He was looking straight ahead and nothing obstructed his view before he fell. The condition was located near a utility pole. He had not walked on that section of Sedgwick Avenue since 2007, and he did not know how long the condition existed before the accident. A statement attributed to plaintiff in the ambulance call report indicated that he fell off a skateboard, but plaintiff denied making that statement. He testified that photographs accurately depicted the sidewalk at the time of the accident, and he circled the accident location on one photograph. The photographs showed a single trench across the sidewalk.

Cablevision's construction supervisor Andre Diaz ("Diaz") testified that JEK installed four 1 1/4-inch conduits from utility pole 71 to the Building's basement as described in a work order. Cablevision generally did not inspect JEK's work on underground jobs and Diaz was unaware of any complaints about JEK's work. Owner Joseph Briody ("Briody") testified that JEK completed the installation in one day between May 7 and May 13, 2011. The work required digging a 12-inch wide by 24-inch deep trench in the sidewalk. According to a May 17 invoice, JEK backfilled the trench and restored the sidewalk with asphalt to a level "suitable for pedestrian traffic." Briody identified a Cablevision conduit which was affixed to a utility pole in photographs of the accident location. The area plaintiff circled as the location of the accident was also "the area where JEK would have created their trench." However, Briody was aware of "joint trenches" where Cablevision shared the same trench with other utilities. Briody testified the photographs showed what he believed were two plastic Verizon conduits affixed to the same pole. He also testified that the trench could have been "re-dug." He averred in an affidavit that JEK received no complaints regarding its work.

Carl Germano ("Germano") testified that he worked at Verizon as an outside plant technician in July 2011. His duties included designing plans to bring Fios cables into new buildings. Verizon issued two job orders to High Caliber for the Building. The second job order involved the installation of two 4-inch conduits from utility pole 71 to the Building and a "turn up" at the pole. The conduits were installed underground because the owner did not want the cables attached to the Building's exterior. No Verizon employee performed any physical work related to the conduit placement. Outside plant engineer Glen P. Karlson ("Karlson") was not involved when Verizon brought service to the Building in 2011 but testified that Verizon applied for and received a permit to open the sidewalk from New York City. No Verizon employee performed any physical work and no one inspected High Caliber's work. Karlson testified that other utilities, including Cablevision, also worked in close proximity to utility poles and that Verizon and Cablevision often worked within the same trench. The

photographs showed that Cablevision also worked at the accident location.

High Caliber's vice president David Hackett ("Hackett") testified that his company installed two 4-inch PVC pipes from a utility pole to the Building. According to its invoice, High Caliber completed the work on May 25, 2011. He was not present when the work was undertaken but testified as to his company's practices. Employees would dig a 12-inch wide by 36-inch deep trench, lay the pipe, cover the pipe with sand, backfill the trench with the dirt that had been removed, and seal the trench. In this case, High Caliber sealed the trench with black asphalt because the entire sidewalk was going to be replaced. Foreman William Baez ("Baez") testified that High Caliber installed an underground pipe "from pole to the building" in a 12-inch wide by 2-foot deep trench in the sidewalk. They repaved the trench using a black cold patch because the Building's contractor was going to replace the sidewalk. Verizon employees did not supervise or perform any of the physical work on the job. Baez averred in an affidavit that the crew excavated a 2-foot wide by 4-foot deep trench. The trench was covered with asphalt which was tamped down level with the sidewalk.

William Medina ("Medina"), an emergency medical technician, testified that he tended to plaintiff after the accident. He filled out an ambulance call report based upon information given to him by plaintiff. The report read "status post falling off skateboard in motion."

In addition to the deposition transcripts, photographs, and the ambulance call report, movants submitted the Aerial, Underground or Building Construction/Plant Maintenance Contract dated August 14, 2010 between CSC Holdings, Inc. and JEK (the "Cablevision Contract") and the Agreement for Construction Services executed in 2010 by Verizon Corporate Services Group Inc. and High Caliber (the "Verizon Contract").

Plaintiff's Claims against Verizon

Verizon argues that it is not liable to plaintiff because High Caliber, its independent contractor, performed the work. Generally, "a principal is not liable for the acts of an independent contractor

because principals ordinarily do not control the manner in which independent contractors . . . perform their work.” *Goodwin v. Comcast Corp.*, 42 A.D.3d 322, 322, 840 N.Y.S.2d 781, 782 (1st Dep’t 2007) (internal citations omitted). Control over the means and methods of the work is a critical factor. *See Melbourne v. New York Life Ins. Co.*, 271 A.D.2d 296, 707 N.Y.S.2d 64 (1st Dep’t 2000). Paragraph 22.1 of the Verizon Contract states in part that High Caliber “shall perform the Services as an independent Supplier” and that “Verizon does not and will not have actual, potential, or any other control over” High Caliber. Germano, Karlson and Hackett testified that no Verizon employee supervised High Caliber’s work. Verizon is entitled to summary judgment dismissing plaintiff’s complaint and all claims asserted against it. *See Fernandez v. 707, Inc.*, 85 A.D.3d 539, 926 N.Y.S.2d 408 (1st Dep’t 2011). No party opposed this branch of Verizon’s motion.

Verizon’s Cross-Claims for Indemnification and Failure to Procure Insurance

Verizon also moves for judgment on its cross-claims for contractual and common-law indemnification against High Caliber. A party’s intent to indemnify must be unmistakably clear in the contract. *See Fresh Del Monte Produce N.V. v. Eastbrook Caribe A.V.V.*, 40 A.D.3d 415, 836 N.Y.S.2d 160 (1st Dep’t 2007). Paragraph 21.1 of the Verizon Contract states in part that High Caliber “shall defend, indemnify and hold harmless Verizon, its parents, subsidiaries and Affiliates . . . from and against any claims, demands, lawsuits, damages, liabilities, loss, costs or expenses (including, but not limited to, reasonable fees and disbursements of counsel and court costs) . . . that may be made: (a) by anyone for injuries. . . resulting in whole or in part from the acts or omissions of [High Caliber].” The clause is clear and unambiguous and does not require a showing that Verizon was negligent. However, judgment in Verizon’s favor is denied. *See Gomez v. Sharon Baptist Bd. of Directors, Inc.*, 55 A.D.3d 446, 866 N.Y.S.2d 164 (1st Dep’t 2008). Plaintiff’s statement recorded by Medina in the ambulance call report raises an issue of fact as to how the accident occurred including whether it was caused by High Caliber’s actions. *See Beltran v. Navillus Tile, Inc.*, 108 A.D.3d 414, 970 N.Y.S.2d 4 (1st Dep’t

2013); *Whitney v. Valentin*, 105 A.D.3d 519, 963 N.Y.S.2d 109 (1st Dep't 2013). Whereas the indemnification clause in *Sand v. City of New York*, 83 A.D.3d 923, 921 N.Y.S.2d 312 (2d Dep't 2011), obligated the contractor to defend and indemnify Verizon for all claims arising out of the contractor's "actual or alleged acts or omissions," the word "alleged" is missing from Verizon's contract with High Caliber.

Verizon also moves for judgment on its cross-claim for breach of contract for High Caliber's failure to procure insurance. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that the contract provision required that such insurance be procured and that the provision was not complied with." *Rodriguez v. Savoy Boro Park Assoc. Ltd. Partnership*, 304 A.D.2d 738, 739, 759 N.Y.S.2d 107, 108 (2d Dep't 2003). An insurance procurement clause is independent of the indemnification provision in a contract and thus a final determination of liability "need not await a factual determination as to whose negligence, if anyone's, caused plaintiff's injuries." *Spector v. Cushman & Wakefield, Inc.*, 100 A.D.3d 575, 575, 955 N.Y.S.2d 302, 304 (1st Dep't 2012). Paragraph 23.1 of the Verizon Contract reads in part that High Caliber "shall secure and maintain at its expense during the term of this Agreement . . . (ii) Commercial General Liability insurance." The policy must name "Verizon and Verizon Communications Inc., its subsidiaries and affiliates, as an Additional Insured." By letter dated October 22, 2015, High Caliber's insurance carrier wrote that there were no additional insureds listed on High Caliber's policy. High Caliber in opposition has raised a triable issue of fact with the submission of a certificate of insurance naming Verizon as an additional insured and showing coverage beginning in April 2011.

Plaintiff's Claims against Cablevision and JEK

Cablevision argues that it is not liable to plaintiff because (1) its independent contractor, JEK, completed its work two months before the accident; (2) plaintiff cannot show that Cablevision had

notice of a dangerous condition; and (3) High Caliber's work constituted an intervening, superseding cause that relieves Cablevision of any liability. Regarding notice, Cablevision has shown that it was unaware of any complaints and that plaintiff did not know how long the condition had existed. However, "[a] contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk." *Cino v. City of New York*, 49 A.D.3d 796, 796, 854 N.Y.S.2d 201, 202 (2d Dep't 2008). Cablevision does not dispute that it performed work on the sidewalk two months before the accident. Cablevision, though, has shown that High Caliber's subsequent work constitutes an intervening, independent cause. *See e.g. Lee v. New York City Hous. Auth.*, 25 A.D.3d 214, 803 N.Y.S.2d 538 (1st Dep't 2005). The testimony establishes that JEK opened a 12-inch wide trench in the sidewalk two weeks before High Caliber opened a 12-inch to 2-foot wide trench in the same section of the sidewalk. The photographs depict a single trench opening extending from the utility pole to a metal fence. Cablevision has also shown that it did not control JEK's work. *See Goodwin v. Comcast Corp., supra*. Based upon the foregoing, JEK, is also entitled to the dismissal of the claims against it.

Neither plaintiff nor High Caliber raised a triable issue of fact in opposition. Although JEK did not submit the pleadings from all parties, they were included on Cablevision's motion. *See Serowik v. Leardon Boiler Works Inc.*, 129 A.D.3d 471, 11 N.Y.S.3d 128 (1st Dep't 2015). Plaintiff and High Caliber also argued that JEK's motion should be denied because the company shredded its records for the work per its 3-year records retention policy. Generally, the loss of evidence must be fatal to the opposing party's ability to mount a defense to the action. *See Squitieri v. City of New York*, 248 A.D.2d 201, 669 N.Y.S.2d 589 (1st Dep't 1998). Plaintiff and High Caliber, though, have not shown that the loss of JEK's records left them prejudicially bereft from presenting a claim or defense. *See Cataudella v. 17 John St. Assoc., LLC*, 140 A.D.3d 508, 35 N.Y.S.3d 304 (1st Dep't 2016). As to notice, plaintiff and High Caliber failed to account for plaintiff's testimony that he did not see the defect before he fell

and that he did not know how long the condition had existed. Plaintiff also argued that JEK created a dangerous condition, but the evidence showed that High Caliber excavated a trench the same width as or wider than JEK's trench and in the same location as JEK's trench two weeks after JEK completed its work. Neither plaintiff nor High Caliber have shown that High Caliber's subsequent excavation left JEK's work untouched.

Cablevision's Cross-Claims for Contribution and Indemnification

In light of the dismissal of the complaint against it, Cablevision's motion on its cross-claims for common-law indemnification and contribution against all defendants and on its cross-claim for contractual indemnification against JEK is denied as moot. *See Mayes v. UVI Holding*, 301 A.D.2d 409, 752 N.Y.S.2d 868 (1st Dep't 2003). To the extent that the indemnification provision allows for the recovery of legal fees, Cablevision cannot prevail on the claim because it has not shown that the accident arose out of JEK's work as stated in Paragraph 23(a) of the Cablevision Contract or that the injury occurred "in the course of performance of this Agreement" as stated in Paragraph 23(d). *See Dos Santos v. Power Auth. of State of N.Y.*, 85 A.D.3d 718, 924 N.Y.S.2d 558 (2d Dep't 2011), *lv denied*, 20 N.Y.3d 856, 983 N.E.2d 770, 959 N.Y.S.2d 691 (2013).

Accordingly, it is

ORDERED, that the motion of defendant Verizon New York Inc. (Motion Sequence # 5) for summary judgment is granted to the extent of dismissing all claims against it and is denied on its cross-claims for contractual and common-law indemnification and for breach of contract for failure to procure insurance against defendant High Caliber Construction, Inc.; and it is further

ORDERED, that the motion of defendant JEK Communications, Inc. (Motion Sequence # 6) for summary judgment dismissing plaintiff's complaint and the cross-claims asserted against it is granted; and it is further

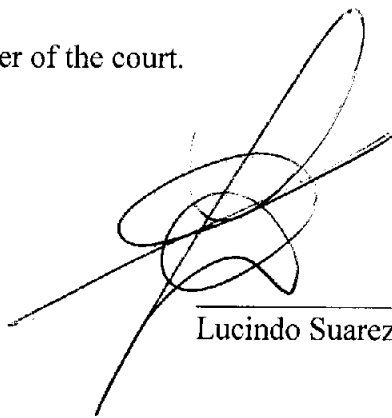
ORDERED, that the motion of defendant Cablevision Systems New York City Corporation

i/s/h/a Cable Systems New York City Corporation (Motion Sequence # 7) for summary judgment is granted to the extent of dismissing plaintiff's complaint and all cross-claims asserted against it and denied as moot on its cross-claims for contractual indemnification against defendant JEK Communications, Inc. and its cross-claim for common-law indemnification and contribution against all defendants; and it is further

ORDERED, that the clerk of the court is directed to enter judgment dismissing the plaintiff's complaint and all cross-claims asserted against defendants Verizon New York Inc., JEK Communications, Inc., and Cablevision Systems New York City Corporation i/s/h/a Cable Systems New York City Corporation.

This constitutes the decision and order of the court.

Dated: January 17, 2017

A handwritten signature in black ink, appearing to be 'Lucindo Suarez', written over a horizontal line.

Lucindo Suarez, J.S.C.