

<b>Berg v Verizon N.Y., Inc.</b>
2017 NY Slip Op 32910(U)
September 29, 2017
Supreme Court, Suffolk County
Docket Number: 2001/2010
Judge: Denise F. Molia
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SHORT FORM ORDER

INDEX No. 2001/2010  
CAL. No. 16-02301OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 3-17-17 (010)  
MOTION DATE 4-14-17 (011)  
MOTION DATE 5-12-17 (012)  
ADJ. DATE 5-12-17  
Mot. Seq. # 010 - MG  
          # 011 - MD  
          # 012 - MD

-----X  
JUDY BERG and STEPHAN BERG,

Plaintiffs,

- against -

VERIZON NEW YORK, INC., TOWN OF  
HUNTINGTON, DIX HILLS WATER  
DISTRICT, CENTER ISLAND SERVICES,  
INC., CABLEVISION SYSTEMS CORP., and  
CSC HOLDINGS, LLC.,

Defendants.  
-----X

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Upon the following papers numbered 1 to 48 read on these motions for summary judgment and to strike pleading; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 19 - 39; 40 - 43; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 44 - 45; Replying Affidavits and supporting papers 46 - 47; Other Affirmation, 48; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion (#010) by defendant Verizon New York, Inc., the cross motion (#011) by defendants Town of Huntington and Dix Hills Water District (improperly denominated as a cross motion), and the motion (#012) by plaintiffs Judy Berg and Stephan Berg, are consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion (#010) by defendant Verizon New York, Inc. for summary judgment dismissing the complaint and all cross claims against it is granted; and it is

**ORDERED** that the motion (#011) by defendants Town of Huntington and Dix Hills Water District for summary judgment dismissing the complaint and all cross claims against them is denied; and it is further

**ORDERED** that the motion (#012) by plaintiffs for an order striking defendant Verizon New York, Inc.'s answer or for a negative inference is denied.

Plaintiff Judy Berg commenced this action to recover damages for injuries allegedly sustained as a result of falling from her bicycle while riding on a roadway between premises known as 43 and 45 Seward Drive, Dix Hills, New York. The accident allegedly occurred on May 25, 2009, when plaintiff's bicycle hit an area of the road with improper paving where installation work had been performed. The bill of particulars alleges that defendants negligently constructed or repaired the subject roadway. Judy Berg's husband, Stephan Berg, brought a derivative cause of action for loss of services.

Defendant Verizon New York, Inc. (Verizon) now moves for summary judgment dismissing the complaint against it on the ground that there is no evidence that it created the alleged defective condition. In support of its motion, Verizon submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, photographs of the area when the accident occurred, and the permit that was issued by the Town of Huntington to Verizon.

Plaintiffs move for an order striking Verizon's answer or for a negative inference, and oppose Verizon's motion for summary judgment. Plaintiffs argue that a triable issue of fact still remains as to whether Verizon created the defective condition. They further argue that while the notices for discovery and inspection called for production of all invoices, work orders and documents related to the installation of the conduits and fiber optic cables at Seward Drive, Verizon has only produced its contract with a subcontractor and the road opening permit. In support of their motion and in opposition to Verizon's motion, plaintiffs submit a transcript of a non-party witness, Lisa Messina, and a copy of the notice for discovery and inspection.

Defendants Town of Huntington and Dix Hills Water District (hereinafter referred to as the Town defendants) move for summary judgment, arguing that there was no prior written notice of the alleged defect.

In support of their motion, the Town defendants submit copies of the pleadings, transcripts of the parties' deposition testimony, and affidavits of Diana Esposito, Richard Scheffler, and John Hennessey. Plaintiffs oppose the motion, arguing that the Town defendants affirmatively created the dangerous condition which caused the accident. In opposition, plaintiffs submit a copy of a document from the Town of Huntington which is entitled "Time and Material Report."

At her examination before trial, nonparty witness Lisa Messina, who lives on property located on 45 Seward Drive in Dix Hills, testified that on the day of the accident, her husband informed her that someone had fallen off of a bicycle. She testified that plaintiff told her the fall was caused by a bump or indent on the road. When asked to describe the area of the roadway which allegedly caused the fall, she testified that there was tar on a patch of the roadway which was not flat and that there was a hole in it. She further testified that about six to seven months before the accident, she observed a van from either Cablevision or Verizon near the area where the subject accident occurred and two workers, one with a shovel, doing work in that area.

At his examination before trial, Arnold Weidner, who is employed by Verizon as an outside plant engineer, testified that his department is involved in designing and bringing new products, such as Verizon FIOS, to various locations. He testified that Verizon has an account with Dycom Industries, a contractor, which hired Horan LLC, a local contractor, to install the FIOS program. He explained that to install FIOS, the contractor would dig holes into the street and use a tunneling device, referred to as a missile, to create a conduit system. He testified that in July and August of 2008, Horan performed the work in the vicinity of the subject location. When shown a photograph of the area where the subject accident occurred, he testified that the lighter patch was performed by Horan and that he does not know who installed the darker patch, which is where the defect that caused plaintiff's accident was located.

At his examination before trial, Clifford Press, who was employed for a contractor which was doing work for Verizon, testified that he met with the crew members installing FIOS at the subject location and that he was there to make sure the boxes were placed in the correct location. When shown a photograph of the area where the subject accident occurred, he identified the lighter patch as the spot which was dug up during the installation. He explained that the conduit goes underground and, after it is installed, the hole is closed up with a "cold patch." He testified that at some point afterwards, the cold patch is replaced by a permanent patch in which separate crew members dig up the cold patch, check that the area is sturdy, put blacktop onto the road, roll and press it down, and then sealing it with liquid tar. He testified that he inspected the area after the permanent patch was placed and the darker patch where the alleged defect is located was not there. He testified that in order to place the fiber optic cable into the conduit, the road would not have to be reopened, as they can use a "giant reel" to pull the lines through the open boxes.

At his examination before trial, Michael Fender, who is employed by Communications Construction Group (CCG) as a project supervisor, testified that his duties include overseeing construction projects from beginning to end and that he was involved in the FIOS installation project at the subject location. He testified that he was at the site daily, conducting "interval inspections," and that the work at the subject location, including digging up the road and closing it, only took one day. He testified that after the road was closed with a cold patch, a permanent patch was done, which he visually inspected and determined it to be

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sufficient. He testified that the lighter patch was the one performed during the FIOS installation and that he does not believe the darker patch was there at the time of his inspection.

At his examination before trial, Steven Desz, who is employed by Verizon as an outside local manager, testified that he supervises technicians during construction. He testified that he does not know whether he was present during the installation of the fiber optic cables at the subject location.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well settled that where a municipal defendant has enacted a prior written notice statute it may not be subjected to liability for injuries caused by a dangerous or defective condition of a roadway or sidewalk unless it has received prior written notice of the dangerous or defective condition complained of by the plaintiff or an exception to the prior written notice requirement applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Griesbeck v County of Suffolk*, 44 AD3d 618, 843 NYS2d 162 [2d Dept 2007]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]). Prior written notice statutes require receipt of written notice of the particular condition about which the plaintiff complains (*see Hampton v Town of North Hempstead*, 298 AD2d 556, 748 NYS2d 675 [2d Dept 2003]). Further, the prior written notification requirement also is applicable to walkways within a community college (*see Delgado v County of Suffolk*, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]; *DeLuca v County of Nassau*, 207 AD2d 428, 615 NYS2d 741 [2d Dept 1994]). The Court of Appeals has recognized only two exceptions to the statutory rule requiring prior written notice (*Amabile v City of Buffalo, supra*; *Carlo v Town of Babylon*, 55 AD3d 769, 869 NYS2d 549 [2008]). The first exception applies in cases where the municipality caused or created the subject defect or hazard through an affirmative act of negligence (*see Amabile v City of Buffalo, supra*). The second exception applies in cases where a special use confers a special benefit upon the municipality (*see Amabile v City of Buffalo, supra*; *Berner v Town of Huntington*, 304 AD2d 513, 757 NYS2d 585 [2d Dept 2003]).

Here, the Town defendants submit evidence demonstrating that there was no prior written notice or complaint regarding any complaint as to the paving or installation work done on the roadway at the subject location. However, the prima facie showing a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings (*see Miller v Village of East Hampton*, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]; *Braver v Village of Cedarhurst*, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]). Plaintiff alleged that defendant created the alleged dangerous condition

by improper installation or repair work done on the subject roadway. The Town defendants failed to eliminate all triable issues of fact as to whether they affirmatively created the condition, as they merely submit evidence that they did not receive prior written notice of the alleged dangerous condition (*see Zielinski v City of Mount Vernon*, 115 AD3d 946, 982 NYS2d 531 [2d Dept 2014]; *Carlucci v Village of Scarsdale*, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]). The Town defendants contend that there is no evidence that they affirmatively created the alleged defective condition. However, they cannot obtain summary judgment by pointing to gaps in plaintiff's proof; rather, they must adduce affirmative evidence that they did not affirmatively create the condition (*see Yun Tung Chow v Reckitt & Coman, Inc.*, 17 NY3d 29, 26 NYS2d 377 [2011]; *Torres v Industrial Container*, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; *Antonucci v Emeco Indus.*, 223 AD2d 913, 636 NYS2d 495 [3d Dept 1996]). Having determined that the Town defendants failed to establish their prima facie burden on the motion, it is unnecessary to consider the sufficiency of plaintiffs' papers in opposition (*see Zambri v Madison Sq. Garden, L.P.*, 73 AD3d 1035, 901 NYS2d 377 [2d Dept 2010]). Accordingly, the motion by the Town defendants for summary judgment dismissing the complaint against them is denied.

As to plaintiffs' motion to strike Verizon's answer or for a negative inference, a party seeking the drastic remedy of striking a pleading under CPLR 3126 on the ground that it was aggrieved by the spoliation of evidence must make a clear showing that the party to be sanctioned wilfully and contumaciously failed to comply with disclosure demands (*see Denoyelles v Gallagher*, 40 AD3d 1027, 834 NYS2d 868 [2d Dept 2007]; *Mylonas v Town of Brookhaven*, 305 AD2d 561, 759 NYS2d 752 [2d Dept 2003]). Alternatively, under the common-law doctrine of spoliation, a party that destroys crucial items of physical evidence, whether intentionally or negligently, before the opposing party has an opportunity to inspect them is properly punished by the striking of its pleading if it was on notice that the evidence might be needed for future litigation (*see Klein v Ford Motor Co.*, 303 AD2d 376, 756 NYS2d 271 [2d Dept 2003] *Foncette v LA Express*, 295 AD2d 471, 744 NYS2d 429 [2d Dept 2002]; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53, 682 NYS2d 452 [2d Dept 1998]).

Here, plaintiffs' motion to strike Verizon's answer or for a negative inference is inappropriate, as plaintiffs have already filed the note of issue without reserving their rights or preserving objections (*see Rivera Irby v City of New York*, 71 AD3d 482, 896 NYS2d 337 [1st Dept 2010]). Thus, spoliation sanctions are not warranted (*c.f. Squitieri v City of New York*, 248 AD2d 201, 669 NYS2d 589 [1st Dept 1998]), and plaintiffs' motion is denied.

With regard to Verizon's motion for summary judgment, Verizon has made a prima facie showing that it did not create the alleged dangerous condition. Here, Weidner, Press, and Fender all testified that the lighter patch was the one installed by Horan when its crew members closed the roadway after the installation of the conduit. Press and Fender both testified that they inspected the area after a permanent patch was installed on the roadway and that there was no defect. Press and Fender also testified that the darker patch, which is where the defect that caused plaintiff's accident was located, was not there at the time of their inspection. In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff contends that nonparty witness Messina's testimony demonstrates that either Cablevision or Verizon did work on the roadway where the subject accident occurred. However, such testimony is insufficient to raise a triable issue of fact as Messina is unable to recall whether Cablevision or Verizon employees were doing work. Moreover, she

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does not testify what type of work they were doing and whether the defect existed before or after the work was done. Furthermore, Press testified at his deposition that once the road work was done, there was no need to reopen the road again as they would only need to thread the fiber optic cables through the underground conduits when residents ordered FIOS service from Verizon. Accordingly, Verizon's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: Sept. 29, 2017

*Denise Medina*  
A.J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION