Verizon N.Y., Inc. v Consolidated Edison, Inc.
2017 NY Slip Op 32925(U)
January 31, 2017
Supreme Court, New York County
Docket Number: 111969/11
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon PART 42
Justice

VERIZON NEW YORK, INC.

- v -

CONSOLIDATED EDISON, INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

[And a Third-Party Action]

INDEX NO. 111969/11

MOTION DATE 12-18-15

MOTION SEQ. NO. 001

The following papers were read on this motion by defendant/third-party plaintiff to dismiss the complaint.

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits — Memorandum of Law ---------- No(s). 1

Answering Affirmation(s) — Affidavit(s) — Exhibits ---------- No(s). 2

Replying Affirmation — Affidavit(s) — Exhibits ---------- No(s). 3

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In this property damage action, the plaintiff, Verizon New York, Inc. (Verizon), seeks to recover $105,130.27 in costs it incurred in repairing damage to its telecommunications equipment, *i.e.* an underground cable, near Avenue A and 10th Street in Manhattan on January 23, 2010, allegedly caused by steam leaking from the facilities of the defendants, Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc., ("Con Ed"). Con Edison, who also commenced a third-party action against Empire City Subway Company, Ltd., now moves to dismiss the complaint on the ground of spoliation of evidence by Verizon. Verizon opposes the motion. The motion is denied.

First, the court notes that, although the motion is denominated both as a motion for spoliation sanctions (CPLR 3216) and a motion for summary judgment (CPLR 3212), the common-law doctrine of spoliation is the ground raised in both. Thus, this is essentially a motion seeking a sanction for spoliation. "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (Kirkland v New York City Housing Auth., 236 AD2d 170, 173 [1st Dept. 1997]) and after being placed on notice that such evidence might be needed for future litigation. See New York City Housing Auth.v Pro Quest Security, Inc., 108 AD3d 471 (1st Dept. 2013); Sloane v Costco Wholesale Corp., 49 AD3d 522 (2nd Dept. 2008). Furthermore, the Supreme Court has "broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation... or employing an adverse inference

instruction at the trial of the action." Ortega v City of New York, supra at 76; see CPLR 3126; Voom HD Holdings LLC v Echostar Satellite LLC, 93 AD3d 33 (1st Dept. 2012); General Security Ins. Co. v Nir, 50 AD3d 489 (1st Dept. 2008). However, "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct." Iannucci v Rose, 8 AD3d 437 (2nd Dept. 2004); see Melcher v Apollo Medical Fund Mgt. LLC, 105 AD3d 15 (1st Dept. 2013); Russo v BMW of North America, LLC, 82 AD3d 643 (1st Dept. 2011). Thus, the sanction of dismissal of the complaint or answer is warranted only where the alleged spoliation prevents the movant from inspecting a key piece of evidence which is crucial to the movant's case or defense (see Mudge, Rose, Guthrie, Alexander & Ferdon v Penguin Air Conditioning, Inc., 221 AD2d 243 [1st Dept. 1995]; Bach v City of New York, 33 AD3d 544 [1st Dept. 2006]) or has left the movant "'prejudicially bereft' of the means of presenting their claim." Kirkland v New York City Housing Auth., supra at 174, quoting *Hoenig, Products Liability, Impeachment Exception: Spoliation Update*, NYLJ, Apr. 12, 1993, at 6, col 5); see Canaan v Costco Wholesale Membership, Inc., 49 AD3d 583 (2nd Dept. 2008). That is not the case here.

It is not disputed that, save for a small section, the subject cable remained in the ground after Verizon performed emergency repairs of the damaged portions in order to quickly restore service to it customers. Thus, Con Edison, who had personnel at the scene at the time of or shortly after the incident, were timely informed of the incident and had an opportunity to inspect the cable. Con Edison requested, by letter dated April 19, 2010, that Verizon retain the damaged cable for an inspection, but did not serve a notice to inspect until four years later. Further, Con Edison is not left "prejudicially bereft" of the means of presenting its defense. The discovery process has produced numerous reports and photographs, as well as testimony, which can be used in its defense. This includes the testimony of Jonathan Joscher, a mechanic in Con Edison's Steam Department, who, in an affidavit, states that he performed a follow-up inspection late in the day of the incident, after Verizon excavated the street and after an initial inspection by Con Edison was not completed due to traffic conditions. Joscher alleges that he found no steam leak near the Verizon equipment, but only a small "packing" leak nearby which did not travel to the effected cable. A second affidavit submitted by Con Edison is that of James Freer, a retired Verizon employee, who inspected reports, photographs and other records. He opined that since Verizon's records indicate both a "defective lead sleeve" and a "steam section", he could not determine the actual cause without inspecting the cable.

To the extent that Con Edison is alleging that the entire cable may have been removed by Verizon years after the incident and not preserved, the proof submitted is insufficient to support granting the motion on that basis. The court also notes that in its motion papers, Con Edison submitted the affidavits of Joscher and Freer, but no deposition transcripts. Deposition testimony was submitted only in opposition and excerpts were submitted in reply.

Thus, this case is distinguishable from Verizon New York, Inc. v Consol. Edison, Inc., 44 Misc 3d 1206(A) (Sup Ct, NY County 2014), where the cause of the damage to the discarded cable was in

real dispute, and the court's dismissal of the complaint was predicated upon Verizon's failure to comply with numerous discovery demands and twelve court orders (see CPLR 3126), circumstances not present here. Nor is dismissal of the instant complaint mandated by the holding in Verizon New York, Inc. v Consol. Edison Co. of New York, Inc., 54 AD3d 599 (1st Dept. 2008). There, the parties also disputed the cause of the damage to a cable, Verizon arguing that it was "burnout" caused by Con Edison and Con Edison arguing that it was Verizon's own negligence in allowing the cables to undergo a process known as electrolysis. The court, while noting that the absence of the cable "substantially hinders" (Cohen Bros. Realty v Rosenberg Elec. Contrs., 265 AD2d 242, 244 [1999] lv dism 95 NY2d 791 [2000]) Con Edison's ability to prove the cause of the damage, nonetheless imposed a lesser remedy. Since the subject cable was not discarded but remained in the ground, the Appellate Division declined to impose the drastic remedy of striking the complaint and instead imposed the cost of excavation of the cable upon the plaintiff.

For these reasons, Con Ed has not demonstrated that the damaged cable was such a "key" piece of evidence and crucial to its defense, that it had no opportunity to inspect it and that its absence left it "prejudicially bereft" of a means of presenting a defense (see Kirkland v New York City Housing Auth., supra at 174) so as to warrant striking the complaint. However, while striking of the complaint is not warranted, the movants may seek an adverse inference charge at trial, a more appropriate remedy in this case, "which will prevent [Verizon] from using the absence of [the cable] to its tactical advantage." General Motors Acceptance Corp. v New York Central Mutual Fire Ins. Co., 104 AD3d 523, 526 (1st Dept. 2013); see Suazo v Linden Plaza Assocs., L.P., 102 AD3d 570 (1st Dept. 2013); Ever Win, Inc. v 1-10 Indus. Assoc., supra.

To the extent Con Edison is seeking summary judgment pursuant to CPLR 3212 on a ground of lack of negligence, the court finds it has not established entitlement to that relief. The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish its entitlement to such relief as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted where there is any doubt about the issue.'" Bronx-Lebanon Hospital Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Con Edison failed to tender proof sufficient to eliminate any triable issues of fact as to whether

the damage to Verizon's cable was caused in whole or part by Con Edison's negligence. Even assuming the two affidavits submitted were sufficient to meet Con Edison's burden, the submissions of Verizon raised triable issues as to the cause of the cable failure. Verizon's submissions included the deposition testimony of Michael Arcati, a Verizon cable maintenance manager, who responded with his team to the location after a service failure was reported and found steam coming from a newly installed Con Edison cement street grading. He testified that he asked Con Edison personnel at the scene to "slow down the steam" so he could repair the cable, but once that portion of the street was opened up, the steam dissipated, enabling him to safely lift the cable and work on it.

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

Dated: January 31, 2017

FILED
FEB 21 2017
COUNTY CLERK'S OFFICE
NEW YORK

JSC
HON. NANCY M. BANNON

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER