

Passantino v City of New York
2021 NY Slip Op 31986(U)
July 9, 2021
Supreme Court, Bronx County
Docket Number: 22973/2014E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 22973/2014E
Motion Date: 3/15/21
Motion Seq No. 6

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JOSEPH PASSANTINO,
Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY, NEW YORK CITY
DEPARTMENT OF EDUCATION and ADMIRAL
CONSTRUCTION, LLC,
Defendants.

Decision/ Order
Present:
Hon. Wilma Guzman
Justice Supreme Court

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THE CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF EDUCATION,
Third-Party Plaintiff,

-against-

VERIZON COMMUNICATION, INC. and AT&T INC.,
Third-Party Defendants.

Decision/ Order
Present:
Hon. Wilma Guzman
Justice Supreme Court

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Recitation as required by CPLR 2219(a), of the papers considered in the review of these motions:

<u>Papers</u>	<u>Numbered</u>
VERIZON’S Notice of Motion, Affirmation in Support and Exhibits thereto.....	1
CITY OF NEW YORK’S Notice of Cross Motion, Affirmation in support, Affirmation in Opposition to VERIZON’s Summary Judgment and Exhibits Annexed thereto.....	2
VERIZON’S Affirmation in Opposition to CITY OF NEW YORK’s Cross Motion and Reply in Affirmation and Exhibits thereto.....	3

Upon the foregoing papers, the Decision/Order on this motion is as follows:

Upon deliberation of the application made by Third-Party Defendant VERIZON COMMUNICATION, INC, (hereinafter “Verizon”) herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an order, pursuant to CPLR § 3212, for summary judgement dismissing Third Party Plaintiff’s THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF EDUCATION, (hereinafter “The City Defendants”) complaint and cross claim against VERIZON is hereby granted.

Upon deliberation of the application made by Third-Party Plaintiff the CITY Defendants, herein, by **NOTICE OF CROSS-MOTION**, and all the papers in connection therewith, for an order, striking Third Party Defendant's Verizon's pleadings for failure to respond to discovery orders is rendered moot.

This is an action arising out of injuries allegedly sustained by Plaintiff when he fell after getting caught in a tarp on a scaffolding located at PS 277, 519 St. Ann's Avenue, Bronx New York (hereinafter "Subject Premises") on December 16, 2013. Third-Party Plaintiffs The City contracted AT&T to provide and install internet, cable, and services related to those goals. AT&T then contracted Verizon to perform the contracted tasks.

Verizon's Summary Judgement Motion

Verizon argues that they are not required to indemnify the City Defendants because they provided Plaintiff with workers compensation benefits which bars any indemnification or contribution claims against them. Verizon argues that they are immune to indemnification and contribution because they provided workers compensation relief to Plaintiff. Verizon relies on the definitions provided in Workers Compensation Laws § 10 and 11, as well as testimony provided by plaintiff to support their claims.

In opposition, Third-Party Plaintiff the City argues that 1) Verizon has not met its standard for summary judgement because there are still triable issues of fact that they have not disproved, 2) that even if Verizon is not liable through common law indemnification they are still required to indemnify The City because of their contractual obligations, and 3) that it is premature to rule on this matter as relevant discovery has not been completed. Third-Party Plaintiff, the City further argue that even if Verizon cannot be held liable for common law indemnification and contribution Verizon would still be required contractually to indemnify Third-Party Plaintiff, the City.

Standard of Review

Summary Judgement is designed to "expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law." Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133 (1974). The moving party must make a "prima facie showing of entitlement to judgement as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). If the movant fails to make such a showing the court must deny the motion for summary judgement regardless of the sufficiency of the opposing papers. *Id.* To defeat a motion for summary judgement the non-moving party must show that there is a genuine triable issue of fact. Fender v. Prescott, 101 A.D.2d 418, 425, 476 N.Y.S.2d 128, 133 (1st Dep't 1984). The issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief. *Id.* at 425.

According to Workers Compensation Law § 10 every employer subject to this chapter must, "secure compensation to his employees and pay or provide for compensation for their disability

or death from injury arising out of and in the course of the employment without regard to fault as a case of the injury". Further, Workers Compensation Law § 11 states that, the liability of an employer prescribed by the last preceding section, § 10, shall be "exclusive and in place of any other liability whatsoever", to the employee his or her family or anyone else entitled to recover damages. Workers Compensation Law § 11 bars claims for contribution or indemnification, against an employer unless there is competent medical evidence that the employee sustained a "grave injury" which shall only mean one or more of the following, "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent and total disability. Here, Plaintiff testified that he was an employee of Verizon at the time of the accident and received workers compensation benefits from them. Further, none of the injuries sustained by Plaintiff fit into the list of "grave injuries" provided by Workers Compensation Law § 11. While Verizon's contract did provide an indemnification clause and requirements, the contract was made between Verizon and AT&T. Hence, The City has no privity of contract with Verizon and therefore cannot claim contractual indemnification for a contract they are not a party to. Dorador v. Trump Palace Condominium, 190A.D.3d 479, 496 (2021). For the foregoing reasons, Verizon's motion for summary judgement is hereby granted.

City of New York's Motion to dismiss Verizon's pleading

Third-Party Plaintiff the City argues that the Court should strike Verizon's pleadings for failure to answer discovery demands pursuant to CPLR §3126. The City contends that Verizon failed to provide the proper documents in discovery and gives a list of requests Verizon has failed to provide, including Verizon's policies and procedures about work injuries, their procedures about returning to work, ADA compliance forms, job description and responsibilities of Plaintiff and Plaintiff's records. Third-Party Plaintiff's the City cite multiple requests for discovery made by them to Verizon that Verizon failed to comply with.

In opposition, Verizon argues that they did in fact provide the information requested by The City that were relevant to the case at hand on February 20, 2020, June 26, 2020 and August 3, 2020, to wit: all the workers compensation claims documents and medical records. Verizon further argues that some of the documents requested were either misplaced or irrelevant to the case at hand.

It is well settled that "the drastic remedy of striking a party's pleading pursuant to CRLP 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith". Henderson-Jones v. City of New York, 87 A.D.3d 498, 504 (1st Dept 2011). Willful and contumacious behavior is can be "inferred by a failure to comply with court orders, in the absence of adequate excuses". Id at 498.

According to the Court file, Verizon provided responses in compliance with the Court's Order. There is no evidence to suggest that any purported non-disclosure by Verizon was "willful,

contumacious or due to bad faith” and therefore the City’s motion to strike Verizon’s pleadings is hereby denied. Moreover, as a procedural matter, this Court having granted Third-party Defendant Verizon’s motion for summary judgment dismissing the Third-party action as to Verizon, renders the City Defendants’ motion to strike the pleadings, moot.

Accordingly, it is,

ORDERED AND ADJUDGED Third-Party Defendant Verizon’s motion for summary judgement dismissing Plaintiff’s complaint is hereby granted. It is further,

ORDERED AND ADJUDGED that Third Party Plaintiffs CITY OF NEW YORK’s Motion for Summary Judgement against Verizon is hereby denied.

This constitutes the Decision and order of the Court

Dated: July 9, 2021



HON. WILMA GUZMAN, J.S.C.