

|  |
|--|
| <b>Liberty Mut. Fire Ins. Co. v PSEG Long Is.</b>  |
| 2021 NY Slip Op 33531(U)   |
| September 27, 2021   |
| Supreme Court, Nassau County   |
| Docket Number: Index No. 606274/2016   |
| Judge: Leonard D. Steinman   |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication.   |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

LIBERTY MUTUAL FIRE INSURANCE COMPANY  
a/s/o CHARLES BELOT,

Plaintiff,

-against-

PSEG LONG ISLAND, JOHN DOES 1-X  
(names being fictitious) and ABC  
CORPORATION 1-X (names being fictitious),

Defendants.

IAS Part 8  
Index No. 606274/2016  
Mot. Seq. Nos. 001-002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law and/or statement of material facts submitted by the parties, were reviewed in preparing this Decision and Order:

|  |   |
|--|---|
| PSEG’S Notice of Motion, Affirmation & Exhibits.....             | 1 |
| Plaintiff’s Affirmation in Opposition & Exhibits.....            | 2 |
| Plaintiff’s Notice of Cross-Motion, Affirmation & Exhibits.....  | 3 |
| PSEG’s Affirmation in Opposition to Cross-Motion & Exhibits..... | 4 |
| Plaintiff’s Reply Affirmation.....                               | 5 |

In this action, Liberty Mutual Fire Insurance company, as subrogor of Charles Belot, seeks to recover property damages allegedly resulting from a September 25, 2014 fire at Belot’s home in Elmont New York. PSEG Long Island now moves for summary judgment pursuant to CPLR 3212. Liberty Mutual cross-moves for the same relief. For the reasons set forth below the motion and the cross-motion are denied.

**BACKGROUND**

Plaintiff alleges that the fire at Belot’s home was caused by a disconnected neutral wire (referred to as an “open neutral”) located at the utility pole near the street outside of Belot’s home. PSEG contests this, but further asserts that if there was an open neutral it was because the wires were cut—and PSEG never cut the wires. Plaintiff alleges the open neutral resulted from corrosion due to a lack of maintenance:

PSEG, which was responsible for service and maintenance of the poles and wires owned by the Long Island Power Authority (including the pole and wires at issue) since January 1, 2014, argues that since it did not cut the wires and had no notice of any defective condition of the wires or pole it cannot be held liable for damages resulting from the fire.<sup>1</sup> It is not disputed that PSEG did not inspect or service the pole or wires servicing the property prior to the fire.

Plaintiff argues that the wires degraded because of lack of maintenance. Plaintiff argues that there is no evidence that the pole was inspected since 1999 and that PSEG failed to have in place a routine, preventative maintenance or inspection schedule.

### LEGAL ANALYSIS

It is the movant which has the burden to establish its entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). “CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses.” *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). Where the movant fails to meet its initial burden as the movant, the motion for summary judgment should be denied. *US Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014). The drastic remedy of summary judgment should be granted only if there are no material issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974).

A defendant's burden cannot be satisfied merely by pointing to gaps in the plaintiff's proof. *Cruz v. 1142 Bedford Avenue, LLC*, 192 A.D.3d 859 (2d Dept. 2021); *Jablonsky v. Nerlich*, 189 A.D.3d 1561 (2d Dept. 2020).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form.

---

<sup>1</sup> Belot did experience problems with the lights of his home dimming and brightening but this issue was never reported.

*Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

PSEG fails to set forth an explanation for the fire. It has not established *prima facie* that an open neutral did not cause the fire since it provides no evidence in this regard. Instead, PSEG relies merely on the absence of any mention of an open neutral in the reports of a Nassau County Fire Marshall and PSEG serviceman shortly after the fire.<sup>2</sup> But PSEG does not dispute that an open neutral was later discovered a few days later.

PSEG then argues that if an open neutral caused the fire it still is not responsible because all of the wires between the utility pole and the house were cut—not by it—and did not corrode. But plaintiff has raised an issue of fact in this regard through its expert affidavit.

PSEG further argues that it had no notice of any defective condition if there was corrosion.<sup>3</sup> A defendant has constructive notice of a hazardous condition when it has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it following a reasonable inspection. *Buckshaw v. Oliver*, 197 A.D.3d 691 (2d Dept. 2021); *Catalano v. Tanner*, 23 N.Y.3d 976 (2014); *Fasano v. St. Bernard Church*, 169 A.D.3d 645 (2d Dept. 2019); *cf.*, *Monroe v. City of New York*, 67 A.D.2d 89 (2d Dept. 1979). PSEG sets forth no evidence of an inspection or maintenance schedule for the poles, wires or the connections it services. Although PSEG has presented evidence that the area in which the pole was located was more “reliable” than the system’s average leading to the fire, that fact still does not tell us the substance of PSEG’s practices and procedure concerning inspections. And PSEG’s expert’s conclusion that PSEG’s service, inspection and maintenance of the wires were “within industry standards” is just that: a conclusion. The expert does not disclose what those industry standards are. He also states that the high

---

<sup>2</sup> PSEG raises other arguments in its reply papers not contained in its initial submission to further support the argument that an open neutral did not cause the fire but this is impermissible. See *Allstate Ins. Co. v. Dawkins*, 52 A.D.3d 826 (2d Dept. 2008).

<sup>3</sup> PSEG, although it did not own the pole or wires, does not argue that it owed no legal duty to Belot.

reliability of the area meant that there was no need for anything other than “normal maintenance,” but does not divulge what “normal maintenance” entails.

In all events, plaintiff has created an issue of fact as to whether (i) the fire was caused by an open neutral, (ii) the open neutral resulted from corrosion and deterioration; and (iii) PSEG had constructive notice of a defective condition. PSEG’s deposition witness testified that PSEG did not have a practice or procedure for performing routine or preventative maintenance on neutral wires on the poles.

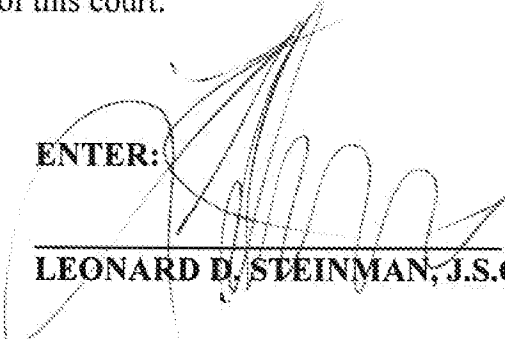
The parties’ factual disputes also compel denial of plaintiff’s cross-motion for summary judgment.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: September 27, 2021  
Mineola, New York

**ENTERED**  
**Sep 30 2021**  
NASSAU COUNTY  
COUNTY CLERK’S OFFICE

ENTER:   
LEONARD D. STEINMAN, J.S.C.