

Alberts v City of New York

2022 NY Slip Op 32343(U)

July 15, 2022

Supreme Court, New York County

Docket Number: Index No. 155168/2017

Judge: J. Mabelle Sweeting

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

DEBRA ALBERTS,

Plaintiff,

- v -

CITY OF NEW YORK, CITYBRIDGE LLC, TIME WARNER
CABLE,

Defendants.

-----X

TIME WARNER CABLE

Plaintiff,

-against-

OLD HDE INC., INDIVIDUALLY AND AS SUCCESSOR IN
INTEREST TO HYLAN DATACOM & ELECTRICAL INC.,
HYLAN DATACOM & ELECTRICAL INC., HYLAN DATACOM
& ELECTRICAL LLC, INDIVIDUALLY AND AS SUCCESSOR
IN INTEREST TO, HYLAN DATACOM & ELECTRICAL INC.

Defendants.

-----X

INDEX NO. 155168/2017

MOTION DATE 02/18/2022,
05/16/2022

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595888/2020

The following e-filed documents, listed by NYSCEF document number (Motion 005) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 171, 172, 173, 174

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In the underlying action, plaintiff Debra Alberts seeks monetary damages for injuries she allegedly sustained on March 1, 2017 when she tripped and fell on a roadway defect in the crosswalk at the northeastern corner of the intersection of Broadway and 56th Street, New York, New York.

Pending before the court are two motions: The first is Motion #005 wherein defendant/third-party plaintiff SPECTRUM NEW YORK METRO, LLC (f/k/a TIME WARNER CABLE NEW YORK CITY LLC) s/h/a TIME WARNER CABLE (“Time Warner”) seeks summary judgment, pursuant to Civil Practice Law and Rules (“CPLR”) Section 3212, dismissing plaintiff’s claims and all cross-claims with prejudice. The second is Motion #006 wherein third-party defendant, OLD HDE INC., individually and as successor in interest to HYLAN DATACOM & ELECTRICAL INC, HYLAN DATACOM & ELECTRICAL LLC, individually and as successor in Interest to, HYLAN DATACOM & ELECTRICAL INC., and HYLAN DATACOM & ELECTRICAL INC. (collectively, “Hylan”) seeks summary judgment, pursuant to CPLR 3212, dismissing the third-party complaint brought by Time Warner, and all cross-claims asserted against Hylan.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most

favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments Made with Respect to Motion #005 (filed by Time Warner)

In its motion, Time Warner argues that neither Time Warner nor its contractor, Hylan, performed work at the subject location. Time Warner further argues that it did not create the alleged defect or have a duty to maintain that area.

In support of its argument, Time Warner submitted the sworn Affidavit of John Piazza, the Construction Manager of TIME WARNER (NYSCEF Document #161) and a packet of “Time Warner Cable work records” (NYSCEF Document #162).

The only opposition was filed by plaintiff who argued that the motion was premature, in that Time Warner has not yet been deposed, and that a diagram attached to Time Warner’s motion, (NYSCEF Document #162, page 15; Document #172, page 1), showed that there was work performed along 55th street for 57 feet, and the work then proceeded north for 271 feet on Broadway. Plaintiff argues that the diagram shows that the work performed could have encompassed the accident location at 56th Street and Broadway.

In Reply, Time Warner submitted a second sworn Affidavit of John Piazza, (NYSCEF Document #174), to “rebut an incorrect assumption made by plaintiff’s counsel.” Time Warner also argued that its motion was not premature, as plaintiff did not refer to any outstanding discovery.

Arguments Made with Respect to Motion #006 (filed by Hylan)

In their motion, Hylan argues that they did not complete any construction work at the subject location, did not create any alleged defect or hazardous condition and cannot, therefore, be found liable for plaintiff’s alleged injuries. While Hylan admits that they performed work at the intersection of 56th Street and 7th Avenue, Hylan argues that this location was “one city block away from the subject location and in no way involved, related, or near where the subject accident

allegedly occurred.” Hylan argues that even Mr. Piazza, a witness from third-party plaintiff Time Warner, admitted that Hylan was not contracted to perform any work to the roadway at the subject location.

In support of their argument, Hylan attached the sworn Affidavit of John Gambino, the Director of Field Operations at Hylan. The only responsive papers were filed by Time Warner, in partial opposition. Time Warner argues, first, that the issue raised by plaintiff was a “red herring” intended to create an issue of fact where none exists, and that the court should find that Hylan’s work was unrelated to the subject defect. Time Warner argues if the court makes this finding, then plaintiff’s complaint should be dismissed against Time Warner, because Time Warner’s only involvement with the areas near the accident site was via the work performed by Hylan.

Time Warner also argues that if the court nevertheless finds that there is an open issue of fact with respect to Time Warner, then the court must also find there is an open issue of fact as to Hylan, because Hylan was an independent contractor working for Time Warner.

Further, Time Warner argues that regardless of whether the court finds Hylan’s work was related or unrelated to the defect, the court should nevertheless not dismiss Time Warner’s third-party claim against Hylan for contractual defense and indemnification. In support of this argument, Time Warner relies, on a First Department case, Espinal v. City of New York, 107 A.D.3d 411 (1st Dept. 2013), which, like the instant action, also involved Time Warner and Hylan, and raised similar issues of law. Time Warner argued that in Espinal, the First Department held that Hylan owed indemnification to Time Warner Cable for any legal claims which “arose out of” Hylan’s work, regardless of whether or not Hylan’s work had physically caused the alleged defect. Time Warner argues that based on Espinal, even if this court were to find that Hylan’s work is

unrelated to the plaintiff's incident, Time Warner's third-party claim against Hylan should nevertheless remain intact.

In Reply, Hylan argues, with respect to the third-party claim, that Espinal differs from the instant matter in one crucial aspect: in Espinal, the court found that Hylan's work was not the ultimate cause of plaintiff's injury, but it was undisputed that Hylan did in fact perform work at the subject intersection where plaintiff was injured. In contrast, in the instant matter, it is undisputed by Time Warner that Hylan did not perform work at the subject intersection that would have impacted the roadway in any way, shape or form.

Conclusions of Law

Both Time Warner and Hylan maintain that they did not perform work at the accident site, and that the diagram is merely a "red herring" to create an issue of fact where none exists. In opposition, plaintiff argues that the diagram produced by Time Warner clearly shows that either Time Warner or Hylan performed work that proceeded north for 271 feet on Broadway, and that this work could have encompassed the accident location at 56th Street and Broadway.

A review of the diagram on which plaintiff relies (NYSCEF Document #162, page 15; Document #172, page 1) shows a dashed line on Broadway, with the accompanying notation of "271'" (i.e., 271 feet). On its face, the diagram suggests that the work site may have extended north on Broadway for 271 feet.

In an attempt to explain this, Time Warner's witness, Mr. Piazza, states that the dashed line merely identifies "underground cables owned by Time Warner Cable running through a pre-existing underground duct system owned and maintained by Empire City Subway" and that "placement of said cables into Empire City Subway's underground duct network does not, and did

not, involve any manner of excavation, paving or other work which would have disturbed the roadway.” Hylan’s witness, Mr. Gambino, states that the work performed by Hylan in the diagram “was exclusively in the intersection of 56th Street and 7th Avenue, not 56th Street and Broadway where plaintiff’s accident allegedly occurred” and that “at no point on or prior to Plaintiff’s accident did Hylan’s work effect or disturb any portion of the subject location where Plaintiff alleges that her accident occurred.”

Conclusion

Given the conflicting accounts, it is hereby:

ORDERED that Motion #005 and Motion #006 are both DENIED as premature; and it is further

ORDERED that Time Warner and Hylan are each granted leave of court to re-file their respective motions after relevant discovery has been conducted.

7/15/2022
DATE


J. MACHELLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE