

Mallory v City of New York

2023 NY Slip Op 30581(U)

February 27, 2023

Supreme Court, New York County

Docket Number: Index No. 452540/2015

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

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TANYA MALLORY,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC., VERIZON NEW YORK,
INC., ROBINSON KASSIEM, JACOB RIVERS,

Defendants.

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INDEX NO. 452540/2015

MOTION DATE 09/19/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160

were read on this motion for REARGUMENT/RECONSIDERATION.

On August 30, 2015, plaintiff commenced this negligence action by summons and complaint alleging that on October 2, 2013 she was injured when a motor vehicle driven by co-defendant Kassiem Robinson, in which plaintiff was a passenger, ran over a manhole located at of East 86th Street and First Avenue which was negligently placed and maintained by defendants the City of New York, Consolidated Edison Company of New York, Inc., and Verizon New York, Inc. (“Verizon”) (NYSCEF Doc. Nos. 1 and 24 [Consolidated Complaints]).

On March 1, 2022, Verizon moved, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all crossclaims against it, on the grounds that Verizon did not own, maintain, control, or make special use of the subject roadway. In support of its motion, Verizon submitted the affidavit of Nai Zhang, an “Engineering Specialist-Network Engineering and Operations,” attesting that:

I am responsible for Verizon facilities for the territory of Manhattan that is composed of the area north of East 64th Street, south of East 130th Street, west of the FDR and Harlem River Drives and east of Fifth/Lennox Avenues. This territory includes the accident location: the intersection of East 86th Street and First Avenue, in the City, County and State of New York.

I am familiar with the location of manholes owned by Verizon in the territory for which I am responsible, and have also consulted the records of Verizon regarding same.

Verizon does not, nor did it at the time of plaintiff's accident on October 2, 2013, own, install or maintain any manholes within the intersection of East 86th Street and First Avenue in the City, County and State of New York.

(NYSCEF Doc. No. 152 [Zhang Aff. at ¶¶1-3] [emphasis added]).

Verizon also submitted the affidavit of Daniel Tergesen, a Construction Manager Consultant for Empire City Subway Company (Limited) ("ECS"), attesting that:

I have reviewed the results of a records search for all ECS facilities and all jobs, installation, construction, excavation, paying, and/or work of any kind completed by ECS or on its behalf, at or near the location of plaintiff's accident on October 2, 2013, specifically located in the eastbound lane just east of the intersection of 86th Street and 1st Avenue in Manhattan, New York (the "Subject Location"), for a period of two years prior to and including the date of the alleged incident. ECS's search revealed no records of any ECS facilities located at the Subject Location.

...

With regards to the Verizon permits produced by the City of New York in their 3rd Response to the Case Scheduling Order, Manhole Embargo Permits are taken out by Verizon when they need ECS to open and close a manhole to work inside the manhole or inspect the inside of the manhole. For the permits in question, no trench work, cuts into the roadway, or any other work that would have disturbed the street occurred. In addition, these Manhole Embargo Permits are in connection with the manhole located on the north side of the intersection known as 86th Street and 1st Avenue. Accordingly, ECS had no facilities, performed no work, and had no connection or involvement with the Subject Location of plaintiff's incident, which is the subject of this lawsuit.

(NYSCEF Doc. No. 153 [Tergesen Aff. at ¶¶5-6, 10-11] [emphasis added]).

In a decision and order dated August 31, 2022 (the "Prior Decision"), this Court denied Verizon's motion, holding, in relevant part, that

[t]he affidavit of Nai Zhang was “notarized without the state and not accompanied by the requisite certificate of conformity” and “the technical defect was not corrected, despite ... timely objection in opposition to defendant[’s] motion.” Even if the Court disregarded this “technical nonconformity” and considered this affidavit it nevertheless fails to satisfy Verizon’s prima facie burden on the instant motion. Zhang’s affidavit does not establish the basis of [his] knowledge regarding the location of Verizon manhole covers or ... explain how [his] role as an Engineering Specialist provides [him] with this knowledge. Neither does the affidavit of Daniel Tergesen establish as a matter of law that Verizon was not involved with the allegedly improper placement of the subject manhole—his affidavit fails to establish the connection between ECS and Verizon and does not establish that Verizon did not perform work at the subject manhole.

(NYSCEF Doc. No. 135 [August 31 2022 Decision and Order]).

Verizon now moves, pursuant to CPLR §2221, to reargue the Prior Decision, arguing that the Court misapprehended relevant facts in determining that Tergesen’s affidavit failed to set forth the relationship between ECS and Verizon and misapprehended the law in: (1) deeming Zhang’s out-of-state affidavit inadmissible; and (2) concluding that Zhang and Tergesen’s affidavits were insufficient to establish Verizon’s prima facie case on its summary judgment motion.

Plaintiff opposes the motion, as do defendants Robinson and Rivers.

The Court now grants reargument and, upon reargument, adheres to the Prior Decision, for the reasons set forth therein and expanded upon below, except to the limited extent that the Prior Decision is modified to permit Verizon to renew its motion for summary judgment upon the completion of discovery.

DISCUSSION

A motion to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion...” (CPLR §2221[d][2]). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally

asserted” (Setters v AI Properties and Developments (USA) Corp., 139 AD3d 492, 492 [1st Dept 2016] [internal citations and quotations omitted]).

The Court did not misapprehend any facts. Contrary to Verizon’s contention, no part of Tergesen’s affidavit, including his statement that “Manhole Embargo Permits are taken out by Verizon when they need ECS to open and close a manhole to work inside the manhole or inspect the inside of the manhole,” establishes that ECS conducts all subsurface work on behalf of Verizon in Manhattan and the Bronx.

While the Court agrees with Verizon that Zhang’s out-of-state affidavit was admissible, despite the absence of a certificate of conformity, because plaintiff did not allege any prejudice arising from its consideration (See Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda, 68 AD3d 672, 673 [1st Dept 2009]; see also Charnov v New York City Bd. of Educ., 171 AD3d 409, 410 [1st Dept 2019]), the Court nevertheless adheres to its denial of Verizon’s motion.

The Court did not misapprehend the law in concluding that Zhang and Tergesen’s affidavits were insufficient to establish Verizon’s prima facie case. Specifically, Zhang and Tergesen each rely upon searches of unspecified “records” without producing these records and their affidavits are, therefore, insufficient to establish summary judgment (See Residential Credit Sols., Inc. v Gould, 171 AD3d 638, 641 [1st Dept 2019] [“[w]here an affiant’s knowledge of the facts alleged is obtained from ... unidentified and unproduced work records, the affidavit lacks any probative value and fails to fulfill the requirement of CPLR §3212(b) that the party seeking summary judgment present affidavits citing material facts from affiants with knowledge of those facts”]).

In light of the foregoing, it is

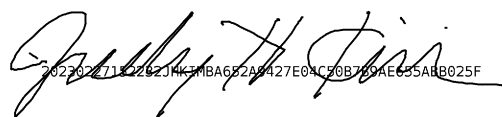
ORDERED that the motion by defendant Verizon New York Inc. to renew and reargue the Court’s Prior Decision is granted; and it is further

ORDERED that, upon reargument, the Court adheres to the Prior Decision, except to the extent that the Prior Decision’s denial of Verizon New York Inc.’s motion for summary judgment is without prejudice to renewal upon the completion of discovery; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all defendants as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) within ten days of the date of this decision and order; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “Efiling” page on this court’s website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



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2/27/2023
DATE

HON. JUDY H. KIM, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |