

|                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Hochberg v Village of Nyack</b>                                                                                                                                                                                             |
| 2024 NY Slip Op 35643(U)                                                                                                                                                                                                       |
| March 12, 2024                                                                                                                                                                                                                 |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 66205/2023                                                                                                                                                                                            |
| Judge: Thomas Quiñones                                                                                                                                                                                                         |
| 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.                                                                                                                                                         |

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

-----X  
JEFFREY DAVID HOCHBERG,

Plaintiff(s)

-against-

VILLAGE OF NYACK, THOMAS LYNCH, and  
VERDE ELECTRIC MAINTENANCE CORPORATION,

Defendant(s).  
-----X

**DECISION AND ORDER**

Index No. 66205/2023

Motion Sequence No. 1

The following papers were filed to the New York State Court Electronic Filing System (NYSCEF) and read on Defendant VERDE ELECTRIC MAINTENANCE CORPORATION's motion for dismissal of Plaintiff's complaint pursuant to CPLR §§3211(a)(1) and (7).

NYSCEF Documents No. 8-31.

**Background Facts:**

Plaintiff filed a Summons and Complaint on August 31, 2023 arising out of a motor vehicle accident. It is alleged that the motor vehicle accident occurred on or about February 4, 2023, at approximately 3:57 p.m., at Route 340 at its intersection with Oak Tree Road, in the Town of Orangeburg, County of Rockland, State of New York. It is further alleged that Plaintiff and Defendant LYNCH's vehicle came into contact with Plaintiff's vehicle as a result of Defendants' negligence without any negligence attributable to Plaintiff. As it relates to VERDE ELECTRIC MAINTENANCE CORPORATION ("VERDE"), Plaintiff alleged that VERDE contracted with the State of New York to repair, inspect, maintain, and control the traffic signal at the subject intersection and VERDE breached such duty.

**Defendant VERDE's Motion:**

Defendant VERDE filed the instant pre-answer motion for dismissal of Plaintiff's complaint pursuant to CPLR §§3211(a)(1) and (7). Counsel contends that co-defendant, LYNCH, commenced a prior action against VERDE and HOCHBERG, by filing a Summons and Complaint in Westchester

Supreme Court under Case Index Number 62342/2023, captioned *Thomas Lynch v. Verde Electric Maintenance Corporation and Jefferey David Hochberg*. The prior action arises from the same accident wherein LYNCH asserts the same allegations against VERDE. Counsel states that subsequent to VERDE filing an Answer, VERDE filed a motion for dismissal based, in part, upon the contract agreement between the New York State Department of Transportation and VERDE, and an Affidavit in Support for Jason Kostner, a Light Forman employed by VERDE as documentary evidence to demonstrate that VERDE was not involved with the traffic control signals at the subject roadway on and prior to the date of the accident. Counsel also states that said motion was resolved by a Stipulation of Discontinuance without Prejudice, signed by all parties, including HOCHBERG, plaintiff in this present action. (Tadros Aff. ¶16, *citing* Plaintiff's Exhibits H, I). Counsel notes that LYNCH and HOCHBERG agreed to sign the Stipulation of Discontinuance without Prejudice, thereby discontinuing the action and their cross-claims against VERDE. (Tadros Aff. ¶12, *citing* Plaintiff's Exhibit G). Accordingly, counsel now contends that VERDE is entitled to dismissal of this present action arising from the same accident and asserting the same negligence allegations against VERDE.

Plaintiff HOCHBERG's Opposition:

Plaintiff's counsel filed opposition based on the following legal arguments.

First, counsel contends that VERDE's motion should be denied at the outset. Counsel cites to CPLR §§3211(e) as governing authority that such motion shall be filed "[a]t any time before service of the responsive pleading is required". Counsel states that VERDE's time to answer the Complaint expired on September 20, 2023, and thus VERDE's motion filed on October 23, 2023 is untimely and should be denied.

Second, counsel refutes VERDE's contention that the present action is not barred by documentary evidence. In that regard, counsel contends that VERDE's documentary evidence is incomplete and insufficient. By way of example, counsel cites the contract proffered by VERDE entered into with the Department of Transportation, which purports to pertain to the repair and maintenance of the 306 traffic lights in Westchester County. Counsel argues that, by citing the existence of this Westchester County contract, VERDE asserts that it did not enter into or bear any responsibility for traffic lights in Rockland County. Counsel concludes that "[h]owever, arguing in the negative does not prove Defendant did not have responsibility for traffic lights other than Westchester. (Leitner Aff. ¶12). Counsel also argues that affidavit of VERDE's light foreman filed in the prior action is insufficient insofar as the foreman "does not aver how or in what capacity he would have personal knowledge of the various contracts entered into and signed by the President of VERDE ELECTRIC, who signed the single Westchester contract attached to the motion." (*Id.* at ¶14).

Third, counsel contends that VERDE's claim that it did not have any contractual obligation related to Rockland County is contradicted by Plaintiff's documentary evidence. Counsel cites to a document which counsel contends demonstrates that VERDE was in contract related to "Traffic signal & detection improvements various locations Hudson Rockland Westchester County" under Contract Number D264308 for \$6,410,315.61 with a Start Date of 10/27/2020 and End Date of 12/29/2023. (Plaintiff's Opp. Exhibit A [emphasis added]). Counsel further contends that VERDE was on the scene of the accident within hours prior to the accident and reported the traffic signal malfunction: "The DOT's Incident Detail Report for this accident location related to a 'Traffic Signal Malfunction' reveals that at 6:46 AM in the morning before the accident, 'Jason VERDE (914-263-0131) advised the TMC signal is on flash; DOT signals req'd.'" (Plaintiff's Motion Exhibit D).

Counsel also cites to a subsequent action filed in Rockland Supreme Court under Case Index Number 035071/2023 captioned *Toal v Town of Orangetown* relating to an accident date of January 19, 2023, at a subject crosswalk in the Town of Pearl River (Rockland County) wherein the Town of Orangetown set forth in its Answer that "Verde Electric was performing work at and in the vicinity thereof at the time of the alleged incident" and asserted cross-claims against Verde Electric." (Plaintiff's Opposition Exhibit E).

Lastly, counsel contends that VERDE's motion for dismissal is premature since no discovery has been conducted on the present action.

#### Decision:

A motion to dismiss a complaint pursuant to CPLR §3211(a)(1) may be granted only where the documentary evidence utterly refutes the complaint's factual allegations, conclusively establishing a defense as a matter of law (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017] citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]).

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept. 2013]; see *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2d Dept. 2013]). "On a motion made pursuant to CPLR §3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party" (*E&D Group, LLC v. Violet*, 134 A.D.3d 981, 982 [2d Dept. 2015], citing *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept. 2010]), and a plaintiff defending a motion for dismissal "will not be penalized because [plaintiff] has not made an evidentiary showing in support of [plaintiff's] complaint" (*E&D Group, LLC v. Violet*, 134 A.D.3d at 982, citing *Rovello v Orofino Realty Co.*, 40 N.Y.2d 633, 635 [1976]). "Whether a plaintiff can ultimately establish its allegations is not part of

the calculus in determining a motion to dismiss", but rather the court's purview at this juncture is limited to whether the facts as alleged fit within any cognizable legal theory. (*Zurich Am. Ins. Co. v City of New York*, 176 AD3d 1145 [2d Dept. 2019]; *E&D Group, LLC v. Violet*, 134 AD3d 981, 982 [2d Dept. 2015] [internal citations omitted]).

In applying the aforementioned legal principles to the case at bar, Defendant VERDE's motion for dismissal pursuant to CPLR §§ 3211(a)(1) and (7) is denied without prejudice to renewal following completion of relevant discovery.

As a preliminary matter, VERDE's motion for dismissal absent any discovery in this case is premature (CPLR §3212[f]). This is particularly the case where, as here, "the opposing party has not had reasonable opportunity for disclosure prior to the making of the motion." (*Gardner v. Cason, Inc.*, 82 A.D.3d 930, 931 [2d Dept. 2011]). Moreover, evidence related to any such contracts executed by VERDE in connection with the subject traffic light located in Rockland County is likely within the knowledge and control of VERDE and thus Plaintiff should have the opportunity to examine such evidence. (*See, Baron v. Incorporated Village of Freeport*, 143 A.D.2D 792 [2d Dept. 1988]). Although VERDE proffered one contract which purports to evince that VERDE's scope of work was limited to Westchester County, the contract states that it arises from an "Invitation for Bids [IFB] identified in Solicitation Number BA18-012" related to "DOT's Region 8" as described in the IFB. Such solicitation and IFB were not made part of the motion record. Even assuming arguendo that same were submitted, the one contract related to one IFB does not demonstrate, as a matter of law, that VERDE was not in contract to perform such work in Rockland County under a separate contract arising from a different IFB.

Moreover, the motion record includes documentary evidence which appears to contradict VERDE's contention and evidence. Specifically, Plaintiff submitted a document entitled "State Comptroller Contract Transactions" related to VERDE (as "Vendor") related to "Traffic signal & detection improvements various locations Hudson Rockland Westchester County" under Contract Number D264308 for \$6,410,315.61 with a Start Date of 10/27/2020 and End Date of 12/29/2023. (Plaintiff's Opp. Exhibit A [emphasis added]). Plaintiff also directs the Court's attention to the matter of *Toal v Town of Orangetown*, Rockland Supreme Court Case Index No. # 035071/2023 relating to an accident date of January 19, 2023, at a subject crosswalk in the Town of Pearl River (Rockland County) wherein the Town of Orangetown set forth in its Answer that VERDE was performing work at and in the vicinity thereof at the time of the alleged incident and asserted cross-claims against VERDE. (Plaintiff's Opposition Exhibit E). Therefore, the conflicting documentary evidence submitted by the respective parties, at a minimum, requires discovery to ascertain the relevant facts pertaining to VERDE's contractual obligations (if any) related to the Rockland County accident site at any relevant times prior to and/or at the time of the accident.

All other arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Based on the foregoing, it is hereby

**ORDERED** that, Defendant VERDE's dismissal motion pursuant to CPLR §§ 3211(a)(1) and (7) is denied without prejudice to renewal following completion of relevant discovery. It is further

**ORDERED** that, VERDE is directed to interpose an Answer to Plaintiff's Verified Complaint within thirty (30) days hereof. This matter will then be referred to the Preliminary Conference Part to conduct a preliminary conference.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 12, 2024  
White Plains, New York

E N T E R :



---

HON. THOMAS QUIÑONES, J.S.C.

TO: *Filed to NYSCEF*