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SHORT FORM ORDER

INDEX No. 06-16848
CAL. No. 10-01334 MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-12-10
ADJ. DATE 3-24-11
Mot. Seq. # 004 - MD
005 - XMD

ANDRE CURTIS, Plaintiff, - against - LISA SOLONCHAK, THE COUNTY OF SUFFOLK, THE TOWN OF BABYLON, THE VILLAGE OF AMITYVILLE, THE LONG ISLAND POWER AUTHORITY, LIPA RESOURCES, INC. CSC HOLDINGS, INC., and VERIZON NEW YORK, INC., Defendants.	PHILLIPS & MILLMAN, LLP Attorneys for Plaintiff 50 Route 9W, Monte Plaza Stony Point, New York 10980 HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, PENDER & KOEHLER, PC Attorneys for Defs.Long Island Power Auth. and LIPA Resources, Inc. 6851 Jericho Turnpike, Suite 250 P.O. Box 1306 Syosset, New York 11791 CONWAY FARRELL CURTIN & KELLY, PC Attorneys for Defendant Verizon 48 Wall Street, 20th Floor New York, New York 10005 SCHONDEBARE & KORCZ, ESQ. Attorneys for Defendant Solonchak 3555 Veterans Memorial Highway, Suite P Ronkonkoma, New York 11779

Upon the following papers numbered 1 to 67 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (004) 23-43 ; Notice of Cross Motion and supporting papers (005) 1-22; Answering Affidavits and supporting papers 44-49; 50-55; 56-57; 65-66 ; Replying Affidavits and supporting papers 58-59; 60-64; Other 67; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by the defendant Long Island Power Authority for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing plaintiff's complaint and all cross claims asserted against it is denied; and it is further

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ORDERED that cross motion (005) by the defendant Verizon New York, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing plaintiff's complaint and all cross claims asserted against it is denied.

This is an action for damages for personal injury sustained by the plaintiff, Andre Curtis, arising out of an automobile accident which occurred on August 2, 2005 at the intersection of Nicoll Avenue and Oak Street, in the Village of Amityville, Town of Babylon, County of Suffolk, State of New York, when the motorcycle operated by Curtis, and the vehicle operated by the defendant Lisa Solonchak, came into contact. It is claimed that defendant Solonchak was negligent in the operation of her vehicle and that the municipal defendants were negligent in causing and allowing two utility poles to be placed at or near the intersection causing a dangerous and defective condition. By stipulation dated September 21, 2009, this action was discontinued as against the County of Suffolk, the Town of Babylon, the Village of Amityville and CSC Holdings, Inc., only, with prejudice.

In motion (004), Long Island Power Authority, LIPA Resources, Inc. (hereinafter LIPA defendants) seek summary judgment dismissing the complaint and all cross claims asserted against them on the basis that Lisa Solonchak was the sole proximate cause of the accident, and that LIPA bears no liability for the happening of the accident in that, pursuant to its agreement with the defendant Verizon New York, Inc. (Verizon), Verizon was responsible for removing the old telephone pole once the new one was installed.

In motion (005), Verizon New York, Inc. (Verizon) seeks summary judgment dismissing the complaint and all cross claims asserted against it on the bases that the subject pole was owned by LIPA, who, pursuant to its agreement with Verizon, was responsible for maintaining the poles in a safe and serviceable condition; that LIPA never notified Verizon in writing that it replaced a pole; that Verizon owed no duty of care to the plaintiff, as it did not own or replace the subject pole, that it was not responsible for maintaining the pole, and that the alleged sight reduction at the intersection did not proximately cause the accident.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (004) the LIPA defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answers served by defendant Solonchak, the County of Suffolk, and the Town of Babylon each with a cross claim over against the co-defendants for contribution, the answers served by the Village of Amityville and LIPA each with cross claims against the co-defendants for contribution and indemnification, the amended answer served by CSC Holdings, Inc. (s/h/a Cablevision Systems Long Island Corporation) with a cross claim against the co-defendants for contribution and indemnification, and the answer served by Verizon with a cross claim for judgment over against the defendants, for apportionment of responsibility, and indemnification; the plaintiffs' verified bills of particulars; an uncertified copy of the MV 104 Police Accident Report; a copy of the plaintiff's MV 104 Accident Report signed by Jeff Millman as attorney-in-fact for Andre Curtis; photographs; an unauthenticated copy of the agreement effective January 1, 1969 between Long Island Lighting Company and New York Telephone; an unauthenticated office memo dated March 4, 1997; a page labeled plaintiff's exhibit 3; signed copies of the transcripts of the examinations before trial of Andre Curtis dated February 24, 2006 and Thomas Brandt dated October 1, 2008; and unsigned copies of the transcripts of the examinations before trial of Andre Curtis dated April 1, 2008, Lisa Solonchak dated September 21, 2007, John Christiansen on behalf of Verizon dated October 10, 2008 and May 6, 2010, which unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion. Additionally, the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

In support of their cross motion (005), Verizon has submitted, inter alia, an attorney's affirmation; a duly notarized affidavit by Janet Rapuano; copies of the summons and complaint, answers with cross claims served by Verizon, Solonchak and LIPA, and the plaintiff's verified bills of particulars; notice to admit and LIPA's response thereto; photographs; unauthenticated copy of the agreement effective January 1, 1969 between Long Island Lighting Company and New York Telephone; discovery responses served by LIPA; pages labeled plaintiff's Exhibit 3 and 4; signed copies of the transcripts of the examinations before trial of Lisa Solonchak dated September 21, 2007, Thomas Brandt dated October 1, 2008, John Christiansen on behalf of Verizon dated October 10, 2008 and May 6, 2010; and the unsigned copy of the transcript of the examination before trial of Andre Curtis dated April 1, 2008, which unsigned transcript is not in admissible form as required by CPLR 3212 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, *supra*; ***McDonald v Maus***, *supra*; ***Pina v Flik Intl. Corp.***, *supra*), nor is it accompanied by an affidavit pursuant to CPLR 3116, and, therefore, is not considered on this motion.

MOTION (004)

It is determined as a matter of law that the LIPA defendants have not established prima facie entitlement to summary judgment dismissing the complaint and any cross claims asserted against it as the application is insufficient as a matter of law pursuant to CPLR 3212. Although the motion is supported with the signed deposition transcript of Thomas Brandt, Brandt testified that he was employed by National Grid, previously known as KeySpan and Market Span, and prior to that, as LILCO. The relationship between LIPA and National Grid has not been set forth and Brandt did not testify that he was an employee of LIPA. In fact, he testified that

at no time was National Grid called Long Island Power Authority or LIPA. Therefore, Brandt's deposition transcript does not comport with the requirements of CPLR 3212 constituting an affidavit or deposition transcript by a person with knowledge in support of LIPA's motion. Aside from LIPA's motion not being supported by an affidavit or deposition from a person with knowledge on LIPA's behalf, there are factual issues which preclude summary judgment. No evidentiary submissions or expert affidavits have been presented concerning safety at the intersection where the accident occurred with regard to visibility, obstruction of view, and proximate cause of the accident. Further, there are factual issues with regard to the responsibility for ownership, maintenance and control of the poles at the site of the accident which have not been established in LIPA's moving papers. Such factual issues preclude summary judgment.

Accordingly, motion (004) by the LIPA defendants for summary judgment in their favor is denied.

MOTION (005)

Lisa Solonchak testified, inter alia, to the effect that when she approached a stop sign which controlled traffic coming from Nicoll Avenue onto Oak Street, she came to a complete stop but was not able to view westbound traffic on her right on Oak Street as her view was obstructed by a bush in the yard of the corner house. She stated that she then inched up, advancing her car forward; however, when she stopped her car and checked to her left to view eastbound traffic on Oak Street, she saw two poles, but did not see any traffic. Although she stated she could hear a motorcycle, she "inched up" past the poles as they were obstructing her view of Oak Street. Prior to the accident, she had never notified anyone that the bush or the poles created an obstruction. She asserts that on prior occasions, those poles obstructed her vision to her left for about three to four car lengths before the intersection.

Verizon has also submitted the testimony of Thomas Brandt who testified that, while working as an employee for National Grid as a field supervisor, he supervised overhead lines and inspected the daily work for the LIPA systems in the area of Western Suffolk, which included the Village of Amityville. Mr. Brandt further testified that he does not decide whether a pole is to be replaced. Such decision is made by National Grid's Design Group. If a pole is replaced, the work is turned over to National Grid to place the overhead lines. There is no department in his company that determines whether the installation of a second pole would create a site obstruction. He stated OSMOSE inspects the poles for deterioration for National Grid, but he did not know if they inspected the pole at Oak Street and Nicoll Avenue. He continued that OSMOSE does not determine if a pole is set in a safe location. Design Group gives a work order to the National Grid supervisor to replace a pole and also notifies other utilities of the intention to replace a pole. It is his function to do the work on overhead lines and to do pole installation, if required. He testified that the National Grid Safety Department has nothing to do with safety relative to locations of pole placement, and concerns only employee safety. If the Design Group does not map where the new pole is to be set, the crew setting the pole would determine the new pole's location.

Mr. Brandt stated he was aware of "joint pole agreements" for the various utilities, but he did not know what the agreement was or if the joint pole agreement addresses maintenance of the pole. He continued that LIPA, Verizon, and Cablevision jointly put their facilities on the poles. The JU2 joint utility form provides that after a new pole is set, the other utilities are to change over their facilities from the old to the new pole. The old pole is then removed. He stated that the last utility off the pole removes the pole. When the JU2 form and work order concerning the completed pole replacement are turned in to the clerk at National Grid, the clerk or work coordinator faxes or mails the form to the utilities that are on the pole so that the facilities can be transferred onto

the new pole. Municipalities are not notified. He did not know if in 1999, when the crew responsible for the placement of the pole at Nicoll Avenue and Oak Street filled out a JU2. He stated that in 1999, LIPA would have filled out the JU2 form for the replacement of the pole at issue. He later testified that he did not know if LILCO placed the old pole at the intersection. He did not know who owned the pole at issue. After the new pole is set, LIPA then transfers the overhead lines to the new pole. He stated that usually after LIPA makes the transfer, Cablevision is next, and Verizon follows, but he did not know why they were in that order. He continued that he has, on occasions, seen double poles remain for several months. There is only follow up if a customer complains about it.

Brandt also testified that in 2008, he visited the site of the accident and saw that the double poles were still there. He did not observe whether the poles created a site obstruction. He noted that the old pole was rotted. He further observed that the LIPA and Cablevision facilities had been transferred to the newer pole, however, the telephone facilities had not been transferred. He did not thereafter notify LIPA, National Grid, KeySpan, or Verizon that the telephone facilities had not been transferred. He stated each pole has a grid number that the utilities use to determine the location of each pole. He did not know when the old pole was removed from the intersection. He was unsure if LIPA or National Grid had a joint use committee for the poles. He stated grid maps only show were a pole is located but do not indicate if there is a double pole.

John Christiansen testified that he has been employed by Verizon since 1996, is currently working in the outside plant engineering department and designs and issues work for cable plants and telephone phone structures built in the field. He is also the legal liaison and collects information for personal injury and property damage cases. He collected information with regard to the instant action. He visited the site of this accident in October 2007, at the request of counsel, to verify the double wood condition, which he described as two poles next to each other. Verizon cables were still attached to the old pole marked 23.5 which signifies the location. Power company and cable TV attachments were on the new pole. The old pole appeared damaged at the bottom and was roped to the new pole above the Verizon cables. He thereafter searched for records pertaining to the pole and found a work order for the pole location and some supporting documentation, including a work order for pole 23.5 (which is both the old pole and the new pole), and a form for their construction crew to perform the pole work. He noted a joint pole agreement between the Long Island Lighting Company and New York Telephone which became effective in 1969. He continued that there was an 1997 inter-office memo which updates the document to Verizon and LIPA which gives a description of the transfer of ownership of the poles.

Christiansen further stated that a JUA2 form is a joint use agreement form from LIPA to the telephone company, or from the telephone company to LIPA, regarding work required on a pole, and would include setting a pole or the transfer of utilities from one pole to another, if required. He did not know if this form was required in 1999, or when it became required. He did not know whether Verizon had a time line for transferring the utilities. He continued that Verizon is usually the last utility to transfer services as they are situated lowest on the pole. When Verizon receives a JUA2 from LIPA, it is filed with the engineer and support staff.

He testified that in 2004, Verizon had an independent contractor perform a survey in the Massapequa area for Verizon FIOS services to be built. The surveyor inventoried all the telephone poles, attachments, and cables for the area and provided Verizon with a pole survey form which was entered into a spread sheet in the computer on March 18, 2004. He stated that March 19, 2004 was the date that an engineer would have submitted the document or work order (marked as Plaintiff's Exhibit 3) to construction. The document contained the date of

April 19, 2004. He did not know, however, if that thirty day period was the date in which completion of the work was required. Verizon subsequently installed FIOS on the new pole, replacing existing Verizon lines, but he did not know when that was done, who did that, or who would know. He further testified that Plaintiff's Exhibit 5 indicated that LIPA was the owner of the pole, but did not know what or who determined ownership. He did not know who owned the poles at the intersection of Oak Street and Nicoll Avenue on August 2, 2005. He knew the old pole had been removed, but he did not know when it was removed, who removed it, or why it was removed. He did not know if Verizon moved the lines or if an outside contractor moved the lines from the old pole to the new pole. He did not know when the new pole was set. He did not know why the Verizon lines were still on the old pole in 2007. He did not know Verizon's policy for transferring lines.

At his further deposition, John Christensen testified that he conducted an additional search and found a document known as a field work plan relative to transferring a terminal from one pole to another at the Oak Street and Nicoll Avenue. He did not know if the work was done, but stated that the document indicated the job was complete. There was nothing on the document that indicated when the terminal transfer was made. He knew of no other records which would indicate the same. When he went to the site in October 2007, the old pole was there. When he returned in December 2007, the old pole was not there. Pursuant to the work operation log, some of the work encompassed on the work order was done in 2004 and some was not done until 2007, but he did not know why there was a delay. He also stated that the log indicated the pole was removed on December 4, 2007. Christensen further testified that pole 23.5 was considered a foreign pole, one not owned by Verizon. Depending upon the municipality, it could be owned either by a prior electric company or LIPA. He also stated that pole 23.5 was an abandoned pole, or one that Verizon does not own and is no longer in use. He stated that the pole that was removed on December 4, 2007 was an abandoned pole, that Verizon did not abandon it, and that it was LIPA who abandoned the pole.

Janet Rapuano has set forth in her affidavit that she is a facilities manager at Verizon New York, Inc. and that her staff conducted a search of Verizon's records for any JUA2 form received from the Long Island Power Authority, LIPA Resources, Inc., LILCO, or any other entity for the intersection of Oak Street and Nicoll Avenue and that Verizon does not have any record of receiving a JUA2 form.

In response to the Notice to Admit served by the plaintiff, LIPA admitted at paragraphs one and two that it owned a utility pole identified as 23 ½ located on the sidewalk on the southwest corner of Oak Street at the intersection with Nicoll Avenue, Village of Amityville.

Based upon the foregoing, it is determined that Verizon has not demonstrated prima facie entitlement to summary judgment dismissing the complaint. It has not been established by testimony or by admissible evidence whether there were any agreements in place between the parties relative to responsibility for maintaining the subject poles or removing the old pole. It has not been demonstrated whether or not any studies were conducted concerning safety issues at the site of the intersection with regard to visibility, obstructions , and pole location. Moreover, no expert affidavit has been submitted with regard to whether the poles obstructed visibility, presented a safety hazard, or proximately caused the accident. Although an agreement dated January 1, 1969 between New York Telephone and Long Island Lighting Company has been submitted, it is has not been established whether this agreement was in effect at the time of the accident. Nor has it been established whether Verizon was formerly known as New York Telephone and whether Long Island Lighting Company is now known as Long Island Power Authority.

In that the moving defendants have not established prima facie entitlement to summary judgment dismissing the complaint as a matter of law, the burden has not shifted to the plaintiff to raise a triable issue of fact (*see*, ***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005])

Accordingly, motion (005) by Verizon New York, Inc. for summary judgment in its favor is denied.

Dated: April 29, 2011

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**