

<b>Hsiu Chu Chow v RCN Telecom Servs., Inc.</b>
2015 NY Slip Op 31312(U)
May 7, 2015
Supreme Court, Queens County
Docket Number: 8839 2009
Judge: Carmen R. Velasquez
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IA Part 38  
Justice

HSIU CHU CHOW and HSIU BIU CHOW, x

Plaintiffs,

-against-

RCN TELECOM SERVICES, INC., RCN  
INTERNET SERVICES, INC. And RCN Digital  
SERVICES,

Defendants. x

Index

Number 8839 2009

Motion

Date February 4, 2015

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 14 read on this motion by defendant RCN Telecom Services, Inc., defendant RCN Internet Services, Inc., and defendant RCN Digital Services, LLC for, *inter alia*, summary judgment dismissing the complaint against them, on this motion by third party defendant Sordoni Skanska USA and second third party plaintiff Skanska USA Building, Inc. for, *inter alia*, summary judgment dismissing the third party complaint against the former, and on this cross motion by second third party defendant Mastec Contracting Company, Inc., second third party defendant Mastec North America, Inc., and second third party defendant Mastec Services Company, Inc. for, *inter alia*, summary judgment dismissing all of the claims against them

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Upon the foregoing papers it is ordered that the branch of the motion by defendant RCN Telecom Services, Inc., defendant RCN Internet Services, Inc., and defendant RCN Digital Services, LLC which is for an order striking the plaintiffs' errata sheets is granted. The branch of the motion by third party defendant Sordoni Skanska USA which is for an order striking the plaintiffs' errata sheets is granted. The branch of the motion by defendant RCN Telecom Services, Inc., defendant RCN Internet Services, Inc., and defendant RCN Digital Services, LLC which is for summary judgment dismissing the plaintiff's complaint and the cross claims against them is granted. The branch of the motion by defendant RCN Telecom Services, Inc., defendant RCN Internet Services, Inc., and defendant RCN Digital Services LLC which is for summary judgment on the causes of action they asserted against third party defendant Sordoni Skanska USA for contribution and indemnification is denied. The branch of the motion by third party defendant Sordoni Skanska which is for summary judgment dismissing the third party complaint brought against it by defendant/third party plaintiff RCN Telecoms Services, Inc. is granted. The branch of the motion by second third party plaintiff Skanska USA Building, Inc. which is for summary judgment on its cause of action for contractual indemnification is denied. The branch of the motion by second third party plaintiff Skanska USA Building, Inc. which is for summary judgment dismissing the counterclaims asserted against it is granted. The cross motion by second third party defendant Mastec Contracting Company, Inc., second third party defendant Mastec North America, Inc., and second third party defendant Mastec Services Company, Inc. is granted.

## I. The Allegations of the Plaintiffs

### A. The Deposition Testimony of Plaintiff Hsiu Chu Chow (HCC)

On April 29, 2008, plaintiff HCC, who does not speak English, testified through a translator at a deposition conducted by Consolidated Edison in a related action pending in the New York State Supreme Court, County of Queens (*Chow v. Consolidated Edison of New York*, Index No. 6813/07) that she sustained personal injury ( a displaced fracture of her right patella) on April 26, 2006 in the intersection between Roosevelt Avenue and Parsons Boulevard, Queens, New York. She testified that she fell in a crosswalk as she crossed Roosevelt Avenue from the southwest corner of the intersection. She had taken approximately "three steps" when her right foot got caught on a bump in the pavement. "On the pavement there's a little higher up, higher up section of the pavement and then my foot tripped, then I fell." The cross walk has white lines that are perpendicular to the lines that run from curb to curb across Roosevelt Avenue, and, according to the plaintiff, "the accident occurred when I walked on the second white line." When shown a photograph of the accident scene, the plaintiff indicated that the fall occurred at a spot just beyond the second white line. She testified, "Yes, past the second white line, and "I only said I fell on the

second white line, on the second white line. \*\*\* There's a section. It's a little higher. There's a section little higher" and "its on the edge of the-- on the edge on top second white line. \*\*\* No, the area did not reach to the third white line." Nevertheless, she at one point testified inconsistently that she had taken "six or seven steps" and had fallen in the middle of Roosevelt Avenue.

On March 12, 2010, plaintiff HCC testified at a deposition in this case taken by the RCN defendants that the accident occurred in the crosswalk of Roosevelt Avenue and that " I only took three steps before I fell. About three steps." The accident occurred "before I reached the third line." She examined photographs and testified that she fell "Right here. After passing the first two lines \*\*\* the area beyond the first two lines." She fell "Right there by the triangle \*\*\* By the corner or angle, the point."

On June 7, 2011, plaintiff HCC testified at her continued deposition that she had arrived at the southwest corner of the intersection of Roosevelt Avenue and Parsons Boulevard and had noticed that a white car had been parked about four to eight feet to her left. " I stepped just three steps," and her foot made contact with a bump in the road. "It was on the third step that I fell." The bump was located in front of the middle of the parked car. She again viewed a photograph of the accident scene, and she testified, "It [the bump] is here, the second line."

#### B. The Deposition Testimony of Plaintiff Hsiu Biu Chow (HBC)

On June 13, 2011, plaintiff HCC's husband, plaintiff HBC, testified at his deposition that after the accident he went to the intersection of Parsons and Roosevelt and observed his wife sitting on the southwest curb. His wife pointed to a bump in the cross walk. "Yes, on the second white line. \*\*\* I think the raised area is on the first, second white line. I think it's on the right side of the cross walk, not on the left side."

## II. The Allegations of the RCN Defendants

Defendant RCN Telecom Services, Inc., defendant RCN Internet Services, Inc., and defendant RCN Digital Services, LLC (collectively RCN) provide cable, telephone, and internet services for residential buildings in the city. Defendant RCN hired third party defendant Sordoni Skanska USA to be the project manager for the installation of its facilities and network in Queens. Third party defendant Sordoni subcontracted work to second third party defendant Mastec Contracting Company, Inc. The defendants completed their work in the intersection of Parsons Boulevard and Roosevelt Avenue on or about February 16, 2001, approximately five years before plaintiff HCC took her fall on April 26, 2006.

The defendants did not perform any work in the intersection of Parsons Boulevard and Roosevelt Avenue approximately three feet from the curb. There are work permits and drawings pertaining to the intersection of Parsons Boulevard and Roosevelt Avenue. Drawing 238 and drawing 176 show that contractors working for defendant RCN performed road work on Roosevelt Avenue in the vicinity of the intersection ten feet from the curb (drawing 176) and fourteen and one-half feet from the curb (238). The conduit that was placed in the road at the intersection of Parsons and Roosevelt was PVC conduit measuring four inches by four inches. Drawing 176 shows that the conduit running along Parsons Avenue is ten feet from the curb line, and, upon entering Roosevelt Avenue, the conduit makes a 90 degree turn and runs along Roosevelt Avenue fourteen feet from the curb, eventually reaching an RCN manhole.

### III. The Errata Sheets

Plaintiff HCC's examinations before trial were held on April 29, 2008, March 12, 2010, and June 7, 2011. Plaintiff HBC's examination before trial was held on June 8, 2011 and June 13, 2011. Although HCC testified through a translator, she did not indicate that she was having any difficulty understanding the questions. In or about June, 2011, the attorney for defendant RCN sent deposition transcripts to the plaintiffs' attorney for signature. Approximately three years later, the plaintiffs served a Supplemental Compliance with Stipulation dated May 12, 2014 which included errata sheets for plaintiff HCC's examinations before trial. Plaintiff HCC sought to change her deposition testimony concerning the spot where she had fallen to a point further from the curb. Plaintiff HCC sought to completely change her testimony by alleging that she had walked approximately seven to eight steps into the intersection and had fallen in an area past the second perpendicular stripe. The reasons given by the plaintiff are "More accurate," "Not sure I understand the question," "Don't understand the question," "Question is confusing," "Picture is confusing," "When I say 'above,' interpreter translates it as 'on top.'"

### IV. Discussion

#### A . CPLR 3116

A court may strike the affidavits of correction pertaining to deposition testimony submitted by a party where he fails to provide an adequate explanation for significant changes to the deposition testimony. (*See, Horn v. 197 5th Ave. Corp.*, 123 AD3d 768 [change to location of accident]; *Kuzmin v. Visiting Nurse Service of New York*, 56 AD3d 438.) Conclusory reasons on a correction sheet such as "I meant to say that" are insufficient to explain significant, substantive amendments of a plaintiff's deposition testimony. (*See, Marzan v. Persaud*, 29 AD3d 652, 653.) In the case at bar, as in *Horn v. 197 5th Ave. Corp.*

(*supra*), “the plaintiff failed to provide an adequate reason for the numerous, critical, substantive changes she sought to make in an effort to materially alter her deposition testimony \*\*\*.” The assertion of problems with the translator does not find support in the record. (*See, Marzan v. Persaud, supra.*) Where a correction sheet attached to a plaintiff’s deposition transcript presents feigned issues of fact tailored to avoid the consequences of her earlier deposition testimony, it does not suffice to raise a triable issue of fact (*See, Garcia-Rosales v. Bais Rochel Resort, 100 AD3d 687.*)

In the case at bar, plaintiff HCC gave deposition testimony on April 29, 2008, March 12, 2010, and June 7, 2011 that (in summary) she fell at a point in the intersection in the vicinity of the second perpendicular stripe, “before I reached the third line.” No, the area did not reach to the third white line.” “ I only took three steps before I fell. About three steps.” Except at one brief point, her testimony was consistent from April 29, 2008 to June 7, 2011, a period of almost three years that she had walked only about three steps into the intersection and had fallen in the vicinity of the second stripe and before the third stripe. In photographs which clearly showed the stripes, she pointed to where she had fallen. Significantly, she testified on June 7, 2011 that the bump was located in front of the middle of a parked car – in other words, she had fallen in the parking lane, not in the middle of the street as she now seeks to change her testimony. Significantly, her husband testified at his deposition that plaintiff HCC had pointed to a bump in the cross walk. “Yes, on the second white line. \*\*\* I think the raised area is on the first, second white line.” He has not sought to change his testimony.

Under these circumstances, the court finds that the defendants are entitled to an order striking the plaintiff’s correction sheets since they merely present feigned issues of fact tailored to avoid the consequences of earlier deposition testimony. (*See, Garcia-Rosales v. Bais Rochel Resort, supra; see also, Covington v. City of New York, 119 AD3d 408 [affidavit tailored to avoid the consequences of deposition testimony concerning a sidewalk defect properly disregarded on motion for summary judgment].*)

## B. CPLR 3212

### 1. Dismissal of the Complaint and Cross Claims Against RCN

"[T]he 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 \*\*\*." (*Alvarez v. Prospect Hospital, 68 NY2d 320, 324.*) Defendant RCN successfully carried this burden through the submission of evidence showing that it and its contractors did not perform any work near the

second or third stripe of the crosswalk at the southwest intersection of Roosevelt Avenue and Parsons Boulevard. While “a contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk (*Minier v. City of New York*, 85 AD3d 1134, 1134-1135), defendant RCN showed prima facie that neither it nor its contractors performed work at the point where plaintiff HCC fell. (See, *Cruz v. Keyspan*, 120 AD3d 1290; *Walton v. City of New York*, 105 AD3d 732; *Sand v. City of New York*, 83 AD3d 923.) The burden on this motion shifted to the plaintiffs, requiring them to produce evidence showing that there is a genuine issue of fact which must be tried. (See, *Alvarez v. Prospect Hospital, supra.*) The plaintiffs failed to carry this burden. (See, *Walton v. City of New York, supra.*) The plaintiffs failed to submit evidence sufficient to create genuine issues of fact concerning whether defendant RCN or its contractors performed work at the spot where plaintiff HCC fell and created the dangerous condition which caused her injury. (See, *Cruz v. Keyspan, supra*; *Walton v. City of New York, supra*; *Sand v. City of New York, supra.*) The permits issued to defendant RCN to do work in the intersection of Parsons and Roosevelt do not establish that defendant RCN or its contractors did work where the plaintiff fell. (See, *Cruz v. Keyspan, supra.*) The presence of the defendants at the intersection approximately five years before the date of the accident and speculation about what the defendants might have done or left undone are not sufficient to create a triable issue of fact. (See, *Flores v City of New York*, 29 AD3d 356.) Defendant RCN’s motion for summary judgment in this action must be granted since the plaintiffs’ unrevised testimony and the affidavits submitted in opposition to the motions are insufficient to raise an issue of fact. ( See, *Ashford v. Tannenhauser*, 108 AD3d 735; *Garcia v. Stickel* 37 AD3d 368.)

## 2. Indemnification From Sordoni Skanska

### a. Common Law Indemnification

Defendant RCN is not entitled to common law indemnification from third party defendant Sordoni Skanska. “In order to establish a claim for common-law indemnification, a party must ‘prove not only that [it was] not negligent, but also that the proposed indemnitor ... was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury \*\*\*.’” (*Hart v. Commack Hotel, LLC*, 85 AD3d 1117, 1118-1119, quoting *Benedetto v. Carrera Realty Corp.*, 32 AD3d 874, 875.) In the case at bar, evidence produced by defendant RCN itself demonstrates that Sordoni Skanska did not commit any act of negligence or have control over work that caused plaintiff HCC’s injury. The work supervised by Sordoni Skanska was not done where the plaintiff fell.

## b. Contractual Indemnification

The project management agreement between defendant/third party plaintiff RCN Telecom Services, Inc. and third party defendant Sordoni Skanska provides in relevant part: “Project Manager shall indemnify and hold harmless owner from any and all claims or causes of action from liability of any nature, including by not limited to costs, expenses, loss or liability on account of any acts or failure by Project Manager \*\*\*[in] the performance of the services of this agreement. Project Manager shall further indemnify and hold harmless owner for property damage or personal injury, including death, arising out of, as a result of or in connection with the negligent action or omission in the performance of this agreement by Property Manager, his employees, agents, or contractors.”

"A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’ \*\*\*." ( *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777, quoting *Margolin v. New York Life Ins. Co.*, 32 NY2d 149, 153.) In the case at bar, the indemnification clause in the contract between RCN Telecom and Sordoni Skanska does not indicate any intention that the latter would indemnify the former in the absence of fault or causal connection to the injury, and the defendants performed no work at the spot where plaintiff HCC fell.

## 3. Dismissal of the Third Party Complaint Against Sordoni Skanska

No questions of fact exist concerning whether Sordoni Skanska supervised any work performed where plaintiff HCC fell. Sordoni Skanska is not liable for common law indemnification to defendant RCN. (See, *Hart v. Commack Hotel, LLC*, *supra*.) Sordoni Skanska is also not liable for contractual indemnification. A party's right to contractual indemnification depends upon the specific language of the relevant contract. (*Sellitti v. TJX Companies, Inc.*, -AD3d-. - NYS3d-, 2015 WL 1445723; *Sawicki v. GameStop Corp.*, 106 AD3d 979; ; *Alfaro v. 65 W. 13th Acquisition, LLC*, 74 AD3d 1255). “The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances” (*Hooper Assoc. v. AGS Computers*, 74 NY2d 487, 491–492; *Sellitti v. TJX Companies, Inc*, *supra*.) In the case at bar, the indemnification clause in the contract between RCN Telecom and Sordoni Skanska does not indicate any intention that the latter would indemnify the former in the absence of fault or causal connection to the injury, and the defendants performed no work at the spot where plaintiff HCC fell. Finally, Sordoni Skanska is not liable for contribution. (See, *Raquet v. Braun*, 90 NY2d 177.)



#### 4. Dismissal of the Claims against the Mastec Second Third Party Defendants

No questions of fact exist concerning whether the Mastec defendants performed any work where plaintiff HCC fell. The Mastec defendants only contractually agreed to indemnify for injury “caused by, resulting from, arising out of or in connection with the execution of the work.” The Mastec defendants are not liable for contractual indemnification (*see, Sellitti v. TJX Companies, Inc., supra*), common law indemnification (*see, Hart v. Commack Hotel, LLC, supra*), contribution (*see, Raquet v. Braun, supra*), or breach of contract to procure insurance.

Dated: May 7 , 2015

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CARMEN R. VELASQIEZ, J.S.C.