Nickerson v City of New York
2016 NY Slip Op 30864(U)
April 22, 2016
Supreme Court, Queens County
Docket Number: 702003/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. HOWARD G. LANE** **IA Part 6**
Justice

DEBRA NICKERSON,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

Index Number 702003/13

Motion Date February 9, 2016

Motion Seq. No. 3,4, 6, 7 & 8

The following papers read on these separate motions by (1) the Long Island Power Authority ("LIPA"); (2) Verizon Communications, Inc. and Verizon New York, Inc. (herein collectively referred to as "Verizon"); (3) the City of New York ("the City") , and (4) C.A.C. Industries, Inc. ("CAC"), to dismiss the complaint and all cross claims against them pursuant to CPLR 3212; and (5) motion by plaintiff to strike the answers of the City and Verizon pursuant to CPLR 3126.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	EF57-86, 117- 168, 186-200
Answering Affidavits - Exhibits.....	EF169-185, 201-202, 207-212
Reply Affidavits.....	EF203-206, 213-221
Other	EF222- EF223

Upon the foregoing papers it is ordered that the motions are joined for disposition and are determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained in a trip and fall accident on April 5, 2012. It is alleged that the subject accident occurred due to a pothole that existed on the roadway at Beach 59th Street between Beach Channel Drive and Arverne Boulevard, in Far Rockaway, New York. At a time at least three (3)

years prior to plaintiff's accident, certain construction was performed along the said roadway that involved excavation and restoration of an approximately eighteen inch (18") wide trench across the road. Photographs of the site depict that the trench ran from curbside directly in line with a metal conduit carrying electric service wires down along a LIPA utility pole No. 16 into the ground, as well as communication cables/wires running down along a separate LIPA utility pole No. 16 into the ground and terminated near the Post Office located across the street. According to plaintiff's engineer, the trench in question was improperly excavated and restored in violation of generally-accepted construction standards and the New York City Highway Rules, thereby causing the formation of said pothole and tripping hazard. During discovery, it was learned that each of the defendants deny that they performed the subject construction work. As noted above, the defendants move to dismiss the claims and cross claims against it on the ground that they did not perform work at the subject location at the time in question. Only the motion by Verizon is opposed by plaintiff. The remaining motions for summary judgment are unopposed.

Upon its initial motion, plaintiff also moved to strike the answer of the City and Verizon. However, plaintiff has since withdrawn the branch of the motion which is to strike the answer of the City. The motion by plaintiff to strike Verizon's answer is opposed by Verizon.

Facts

The undisputed record indicates that the subject accident occurred due to a pothole that existed in the roadway located at Beach 59th Street between Beach Channel Drive and Arverne Boulevard, in Far Rockaway, New York. Plaintiff's expert engineer, Himad Beg, a professional engineer, inspected the subject location and avers that at least three (3) years prior to plaintiff's accident, certain construction was performed along the roadway that involved the excavation and restoration of an approximate eighteen inch (18") trench across the road. Photographs of the site depict that the trench ran from curbside directly in line with a metal conduit carrying electric service wires down along a LIPA utility pole No. 16 into the ground, as well as communication cables/wires running down along a separate LIPA utility pole No. 16 into the ground and terminated near the Post Office located across the street. According to plaintiff's engineer, the trench in question was improperly excavated and restored in violation of generally accepted construction standards and the New York City Highway Rules, thereby causing the formation of the subject pothole and tripping hazard. During discovery, all of the defendants denied that they performed the subject construction work. In addition, the City produced permits for two years prior to the subject accident that were all unrelated to the subject construction involved in this matter. The City declined to extend its search

beyond the said two (2) year time frame.

CAC produced Ralph Facciola, a project superintendent with CAC for seven (7) years who testified, in substance, that CAC engaged in sanitary sewer, storm sewer and water main construction but did not engage in any work at the subject location for the three (3) to five (5) year period prior to the subject accident. In any event, according to Facciola, the dimensions of the trench at issue was not wide enough for sanitary sewers, storm sewers or water mains; the trench was for utilities.

Verizon produced Aaron Crawford as a witness on its behalf. Crawford testified that he was an engineer for Verizon for 15 years and that he performs research for trips and fall accidents against Verizon and permits that were secured for any road work that was performed in the roadway or sidewalk area. According to Crawford, no permits were secured and no work was performed by Verizon or its contractor at the subject location from April 5, 2009 to April 5, 2012. Crawford acknowledged that Verizon does install conduits under roadways, that run to a utility pole. Other than LIPA, Verizon and Time Warner, this witness was unaware of any other entities that would have access to the subject utility pole.

LIPA's witness, Peter McGoldrick, a senior work coordinator, testified that according to the map which he produced, there were no underground electrical facilities located at the subject location; and according to the "Maximo" system, there were no LIPA jobs at the subject location. Furthermore, after viewing photographs of the utility poles at the subject location, this witness testified that he was able to determine that the wire running along the older pole into the riser and underground were not electrical or for fire alarms which would only leave communication wires.

After reviewing documents and inspecting the subject accident site, John Piazza, a construction manager with Time Warner Cable, concluded that Time Warner does not have any underground facilities in the area where plaintiff fell.

Jonathan Sestak, an engineering supervisor who has been employed by Verizon for 17 years, avers that he conducted a field investigation of the subject area which revealed that Verizon installed an isolated conduit extending from LIPA pole #16 to the post office across the street in January of 1976. He states that due to the age of the trench, Verizon no longer has possession of the road permit that was issued by the City to dig the trench on Beach 59th Street. Sestak also avers that his record research indicates that Verizon has not done any work on the roadway where the trench and enclosed conduit are located since 1976.

Motions by defendants

LIPA (Sequence #3)

The motion by LIPA to dismiss the complaint and cross claims asserted against it is granted as unopposed, and otherwise on the merits (*Soto v City of New York*, 244 AD2d 544, 545 [1997]).

It is well settled that "liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property * * * Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*Minott v City of New York,* 230 AD2d 719, 720, 645 N.Y.S.2d 879, quoting *Turrisi v Ponderosa, Inc.,* 179 AD2d 956, 578 N.Y.S.2d 724; *see also, James v Stark,* 183 AD2d 873, 584 N.Y.S.2d 137; *Balsam v Delma Eng'g Corp.,* 139 AD2d 292, 532 N.Y.S.2d 105). Here, in support of its motion for summary judgment LIPA proffered the deposition testimony of its senior work coordinator, a principal administrative assistant for the City of New York, a Research Manager for Verizon, and a Project Superintendent for C.A.C. Industries (CAC), which together established that LIPA did not perform any work at the site of the plaintiff's alleged injury (see, *Abbenante v Larry E. Tyree Co., Inc.,* 228 AD2d 529, 644 N.Y.S.2d 780; *Hovi v City of New York,* 226 AD2d 430, 640 N.Y.S.2d 782). Relatedly, LIPA also demonstrated that it neither created the defect in, nor exercised any control or supervision over the area where plaintiff fell, nor did it make special use of the location (*see, Minott v City of New York, supra; Hovi v City of New York, supra; Giordano v Seeyle, Stevenson & Knight,* 216 AD2d 439, 628 N.Y.S.2d 373; *Libby v Waldbaum's Inc.,* 213 AD2d 457, 624 N.Y.S.2d 890; *Bykofsky v Waldbaum's Supermarkets,* 210 AD2d 280, 619 N.Y.S.2d 760; *Herzfeld v Incorporated Vil. of Cedarhurst,* 171 AD2d 647, 567 N.Y.S.2d 130). Accordingly, inasmuch as LIPA established its entitlement to judgment as a matter of law and the plaintiff failed to refute its showing by proffering evidence demonstrating a triable issue of fact, summary judgment dismissing the complaint and all cross claims insofar as asserted against LIPA is granted (*see, Zuckerman v City of New York,* 49 NY2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Hovi v City of New York, supra*).

Motion by Verizon (Sequence #4)

The motion by Verizon to dismiss the complaint and cross claims insofar as asserted against it is denied.

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 (*see, Zuckerman v City of New York,* 49 NY2d 557, 562; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v. Williams,* 84 AD2d 648, 649; *Greenberg v. Manlon Realty,* 43 AD2d 968, 969). Here, Verizon failed to make a prima facie showing that it was not negligent in performing road work at the accident site (*see Alvarez v Prospect Hosp.,* 68 NY2d 320; *see Ingles v. City of New York*, 309 AD2d 835 [2003], and plaintiff raised an issue of fact as to whether the accident was proximately caused by the work performed by Verizon rather than by the road work performed in the area by other entities (*see Zuckerman v City of New York,* 49 NY2d 557). The only evidence proffered by Verizon in support of its motion is the deposition of one of its employees, Aaron Crawford who testified, in substance, that Verizon had no underground facilities at the location since there were "no plans" for the subject location. Verizon did not comment on the physical evidence presented such as photographs depicting the riser carrying communication wires/cables into the ground from the older No. 16 Lipa utility pole or the fact that Verizon provides Fios service to the Post Office across the street from the subject accident location. Thus, Verizon failed to eliminate all triable issues of fact as to whether they created the roadway defect and, thus, failed to establish their prima facie entitlement to judgment as a matter of law (*see Winegrad v. New York Univ. Med. Ctr.,* 64 NY2d 851, 853). Under these circumstances, it is not necessary to consider the sufficiency of the plaintiff's opposition papers (*see Tchjevskaia v. Chase,* 15 AD3d 389).

Notably, Verizon concedes in its Reply that it did in fact perform work at the subject location but indicates that the work was performed 36 years prior to the subject accident. Verizon, nonetheless, failed to make a prima facie showing of entitlement to judgment as a matter of law. As such, its motion for summary dismissal of all claims and cross claims against it is denied.

The City (Sequence #6)

The motion by the City is also granted as unopposed, and otherwise on the merits (*see Estrada v City of New York*, 273 AD2d 194 [2000]). A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto (*see Poirier v City of Schenectady,* 85 NY2d 310, 313 [1995]; *Smith v Town of Brookhaven,* 45 AD3d 567 [2007]). Pursuant to Administrative Code of the City of New York § 7-201 (c) (2), a plaintiff must plead and prove that the City had prior written notice of a street defect before it can be held liable for its alleged negligence in failing to maintain its streets in a reasonably safe condition (*see, Woodson v City of New York,* 93 NY2d 936; *Katz v City of New York,* 87 NY2d 241; *David v City of New York,* 267 AD2d 419; *Solone v City of New York,* 238 AD2d 332). Here, plaintiff did not plead,

and the municipal defendant did not receive, prior written notice of the pot hole that allegedly caused the plaintiff's accident. Thus, unless this case falls within a recognized exception to the requirement of prior written notice, no liability can be imposed on the municipal defendant (*see, Sommer v Town of Hempstead,* 271 AD2d 434; *Caramanica v City of New Rochelle,* 268 AD2d 496; *Zinno v City of New York,* 160 AD2d 795).

The Court of Appeals has recognized two exceptions to this rule, "namely, where the locality created the defect or hazard through an affirmative act of negligence . . . and where a 'special use' confers a special benefit upon the locality" (*Amabile v City of Buffalo,* 93 NY2d 471, 474 [1999]; *see Delgado v County of Suffolk,* 40 AD3d 575, 575-576 [2007]). Here, the defendant City established its entitlement to judgment as a matter of law by demonstrating that it did not have prior written notice of the allegedly dangerous condition that purportedly caused the plaintiff's fall (*see Rodriguez v. City of Mount Vernon*, 51 A.D.3d 900 [2008]; *Smith v Town of Brookhaven,* 45 AD3d at 568; *Jacobs v Village of Rockville Ctr.,* 41 AD3d 539, 540 [2007]). The City also established through the Big Apple Map dated June 16, 2003, that there is no indication on the same that a defect existed in the roadway where plaintiff's accident occurred. Accordingly, the City's motion for summary judgment is granted.

Motion by plaintiff (Sequence #7)

By letter dated February 10, 2016, plaintiff via counsel withdrew the branch of its motion which was to strike the answer of the City defendant. Plaintiff moves to strike Verizon's answer for failure to maintain a copy of the work permit pertaining to the subject accident site. The motion by plaintiff to strike Verizon's answer for spoliation of evidence is denied.

Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence (*see* CPLR 3126; *Neve v City of New York*, 117 AD3d 1006, 1008 [2014]; *Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 713-714 [2013]; *Rodman v Ardsley Radiology, P.C.*, 103 AD3d 871, 872 [2013]). "The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d at 714).

"The party requesting sanctions for spoilation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to' " prove its claim or defense (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2009], quoting *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629

[2005]). However, " striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct' " and, thus, the courts must " consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness' " (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d at 718, quoting *Iannucci v Rose*, 8 AD3d 437, 438 [2004]; *see Favish v Tepler*, 294 AD2d 396, 397 [2002]). When the moving party is still able to establish or defend a case, a less severe sanction is appropriate (*see De Los Santos v Polanco*, 21 AD3d 397, 398 [2005]; *Iannucci v Rose*, 8 AD3d at 438; *Favish v Tepler*, 294 AD2d at 397). Furthermore, where the plaintiff and the defendants are equally affected by the loss of the evidence in their investigation of the accident, and neither have reaped an unfair advantage in the litigation, it is improper to dismiss or strike a pleading on the basis of spoliation of evidence (*see De Los Santos v Polanco*, 21 AD3d at 398; *Lawson v Aspen Ford, Inc.*, 15 AD3d at 629-630; *Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 334 [2004]). Furthermore, the determination of the appropriate sanction for spoliation is within the broad discretion of the court (*see Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]).

Here, plaintiff failed to establish that Verizon's failure to preserve the subject work permit was willful or contumacious (*see Neve v City of New York*, 117 AD3d at 1008; *Samaroo v Bogopa Serv. Corp.*, 106 AD3d at 714; *Lawson v Aspen Ford, Inc.*, 15 AD3d at 630; *Ifraimov v Phoenix Indus. Gas*, 4 AD3d at 334; *Favish v Tepler*, 294 AD2d 396 [2002]; *cf. DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [1998]; *Squitieri v City of New York*, 248 AD2d 201 [1998]), or that its conduct deprived her of the means of proving her claim (*see Foncette v LA Express*, 295 AD2d 471, 472 [2002]; *Chiu Ping Chung v Caravan Coach Co.*, 285 AD2d 621 [2001]; *Gitlitz v Latham Process Corp.*, 258 AD2d 391 [1999]). Accordingly, the motion to strike is denied.

CAC (Sequence #8)

The motion by CAC for summary judgment in its favor is granted as unopposed, and otherwise on the merits. The undisputed testimony of CAC's witness, Ralph Facciola, based upon Facciola's personal knowledge, as well as his review of the relevant contract documents and photographs establish that CAC did not own, operate or control the area in question (*see Minott v City of New York,* 230 AD2d 719, 720), and did not perform any work in the roadway of Beach 59th Street between Beach Channel Drive and Arverne Boulevard (see *Abbenante v Larry E. Tyree Co., Inc.,* 228 AD2d 529, 644 N.Y.S.2d 780; *Hovi v City of New York,* 226 AD2d 430), except at the corners of the intersection. The evidence in the record indicates that plaintiff's accident occurred approximately mid-block on Beach 59th Street, and that CAC's work was, at all times, a minimum of 150-200 feet from where plaintiff fell.

Conclusion

The separate motions by LIPA, the City and CAC for summary judgment in their respective favor are granted.

The motion by Verizon for summary judgment dismissing all claims and cross claims against it is denied.

The motion by plaintiff to strike Verizon's answer is denied.

Dated: April 22, 2016

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Howard G. Lane, J.S.C.