

**Nibbs v City of New York & RCN Telecom Servs. of
NY Inc.**

2012 NY Slip Op 30774(U)

March 26, 2012

Supreme Court, New York County

Docket Number: 401886/2008

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C. Justice

PART 5

Index Number : 401886/2008
NIBBS, MARTHA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/17/12
MOTION SEQ. NO. 002

CAL # 102

The following papers, numbered 1 to 1, were read on this motion to/for summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
APPOINTMENT / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

MAR 28 2012

NEW YORK
COUNTY CLERK'S OFFICE
_____, J.S.C.

Jaffe
BARBARA JAFFE
J.S.C.

Dated: 3/26/12
MAR 26 2012

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
MARTHA NIBBS

Plaintiff,
-against-

Index No. 401886/08
Motion Date: 1/17/12
Motion Seq. No.: 002
Motion Cal. No.: 102

THE CITY OF NEW YORK & RCN TELECOM SERVICES
OF NY INC.,

Defendants.

DECISION AND ORDER

-----X
RCN TELECOM SERVICES OF NY INC.,

Third-Party Plaintiff,
-against-

FILED

HYLAN DATACOM & ELECTRICAL INC.,

MAR 28 2012

Third-Party Defendant.

-----X
BARBARA JAFFE, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

For Hylan:
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The Law Offices of Edward Garfinkel
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Brooklyn, NY 11201-3837
718-250-1100

By notice of motion dated December 21, 2011 and submitted on default, third-party defendant Hylan Datacom & Electrical Inc. (Hylan) moves pursuant to CPLR 3212 for an order dismissing the third-party complaint and all cross-claims against it.

I. BACKGROUND

On or about April 30, 2007, plaintiff tripped and fell on an uneven portion of pavement as she was walking north across East 43rd Street on the crosswalk just east of its intersection with Third Avenue in Manhattan. (Affirmation of Scott C. Perez, Esq., dated Dec. 21, 2011, Exh. C).

Sometime thereafter, plaintiff commenced the instant matter by filing a summons and complaint.

On or about April 2, 2010, defendant RCN Telecom Services of NY Inc. (RCN) commenced a third-party action against Hylan with the filing of a summons and third-party complaint, asserting claims for common-law indemnification and contribution. (*Id.*, Exh. A). On or about July 13, 2010, Hylan joined issue on the third-party complaint with service of its answer. (*Id.*, Exh. B).

At an examination before trial (EBT) held on June 2, 2011, Nadine Loggia, expediter for Hylan, testified that Hylan's records reveal that it performed work on RCN's behalf on East 43rd Street between Lexington and Third Avenues and that the work did not extend into the east crosswalk. (*Id.*, Exh. D). At a second EBT held on September 15, 2011, she examined a photograph on which plaintiff identified the accident site and testified that it did not portray Hylan's work. (*Id.*, Exh. E).

At an EBT held on the same day, Brian Crombie, RCN constructing and engineer manager, testified that a diagram of RCN's subterranean facilities at or near the subject intersection shows that no such facilities exist east of the intersection. (*Id.*, Exh. I).

II. CONTENTIONS

Hylan denies that it owes common-law indemnification or contribution to RCN as it did not perform work at the accident site. (*Id.*).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets

this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]).

Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

To establish a *prima facie* claim of negligence, a plaintiff must show duty, breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). A contractor “who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site.” (*Id.*).

“Common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing a plaintiff’s injuries.” (*Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]). And, pursuant to CPLR 1401, “two or more persons who are subject to liability for damages for the same personal injury . . . may claim contribution among them.”

Having established that it did not perform work at the accident location, and absent any evidence that its work on the other side of the intersection caused or created the defect on which plaintiff tripped, Hylan has demonstrated, *prima facie*, that it may not be held liable to plaintiff, thereby dispositively rebutting RCN’s claims for common-law indemnification and contribution. (*See Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008] [where unrebutted affidavit of project superintendent reflected that defendant did not perform work at accident site, and no evidence showing that its work caused defect offered, defendant entitled to summary judgment]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006][defendant entitled to summary


[*5]
judgment “[a]bsent some evidence connecting [its] work to the situs of plaintiff’s injury”).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that third-party defendant Hylan Datacom & Electrical Inc.’s motion for summary judgment on the third-party complaint is granted.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 26, 2012
New York, New York
MAR 26 2012

FILED

MAR 28 2012

NEW YORK
COUNTY CLERK'S OFFICE