

Verizon N.Y., Inc. v Keyspan Gas E. Corp.
2012 NY Slip Op 31740(U)
June 28, 2012
Sup Ct, NY County
Docket Number: 118833/06
Judge: Saliann Scarpulla
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 118833/2006
VERIZON NEW YORK
vs.
KEYSPAN GAS EAST
SEQUENCE NUMBER : 012
PRECLUDE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ **No(s).** _____
Answering Affidavits -- Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

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

granted and cross-motion are decided in accordance with accompanying memorandum decision.

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

FILED

JUL 03 2012

Dated: 6/27/12

NEW YORK COUNTY CLERK'S OFFICE
Saliann Scarpulla, J.S.C.

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: CIVIL TERM: PART 19

-----X
VERIZON NEW YORK, INC.,

Plaintiff,

Index No.: 118833/06
Submission date: 11/16/11

-against-

DECISION AND ORDER

KEYSPAN GAS EAST CORPORATION,
KEYSPAN ENERGY CORPORATION, HAWKEYE
LLC and OCEAN ELECTRIC CORPORATION,

FILED

JUL 03 2012

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HAWKEYE LLC,

Third-Party Plaintiff,

Index No.: 590258/07

-against-

UTILITIES PLUS CORPORATION,

Third-Party Defendant.

For Plaintiff:
Pillinger Miller Tarallo, LLP
570 Taxter Road, Suite 275
Elmsford, NY 10523

For Defendant Hawkeye, LLC:
Lewis, Brisbois, Bisgaard & Smith LLP
77 Water Street
New York, NY 10005

For Defendant Ocean Electric
Corporation:
Baxter, Smith, Tassan & Shapiro, PC
99 North Broadway
Hicksville, NY 11801

HON. SALIANN SCARPULLA, J.:

Defendant/third-party plaintiff Hawkeye LLC ("Hawkeye") moves to preclude plaintiff Verizon New York, Inc. ("Verizon") *in limine* from introducing certain evidence at trial, consisting of a "Cost Allocation Manual" ("CAM"), invoices and the testimony of its billing specialist, arguing that such claimed proof of damages is inadmissible under

New York law. Hawkeye also moves pursuant to CPLR 3212, for partial summary judgment on the issue of damages. Defendant Ocean Electric Corporation (“Ocean Electric”) cross-moves to extend its time to move to file the within summary judgment motion, and, pursuant to CPLR 3212, for summary judgment on all claims and cross claims against it.

By letter dated June 27, 2012, counsel for Hawkeye informed the Court that Verizon and Hawkeye have entered into a settlement, and the action as to Hawkeye will be discontinued. Accordingly, Hawkeye’s motion to preclude and for summary judgment is denied as moot.

Verizon commenced this in December 2006 against defendants Keyspan Gas East Corporation (“Keyspan Gas”), Keyspan Energy Corporation (“Keyspan Energy”), Hawkeye and Ocean Electric. Verizon also commenced a related action against Utilities Plus this Court entitled *Verizon New York, Inc. v. Utilities Plus Corporation*, Index Number 111521/2007, and obtained a default judgment against Utilities Plus on September 16, 2008. Verizon seeks to recover \$438,833.12 in damages allegedly sustained to its underground telecommunication facilities on December 8, 2004, as a result of defendants’ underground drilling work on Hempstead Turnpike, approximately 800 feet east of Oak Street, Hempstead, New York.

At the time of the accident, Hawkeye had contracted with Keyspan Communications, not a party to this action, for the installation of fiber optic cable and

conduit in connection with a telecommunications upgrade at Hofstra University in Hempstead, New York. Hawkeye retained third-party defendant utilities Plus Corporation (“Utilities Plus”) to provide the directional drill and ancillary equipment and to operate the directional drill for underground boring and conduit installation work. Directional drilling was required for the purpose of running Keyspan Communications’ conduit and cable from an area north of the westbound lanes of Hempstead Turnpike adjacent to Hofstra University to a hand-dug exit pit at the center median, approximately eight to ten feet north of the eastbound lanes of Hempstead Turnpike.

Verizon alleges that one of its conduit banks was severed during the directional drilling in the center median approximately 15 feet north of the eastbound lanes of Hempstead Turnpike due to the negligence of Hawkeye, Utilities Plus and/or Ocean Electric in locating marked-out utilities. Hawkeye contends that any damage sustained by Verizon was a result of Verizon’s negligence in failing to properly mark-out and/or identify its underground facilities. After the incident, Verizon’s in-house employees repaired the cables, using their own materials and tools. Verizon sent Hawkeye an invoice for the damage totaling \$438,833.12, which Verizon alleges was the total cost of repair.

Utilities Plus, the entity performing the drilling which allegedly severed Verizon’s cable, is now a dissolved corporation. Ocean Electric was formerly affiliated with Utilities Plus, as they were both owned by the same individual. Ocean Electric cross-

[* 5] .
moves for summary judgment on the ground that it was not involved in the planning, operation or execution of any of the work at issue in this action.

Keyspan Gas and Keyspan Energy moved for summary judgment dismissing the complaint as against them. Their motions were granted without opposition, in a decision and order placed on the record on April 20, 2011.

Hawkeye commenced a third-party action against Utilities Plus on March 16, 2007, by filing its third-party summons and complaint. On March 14, 2008, Hawkeye was granted a default judgment against Utilities Plus for its non-appearance in the third-party action.

By order of this Court, placed on the record April 20, 2011, I precluded Verizon from submitting any proof of damages at trial which had not been produced as of April 22, 2011.

Ocean Electric cross-moves to extend its time to move to file the within summary judgment motion, and pursuant to CPLR 3212, for summary judgment on all claims and cross claims against it.

Ocean Electric alleges that it was not involved in the planning, operation or execution of any of the work on Hempstead Turnpike on the date of the accident. Ocean Electric, which is owned solely by Jeffrey Dilandro "Dilandro" and his wife Helen, alleges that is an entity involved in residential electrical contracting and not commercial directional drilling, boring or underground conduit installation. Utilities Plus, on the

[* 6] ,
other hand, was an underground utilities contractor which was also partially owned by Dilandro. Ocean Electric contends that it is being sued because it is owned by Dilandro.

On April 20, 2011, in an on the record order at which counsel for Ocean Electric was present, I directed that June 30, 2011 was the deadline to file the note of issue, and that all summary judgment motions must be made within 60 days thereafter. Note of issue was filed on June 30, 2011. The within cross motion for summary judgment was brought on September 15, 2011, approximately 17 days after my deadline.

Counsel for Ocean Electric argues that the within motion is timely in that, although Verizon filed its note of issue on June 30, 2011, it did not file said note with proof of service, as required by CPLR 3402 (a).¹ Ocean Electric asserts that because Verizon did not serve its proof of service at the time of filing the note of issue, its note of issue is a nullity. Further, Ocean Electric claims that it did not learn that Verizon had filed its note of issue until July 21, 2011, when counsel for Hawkeye served correspondence by facsimile, notifying both Verizon and Ocean Electric that Verizon had filed its note of issue but improperly failed to serve the defendant with a copy of the note. On July 27, 2011, counsel for Ocean Electric received a copy of Verizon's note of issue by regular mail.

¹ CPLR 3402(a) requires that "any party may place a case upon the calendar by filing, *within ten days after service, with proof of such service* two copies of a note of issue with the clerk." (Emphasis added).

[* 7]

Ocean Electric cites the First Department's prior rulings that "the 60-day period cannot be construed to run from the date of the unilateral act of filing a note of issue," but rather that "defendants . . . cannot be charged with knowledge of the triggering event commencing the 60 days, i.e., the filing of the note of issue, until the service by mail is completed." *Szabo v. XYZ, Two Way Radio Taxi Assn.*, 267 AD.2d 134, 135 (1st Dept 1999). *See also Luciano v. Apple Maintenance & Servs.*, 289 A.D.2d 90 (1st Dept 2001). In both *Szabo* and *Luciano* the First Department, citing CPLR 2103 (b) (2), extended the defendant's time to file a summary judgment motion by five days where the plaintiff had served its notice of filing the note of issue by mail.

However, *Szabo* and *Luciano* both predate *Brill v. City of New York*, 2 N.Y.3d 648 (2004), wherein the Court of Appeals held that courts may not consider the merits of an untimely summary judgment motion for any reason other than "good cause for the delay in making the motion." *Brill*, 2 N.Y.3d at 652. Accordingly, the First Department has recently found that *Szabo* and *Luciano* are no longer good law to the extent that they permit a five-day extension of the filing deadline for summary judgment motions pursuant to CPLR 2103(b)(2). *Group IX, Inc. v. Next Print. & Design Inc.*, 77 A.D.3d 530 (1st Dept 2010).

Ocean Electric also cites *McFadden v. 530 Fifth Ave. RPS II Assoc., LP*, 28 A.D.3d 202 (1st Dept 2006), which held that a plaintiff's failure to serve a note of issue

constituted good cause for a late summary judgment motion, where defendants did not learn of the filing of the note of issue until after the 60-day period had expired.

Here, however, I explicitly informed counsel for the parties that the note of issue had to be filed by June 30, 2011 and that any motions for summary judgment had to be filed within 60 days thereafter. Counsel for all parties were advised that this case, which was commenced in 2006, had been delayed too long and needed to proceed to trial.

Finally, the fact that there was outstanding discovery between Verizon and Hawkeye is not good cause for delaying Ocean Electric's motion for summary judgment which is based solely upon the relationship between itself and Utilities Plus.

Therefore, Ocean Eclectic's motion for an extension of time to file its motion for summary judgment will be denied, and its motion for partial summary judgment denied as untimely.

In accordance with the forgoing, it is

ORDERED that the motion by defendant/third-party plaintiff Hawkeye LLC to preclude plaintiff from introducing certain evidence at trial, and for partial summary judgment as to damages is denied as moot; and it is further

* 9]

ORDERED that the cross-motion by defendant Ocean Electric Corporation to extend its time to move to bring a motion for summary judgment, is denied, and its motion for summary judgment dismissing all claims and cross-claims against it is denied as untimely.

This constitutes the Decision and Order of the Court.

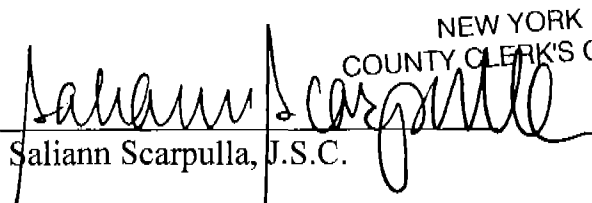
Dated: New York, New York
June 28, 2012

FILED

ENTER:

JUL 03 2012

NEW YORK
COUNTY CLERK'S OFFICE


Saliann Scarpulla, J.S.C.