

Rios v Metropolitan Transportation Authority

2012 NY Slip Op 32197(U)

August 13, 2012

Sup Ct, New York County

Docket Number: 111515/09

Judge: Michael D. Stallman

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ANNEXED ON 8/21/2012
* 1]

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 21

Justice

Index Number : 111515/2009
RIOS, ROBERT, JR.
vs.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 111515/09
MOTION DATE 6/7/12
MOTION SEQ. NO. 005

The following papers, numbered 1 to 4 were read on this motion for

Notice of Motion; Affirmation — Exhibits A-F	No(s). <u>1; 2</u>
Answering Affirmation — Exhibits A-F	No(s). <u>3</u>
Replying Affirmation	No(s). <u>4</u>

Upon the foregoing papers and the papers included in motion sequences 006 and 007, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order; and it is further

ORDERED that this action is respectfully referred to the Trial Support Office for reassignment to a General Part, as the NEW YORK CITY TRANSIT AUTHORITY is no longer a party to the action.

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE
HON. MICHAEL D. STALLMAN

Dated: 8/13/12
New York, New York


_____, J.S.C.

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

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check if 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 : IAS PART 21

-----x
ROBERT RIOS, JR.,

Plaintiff,

- against -

Index No. 111515/09

Seq. Nos. 005, 006,
007

METROPOLITAN TRANSPORTATION AUTHORITY,
S3 TUNNEL CONSTRUCTION AJV, a joint
venture between SKANSKA USA CIVIL, INC.,
J.F. SHEA CONSTRUCTION, INC.,
SCHIAVONE CONSTRUCTION CO., INC.,
THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, WARREN GEORGE, INC.,
TIME WARNER CABLE OF NEW YORK, and
CONSOLIDATED EDISON OF NEW YORK,

DECISION AND ORDER

Defendants.

-----x
TIME WARNER ENTERTAINMENT COMPANY, L.P.
d/b/a TIME WARNER CABLE through its
New York City division s/h/a
TIME WARNER CABLE OF NEW YORK,

Third-Party Plaintiff,

- against -

HYLAN DATACOM & ELECTRICAL INC.,

Third-Party Defendant.
-----x

FILED

AUG 21 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. MICHAEL D. STALLMAN, J.:

Motions designated Sequence Numbers 005, 006, and 007 are consolidated for disposition.

In Motion Sequence Number 005, defendant/third-party plaintiff Time Warner Entertainment Company, L.P., d/b/a Time Warner Cable through its New York City division s/h/a Time Warner Cable of New York ("Time Warner Cable") moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint and all cross

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claims against it. Time Warner Cable also seeks summary judgment on its cross claim for indemnity against third-party defendant Hylan Datacom & Electrical Inc. ("Hylan").

In Motion Sequence Number 006, Hylan moves, pursuant to CPLR 3212, to dismiss the Complaint, third-party Complaint, and all cross claims against it.

In Motion Sequence Number 007, defendants Metropolitan Transportation Authority ("MTA") and S3 Tunnel Construction AJV ("S3 Tunnel"), a joint venture between Skanska USA Civil Northeast, Inc., s/h/a Skanska USA Civil, Inc. ("Shanska"), J.F. Shea Construction Co., Inc. ("J.F. Shea"), Schiavone Construction Co. LLC s/h/a Schiavone Construction Co. Inc. ("Schiavone"), New York City Transit Authority ("NYCTA"), and Warren George Inc. ("Warren George") (collectively, "MTA Defendants") move, pursuant to CPLR 3212, to dismiss the Complaint against them.

BACKGROUND

Plaintiff commenced this action seeking to recover damages from defendants for personal injuries he allegedly sustained on January 24, 2009, when he fell while riding his bicycle along the east side of Second Avenue between East 95th and East 96th Streets, in Manhattan. Plaintiff claims, in essence, that a defect in the roadway, namely, a gap between two metal construction plates, caused him to fall. He further claims that defendants negligently installed the construction plates in the

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roadway. The following circumstances are gleaned from the submission of the parties.

By Cable Television System Construction Agreement, dated December 18, 1996, Time Warner Cable retained Trinity Communications Corporation ("Trinity") on an "as required" basis to perform work in connection with Time Warner Cable's business of providing cable and fiber optic services (Contract, Not of Mot, Seq. No. 005, Exh H). The Agreement states (1) that Trinity "is an independent contractor, solely responsible for the performance of the Work in an effective, safe, and lawful manner"; (2) that there is no agency, partnership or employer-employee, principal-agent or joint venture relationship between the contracting parties; and (3) that Time Warner Cable "shall have no liability whatsoever for either the obligations of the Contractor or the actions of the Contractor's agents, representatives or employees" thereunder (*id.*). In addition, Trinity agreed to:

[I]ndemnify, defend and hold harmless [Time Warner Cable] ... against ... claims, demands, damages, and costs and expenses (including, without limitation, reasonable attorneys' fees, court and other proceeding costs and all other costs incurred to enforce the indemnity granted in this Section) ... arising out of or in any way connected with the acts or omissions of [Trinity] in connection with its work for [Time Warner Cable], except to the extent attributable to the negligence of [Time Warner Cable]

(*id.*).

By Assignment Agreement, dated February 4, 2003, Hylan agreed to assume, and be bound by, the terms and conditions of the agreement between Time Warner Cable and Trinity, effective February 15, 2003 (Assignment Agreement, Not of Mot, Mot. Seq. No. 005, Exh I).

Initially, plaintiff commenced this negligence action against Time Warner Cable. However, he later filed a supplemental Complaint, adding the other defendants. The supplemental Complaint essentially alleges that defendants owned, operated, maintained, or were involved in a construction project on, the roadway where the alleged accident occurred, and that the accident was caused solely by the negligence of defendants in the ownership, operation, and maintenance of the roadway and the construction project. The Bill of Particulars contains similar allegations.

Defendants filed answers, generally denying the allegations in the Complaint, asserting numerous affirmative defenses, and alleging cross claims against co-defendants for contribution or indemnification. Time Warner Cable also impleaded Hylan seeking contribution or indemnification.

Time Warner Cable, Hylan, and the MTA defendants now seek summary judgment dismissing the claims and cross claims against them. Time Warner Cable also seeks summary judgment on its cross claim for contribution or indemnification against Hylan.

DISCUSSION

It is well settled that 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 demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, *supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, plaintiff seeks to recover damages from defendants based on their alleged negligence in causing his accident. Negligence requires the breach of a duty on the part of defendant as to plaintiff, resulting in injury (see *Pulka v Edelman*, 40 NY2d 781, 782 [1976]).

At an examination before trial ("EBT") held on January 21, 2011, plaintiff testified that he was riding his bicycle on the east side of Second Avenue when he encountered a gap between two metal construction plates that were in the roadway near the northeast corner of Second Avenue and East 96th Street (Rios EBT, Not of Mot 005, Exh B, pp. 22-23). Plaintiff further stated that

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he fell from his bicycle, injuring, among other things, his right knee.

The submissions include photographs of the site that were taken two days after the alleged incident (see *id.*, Exh C.), as well as a permit, issued to Time Warner Cable on September 3, 2008, for work to be performed on Second Avenue between East 95th and East 96th Streets (*id.*, Exh D). It is undisputed that Hylan performed the work contemplated by the permit as an independent contractor for Time Warner Cable.

In seeking summary judgment, Time Warner Cable argues that it cannot be held liable for any alleged negligence by Hylan, its independent contractor, and, in any event, Hylan did not perform any work for it at the alleged accident site. To support its position, Time Warner Cable submits, among other things, copies of its December 18, 1996 Cable Television System Construction Agreement with Trinity Communications, the February 4, 2003 Assignment Agreement between Trinity Communications and Hylan, and the September 3, 2008 permit. Time Warner Cable also submitted transcripts of the EBT testimony of Victor Flores, one of its employees, and Nadine Loggia, a Hylan employee.

The general rule is that an employer who hires an independent contractor is not liable for the negligent acts of the independent contractor (see *Rosenberg v Equitable Life Assur. Socy.*, 79 NY2d 663, 668 [1992]). Exceptions to the general rule apply where the employer (1) is under a statutory duty to perform

or control the work; (2) has assumed a specific duty by contract; (3) is under a duty to keep the premises safe; or (4) has assigned work to the independent contractor which the employer knows involves special dangers inherent in the work or dangers which should have been anticipated by the employer (*id.*).

Here, the Cable Television System Construction Agreement and Assignment Agreement unequivocally establish that Hylan was an independent contractor during the performance of its work for Time Warner Cable. Furthermore, plaintiff fails to offer any evidence to establish a triable issue of fact as whether the exceptions imposing vicarious liability on an employer should apply in this case. Thus, on review of the submissions, the Court concludes that Time Warner Cable cannot be held liable for any alleged negligence by Hylan, and the claims against it must be dismissed.

Moreover, the submissions amply demonstrate that Hylan did not perform any work at the alleged accident site. Specifically, at an EBT held on April 12, 2011, Victor Flores testified that in November 2008, Hylan performed work for Time Warner Cable on the west side of Second Avenue, near East 96th Street, across the street from the site of the alleged incident; that Hylan did not use any metal construction plates during the project; and that the project was completed on November 17, 2008 (Flores EBT, Not of Mot 005, Exh E, pp. 11-13). Nadine Loggia essentially corroborated the testimony of Victor Flores at an EBT held on

December 13, 2011, (Loggia EBT, Not of Mot 005, Exh G.).

Neither Time Warner Cable nor plaintiff offers anything to raise any triable issue of fact as to Hylan's negligence.

Nevertheless, Time Warner Cable moves for summary judgment on its claim for contribution or indemnification against Hylan. Hylan opposes the motion and seeks to dismiss the third-party Complaint and all cross claims against it.

As stated, pursuant to the parties' Cable Television System Agreement and Assignment Agreement, Hylan agreed to indemnify Time Warner Cable for the former's acts or omissions in connection with its work for the latter. Absent any evidence that Hylan committed any act or omission in the performance of its work for Time Warner Cable which caused or contributed to plaintiff's accident, Time Warner Cable has failed to demonstrate that Hylan's duty to indemnify was triggered (see *Steel v City of New York*, 271 AD2d 435 [2d Dept 2000]).

Moreover, while a duty to defend is broader than the duty to indemnify and arises whenever the allegations in the complaint "suggest a reasonable possibility of coverage" (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]), plaintiff in this action does not allege that Hylan's acts or omissions in the performance of its work for Time Warner Cable caused or contributed to his accident. In fact, plaintiff does not allege any claims against Hylan; rather, it was Time Warner Cable that impleaded Hylan as third-party defendant.

Thus, Hylan's duty to defend Time Warner Cable does not arise here (see e.g. *Stellar Mech. Servs. of New York, Inc. v Merchants Ins. of New Hampshire*, 74 AD3d 948 [2d Dept 2010]). As such, Hylan is entitled to summary judgment dismissing the claims and cross claims concerning Hylan.

The Complaint alleges that the MTA defendants were negligent in creating or permitting a trap-like condition to exist at the site of the alleged incident, near the MTA/NYCTA Second Avenue Subway construction project. In seeking summary judgment, the MTA defendants argue that they did not owe a duty to plaintiff because they did not create the condition which allegedly caused plaintiff's accident. To support their position, the MTA defendants offer, among other things, a copy of the transcript from the EBT of Alaeden Jlelaty, an employee of Skanska and project manager for the subway construction project (Jlelaty EBT, Not of Mot 007, Exh F).

At an EBT held on April 11, 2011, Alaeden Jlelaty testified that the work on the construction project included the excavation in the center of the roadway on Second Avenue between East 95th and East 96th Streets, in late 2008 (*id.* at 21-22); that excavation was performed inside a barricaded area, not open to pedestrians (*id.* at 23); and that the work did not require the use of roadway plates (*id.* at 26). He also testified that at the time of the alleged incident, tunnel related construction was

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being performed on the west side of Second Avenue, between East 95th and East 96th Streets (*id.* at 20).

By offering competent evidentiary proof that they did not create the dangerous condition on which plaintiff fell and that they performed no work at the accident location, MTA defendants sufficiently demonstrate entitlement to summary judgment (*see Amarosa v City of New York*, 51 AD3d 596 [1st Dept 2008]).

Plaintiff attempts to raise a triable issue of fact by offering a copy of the transcript of the EBT of Thomas Fitzgerald, a Con Ed employee, essentially stating that nonparty Roadway Contracting Inc. ("RCI"), a subcontractor for S3 Tunnel, did all of the trenching for manholes in the area Second Avenue near East 95th and East 96th Streets from June to December 2008, and that RCI probably installed plates so that people and cars could traverse the trenching (Fitzgerald EBT, Affirm in Opp, Exh A, pp. 19-22). However, it is well established that mere speculation is insufficient to defeat summary judgment (*see Zuckerman v City of New York*, *supra*).

Accordingly, it is

ORDERED that the summary judgment motion designated Motion Sequence Number 005 is granted to the extent of dismissing the Complaint and cross claims against defendant/third-party plaintiff Time Warner Entertainment Company, L.P., d/b/a Time Warner Cable through its New York City division s/h/a Time Warner Cable of New York, and it is otherwise denied; and it is further

ORDERED that the summary judgment motion designated Motion Sequence Number 006 is granted and the Complaint, third-party Complaint, and all cross claims against defendant Hylan Datacom & Electric, Inc. are dismissed; and it further

ORDERED that the summary judgment motion designated Motion Sequence Number 007 is granted and the Complaint is dismissed as to defendants Metropolitan Transportation Authority and S3 Tunnel Construction AJV, a joint venture between Skanska USA Civil Northeast, Inc., s/h/a Skanska USA Civil, Inc., J.F. Shea Construction Co., Inc., Schiavone Construction Co. LLC s/h/a Schiavone Construction Co. LLC, New York City Transit Authority, and Warren George Inc., and it is further

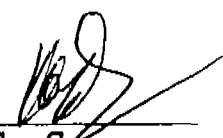
ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that this action is respectfully referred to the Trial Support Office for reassignment to a General Part, as the New York City Transit Authority is no longer a party to the action.

Dated: August 13, 2012

New York, NY

ENTER:



J. S. C.

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN