

Verizon New York, Inc. v Tully Constr. Co., Inc.

2013 NY Slip Op 32545(U)

October 11, 2013

Sup Ct, New York County

Docket Number: 113914/08

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 113914/2008

VERIZON NEW YORK

vs

TULLY CONSTRUCTION

Sequence Number : 001

SUMMARY JUDGMENT

PART 19

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

decided per the memorandum decision dated 10/11/13
which disposes of motion sequence(s) no. 001

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

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NEW YORK

Dated: 10/11/13

[Signature], 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 Number: 113914/08
Submission Date: 5/8/13

- against -

DECISION and ORDER

TULLY CONSTRUCTION CO. INC.,
Defendant.

----- X

TULLY CONSTRUCTION CO., INC.,
Third-Party Plaintiff,

- against -

EMPIRE CITY SUBWAY COMPANY, LTD.,
Third-Party Defendant,

----- X

For Plaintiff:
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For Third-Party Defendant:
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Papers considered in review of this defendant's motion for summary judgment/motion to dismiss based on spoliation:

Notice of Motion/Affirm. of Counsel in Supp/Exhibits.....	1
Affirm. in Opp. to Defendant's Mot/Exhibits	2
Reply Affirm. in Supp. of Motion.....	3
Affirm. in Supp. of Cross-Motion.....	4
Reply Affirm. in Opp. to Cross-Motion.....	5

HON SALIANN SCARPULLA, J.:

In this action to recover for property damage, defendant Tully Construction Co., Inc. (“Tully”) moves for summary judgment dismissing plaintiff Verizon New York, Inc.’s (“Verizon”) complaint pursuant to CPLR § 3212. In the alternative, Tully moves for an order dismissing the complaint on spoliation grounds pursuant to CPLR § 3126.

On October 15, 2008, Verizon commenced this action against Tully seeking to recover \$727,118.95 for property damage to its underground cables.¹ Verizon alleges that Tully trespassed and damaged its underground cables on or about April 2, 2006.

Verizon’s local manager, Robert Sheldon (“Sheldon”), testified at his deposition that Verizon discovered the damaged cables on the morning of April 2, 2006. After receiving customer reports of service outages, Verizon traced the damage to the southwest corner of West Houston and Varick Streets.

Sheldon testified that the cable damage consisted of three splices that failed – a lead joint splice and two stalpth sheathing splices. Sheldon explained that the purpose of a splice is to join two cables together to extend their length. Sheldon testified that approximately 5,400 pairs were damaged.

Sheldon opined that the cable damage was caused by Tully’s work in the area. Sheldon testified that the cables shifted during Tully’s construction of a new catch basin, which required Tully to break the walls of the manhole at the southwest corner, and to

¹ Empire City Subway Company, Ltd. (“ECS”) cross-moves for summary judgment dismissing the third-party complaint. ECS’ cross-motion is settled pursuant to a stipulation discontinuing the third-party action filed on August 26, 2013.

move Verizon's telephone ducts and cables to make room for the catch basin. According to Sheldon, the telephone cables shifted and were left unsupported by the racking system.

Sheldon testified that the cable damage must have occurred a few days prior to the discovery of the damage on April 2. Once the damage was discovered, Verizon performed repairs on the damaged cables from April 2, 2006 to May 8, 2006.

Tully's project superintendent Dino Basso ("Basso") was also deposed. Basso testified that Tully worked as a general contractor on a "curb-to-curb" reconstruction job along West Houston Street between West Street and Bowery from August 2005 to September 2009. The project involved excavation of the roadway and installation of new gas mains, new water mains, and sewer work.

Basso described several projects that Tully worked on near West Houston and Varick Streets during the weeks prior to the cable damage: (a) installation of a water main on the southeast corner; (b) raising an existing gas main on the northeast corner; (c) installing fire hydrants in the middle of the block along West Houston Street between Varick and Hudson Streets.

Basso also testified that Tully performed a "large amount of telephone and electric relocation" work for the project, and that Tully hired ECS to perform interference work with telephone conduits. Basso testified that telephone ducts had to be relocated in the southwest corner of Varick and Houston Streets, but he could not recall when the relocation work was performed. Basso also did not know whether Tully excavated a trench in the area where the cable damage occurred.

ECS' plant inspector, James McGlone ("McGlone"), testified at his deposition that he was responsible for protecting the integrity of Verizon's cables for the water main project on West Houston Street in April 2006.

McGlone testified that Tully excavated the roadway and installed the water main, which consisted of a pipe placed in the middle of the roadway. In addition to the water main, Tully installed catch basins and chutes that led to sewers along the northern and southern side of the street. McGlone testified that it was also necessary for utilities to be moved to install the water main.

McGlone testified that he did not observe Tully performing work in the southwest corner, but that he knew that Tully performed work in the area at night because ECS employed a night crew to conduct night inspections of the work. McGlone also observed road plates approximately ten feet away from ECS' manhole at the southwest corner, which indicated that night work had been performed underground.

In the current motion for summary judgment, Tully argues that the complaint should be dismissed because it did not relocate any Verizon facilities in the area where the cables were damaged. In the alternative, Tully argues that the complaint should be dismissed because Verizon failed to preserve the damaged cables for inspection.

In opposition, Verizon argues that Tully worked in the area where the cables were damaged. In support of its argument, Verizon submits Tully's daily work reports for the period of March 2, 2006 to April 6, 2006. Verizon also contends that Basso's testimony fails to demonstrate that Tully did not trespass or damage the cables.

Verizon further argues that spoliation sanctions are inappropriate because Tully has the ability to establish a defense without examining the cables, and Tully fails to demonstrate the necessity of inspecting the cables.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In a negligence action, the plaintiff must show that: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; (3) which caused the plaintiff's injury. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981).

In a trespass to chattels action, the plaintiff must show that the defendant intentionally and wrongfully intruded or interfered with the plaintiff's personal property. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487 (1983).

I find here that Tully failed to demonstrate its entitlement to judgment as a matter of law dismissing Verizon's complaint. Tully failed to eliminate material issues of fact as to whether it performed work in the southwest corner of West Houston and Varick Streets during the time frame that the cable was damaged.

Tully's project manager, Dino Basso, testified that Tully worked in the northeast and southeast corners throughout March 2006, but he could not recall whether Tully performed any work at that time in the southwest corner. Basso acknowledged that Tully worked in the southwest corner and that telephone ducts in that area were relocated, but he could not recall when that work was performed. Basso also could not recall whether Tully dug a trench in the southwest corner at West Houston and Varick Streets.

Based on the deposition testimony and the extensive amount of work performed by Tully at the intersection of West Houston and Varick Streets during the time frame of the cable damage, I find that issues of fact exist as to whether Tully's reconstruction work caused damage to Verizon's cables. Accordingly, I deny Tully's motion for summary judgment dismissing Verizon's complaint.

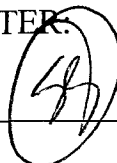
In accordance with the foregoing, it is

ORDERED that defendant Tully Construction Co., Inc.'s motion for summary judgment dismissing Verizon's complaint pursuant to CPLR § 3212 is denied.

This constitutes the decision and order of this Court.

Dated: New York, New York
October 11, 2013

ENTER:



Saliann Scarpulla, J.S.C.

FILED

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