Consolidated Edison Co. of N.Y., Inc. v Sicon Contr., Inc.
2019 NY Slip Op 31653(U)
June 10, 2019
Supreme Court, New York County
Docket Number: 160258/2015
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

SICON CONTRATORS, INC. and PROTEK LOCATING, INC.

Defendants.
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DECISION AND ORDER

Index Number

160258/2015

FRANK P. NERVO, J.S.C.

Defendant Protek Locating, Inc. ("Protek") moves to dismiss the complaint against it pursuant to CPLR §§ 3211(a)(1) and (7), contending documentary evidence establishes a defense and the pleading fails to state a cause of action. Defendant Sicon Contractors, Inc. ("Sicon") cross-moves for similar relief pursuant to CPLR §§ 3211(a)(1) and 3212. Plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed") opposes the motion and cross-motion.

Protek entered into a contract with Con Ed whereby Protek was responsible for, inter alia, marking the location of various buried Con Ed equipment/facilities for the purpose of alerting contractors to the location of the equipment. Sicon was hired to perform construction and excavation work along West 33rd Street between 8th and 9th Avenues. That construction work resulted in a cut and damage to buried Con Ed equipment in two separate incidents. Con Ed brought suit against Sicon, alleging Sicon performed the work negligently and failed to comply with notice provisions of General Business Law (GBL) § 760 et. seq., Public Service Law § 119-b, and 16 NYCRR § 753. Con Ed also alleges Protek failed to properly mark the location of the electrical equipment resulting in damage.

MOTION AND CROSS-MOTION TO DISMISS

a. failure to state a claim

On a CPLR § 3211(a)(7) motion to dismiss, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]). Where evidentiary material is submitted on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one (*Leon*, 84 NY2d at 88; *Gawrych v. Astoria Federal Savings and Loan*, 148 AD3d 681 [2d Dept 2017]).

As an initial matter, plaintiff's claims against Protek have been discontinued with prejudice pursuant to a February 11, 2019 stipulation (NYSCEF Doc. No. 45). Consequently, Protek's motion for relief under CPLR § 3211 is academic.

As to Sicon's cross-motion to dismiss the complaint, this Court treats the allegations in the complaint as true and accords plaintiff every possible favorable inference. The complaint alleges Sicon performed its construction activities negligently by, inter alia, digging with mechanical equipment instead of hand tools, or digging in an incorrect location. The complaint also alleges Sicon failed to follow notice requirements of GBL § 760, Public Service Law § 119-b, and 16 NYCRR § 753. Based on the foregoing, the complaint alleges a valid first cause of action for negligence, and a valid second cause of

action for a violation of GBL § 760 et. seq., sufficient to defeat Sicon's CPLR § 3211(a)(7) cross-motion to dismiss.

However, plaintiff's third cause of action, alleging violations of PSL § 119-b, must be dismissed. PSL § 119-b, in part, provides:

> 2. The commission shall adopt rules and regulations to implement and carry out the requirements of article thirty-six of the general business law [§ 760 et. seq.] established for the protection of underground facilities. Such rules and regulations shall include, but not be limited to, requirements for notice, one-call notification systems, participation of operators in such systems, designation and marking of the location of underground facilities and the verification of the designated or marked location of underground facilities, support for the underground facilities and obligations of excavators to protect underground facilities under such article, including the use of hand-dug test holes at underground facilities furnishing gas or liquid petroleum products and such other matters as may be appropriate for the protection and security of property, life or public health, safety or welfare.
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> [...]
>
> 4. The rules and regulations adopted pursuant to this section shall be in accordance with the provisions of article thirty-six of the general business law [§ 760 et. seq.].

PSL § 119-b therefore provides a basis for the commission to adopt rules and regulations in accordance with GBL § 760 et. seq., but notably it regulates only the commission, not excavators. Consequently, an excavator's violation of rules and regulations promulgated by the commission pursuant to PSL § 119-b does not provide for a separate cause of action. Instead, "any penalties, fines and financial liability resulting from violations of such rules and regulations shall be those specified in section seven hundred sixty-five of the general business law" (PSL § 119-b[7][b]). As such, plaintiff's third cause of action alleging a separate claim for a violation of PSL § 119-b must be dismissed, as duplicative of plaintiff's second cause of action, alleging a violation of GBL §§ 760 and 765.

Likewise, plaintiff's fourth cause of action claiming a violation of 16 NYCRR § 753 et. seq. cannot survive dismissal under CPLR § 3211(a)(7). 16 NYCRR § 753-3.6 requires excavators to verify the "precise location" of an underground facility where a facility overlaps a tolerance zone of any part of a work area. Similarly, 16 NYCRR § 753-3.8

prohibits the use of mechanical or powered excavating equipment within four inches of a marked or known underground facility. 16 NYCRR § 753-3.10 provides a general standard and requires excavators to take all reasonable precautions to avoid damage to underground facilities (*see also Level 3 Communications, LLC v. Petrillo Contr., Inc.*, 73 AD3d 865 [2d Dept 2010]). Plaintiff alleges, in its fourth cause of action, that Sicon violated 16 NYCRR § 753 by causing damage to its underground facility. However, such a violation, if it occurred, would give rise to, or support, a claim of negligence and would not form a basis for a separate cause of action *(see e.g. Avis Budget Car Rental, LLC, v. JD2 Environmental, Inc.*, 2016 WL 3251394 at *13 [EDNY 2016, Chen, J.][discussing violation of article 16 of NYCRR as evidence of negligence]). A violation of a regulation or ordinance does not conclusively establish negligence, but rather may be some evidence of negligence (*Verizon N.Y., Inc. v. Village of Athens*, 73 AD3d 526 [3d Dept 2007]; *Avis Budget Car Rental, LLC,* 2016 WL 3251394). Further supporting a finding of duplicity, plaintiff's complaint "fail[s] to include a single allegation that contain[s] any distinction between the damages applicable" to its first or fourth causes of action *(Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 30 NY3d 704, 712 [2018]). Therefore, plaintiff's fourth cause of action under 16 NYCRR § 753 et. seq. is duplicative of its first cause of action alleging negligence, and must be dismissed (*id.* at 711).

b. documentary evidence

Dismissal under CPLR § 3211(a)(1) is "warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, 84 NY2d 83 [1994]). "The evidence submitted in support of such motion must be 'documentary' or the motion must be denied" (*Cives Corp. v. George A . Fuller Co., Inc.*, 97 AD3d 713 [2d Dept 2012]). Documentary evidence is unambiguous, authentic, and undeniable; however, affidavits, deposition testimony, and letters are not considered documentary evidence for the purpose of motions to dismiss (*Granada Condominium III Assn. v. Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *see also GEM Holdco, LLC v. Changing World Technologies, L.P.*, 127 AD3d 598 [1st Dept 2015]). Here the affirmations, affidavits, and supporting exhibits submitted by Sicon fail to unambiguously establish, by admissible documentary evidence, a conclusive defense as a matter of law to plaintiff's first cause of action against it for damaging plaintiff's

facilities through negligence. The affidavit of Mr. Ferrara is not properly considered on a motion to dismiss and the Court has not considered those documents which are not properly before it (*GEM Holdco, LLC*, 127 AD3d at 599). The Field Reports of Damage to Company Property, are properly before the Court. These reports, created by Con Ed and relied on by Sicon, state that the marks made at the location were visible but "not fresh" (NYSCEF Doc. Nos. 66 and 67). The reports answer the question "Marked Correctly?" in the negative, but also state "the obstruction map provided clearly indicates shallow cover... Contractor failed to refresh marks before saw cutting," and advise that the work should have been completed by hand instead of machine (*id.*). Thus, these documents do not establish a defense, as a matter of law, to plaintiff's allegation of negligence against Sicon.

However, Sicon has established a defense, as a matter of law, to the second cause of action alleging that "excavation was made without compliance with the written notice provisions ... of the aforesaid section 760 (et. seq.) of the General Business Law [GBL] resulting in damages" (NYSCEF Doc. 1 at ¶ 16). GBL § 764 provides that an excavator shall give notice of the location and date of proposed excavation to operators with underground facilities in the area. It further provides that notification to the one-call notification system, New York 811, is sufficient notice where all operators notify the excavator that they have no underground facility within 15 feet of the proposed excavation site or the operator has marked any underground facility in the area (*id.*) GBL § 765 imposes fines and/or liability on excavators that fail to comply with the notice requirements. Sicon provides copies of notice to the one-call notification system, New York 811, in compliance with the notice requirements of GBL § 764 (NYSCEF Doc. No. 55). Furthermore, Con Ed's own field reports state that the site had been marked prior to the time of the incidents, evidence that plaintiff, an operator with underground facilities in the area, had been notified of Sicon's proposed construction activities at the location and had marked its facilities (NYSCEF Doc. Nos. 55, 66, and 67). Con Ed does not dispute that it retained Protek's services to mark Con Ed's underground facilities at the location. Therefore, Sicon has demonstrated its compliance with the applicable notice provisions and its defense, as a matter of law, to the second cause of action alleging failure to provide notice pursuant to GBL § 760 et. seq.

Accordingly, Protek's motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (7) is denied as academic. Sicon's motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (7) is granted only to the extent of dismissing the second, third, and fourth causes of action against it, and otherwise denied.

MOTION AND CROSS-MOTION TO FOR SUMMARY JUDGMENT

On a motion for summary judgment, pursuant to CPLR § 3212, the burden rests with the moving party to make a prima facie showing that it is entitled to judgment as a matter of law, and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). "[I]t is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense" (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NYD 175 [1982]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Here, issues of fact preclude summary judgment. The field reports do not resolve issues with respect to the visibility and correctness of the marks made by Protek, Sicon's reliance on those marks, Sicon's alleged failure to utilize the obstruction map "clearly" showing "shallow cover", or Sicon's performance of its construction duties using mechanical tools in place of hand tools (NYSCEF Doc. 41, 43, 55, 66, 67). Likewise, Mr. Ferrara's affidavit relying on these reports does not demonstrate the absence of material issues of fact regarding, inter alia, the location or applicability of any tolerance zone under 16 NYCRR § 753-3.6 or the reasonableness of using mechanical tools at the excavation location. Consequently, summary judgment must be denied.

Accordingly, it is

ORDERED that Protek Locating, Inc.'s motion to dismiss is denied as academic; and it is further

ORDERED that Sicon Contractors, Inc.'s cross-motion to dismiss is granted to the extent of dismissing the second, third, and fourth causes of action against Sicon Contractors, Inc., and otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that Sicon Contractors, Inc.'s cross-motion for summary judgment is denied; and it is further

ORDERED that to the extent Protek seeks summary judgment, its motion is denied.

THIS CONSTITUES THE DECISION AND ORDER OF THE COURT.

Dated June 10, 2019

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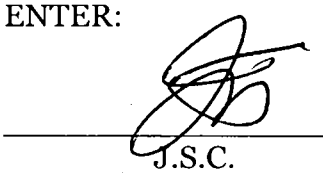

J.S.C.
HON. FRANK P. NERVO