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| Verizon N.Y., Inc. v National Grid USA Serv. Co., Inc. |
| 2019 NY Slip Op 33682(U) |
| December 17, 2019 |
| Supreme Court, New York County |
| Docket Number: 152290/2017 |
| Judge: Nancy M. Bannon |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 152290/2017

VERIZON NEW YORK, INC.,

MOTION DATE 09/25/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

NATIONAL GRID USA SERVICE COMPANY,
INC., NATIONAL GRID NY, and NATIONAL GRID
NEW YORK

DECISION + ORDER ON
MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28,
29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58,
59

were read on this motion to/for AMEND CAPTION/PLEADINGS

And cross-motion to DISMISS COMPLAINT

In this action, the plaintiff, Verizon New York, Inc., seeks to recover \$183,256.85 in
damages allegedly caused to its underground telecommunications facilities and equipment by
the defendants on June 18, 2014, in the course of the defendants' excavation and drilling
activities. The plaintiff moves (1) pursuant to CPLR 3025(b) to amend the complaint to add
KeySpan Gas East Corporation d/b/a National Grid (KeySpan) as a defendant; (2) pursuant to
CPLR 3124 to compel further discovery; and (3) to extend the Note of Issue filing deadline.
Defendant National Grid USA Service Company cross-moves to dismiss the complaint as
against it pursuant to CPLR 3211 and 3212. The other two named defendants, National Grid NY
and National Grid New York, did not answer or appear.

Leave to amend a pleading should be freely granted absent evidence of substantial
prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently
devoid of merit. See CPLR 3025(b); McCaskey, Davies and Assocs., Inc v New York City
Health & Hospitals Corp., 59 NY2d 755 (1983); JPMorgan Chase Bank, N.A. v Low Cost
Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013); 360 West 11th LLC v ACG Credit Co. II, LLC,

90 AD3d 552 (1st Dept. 2011). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015). Although the plaintiff cites only to “mistake” as the reason for not seeking this relief sooner, it has met its burden on this branch of the motion; and the defendant has not. Indeed, the defendant acknowledges that KeySpan is the regulated utility for the Nassau County area where the damage is alleged to have occurred and is closely related to the current defendants. Nor does it dispute the plaintiff’s assertion that KeySpan is often a named defendant along with the National Grid defendants in similar property damage cases. KeySpan’s connection to this case also appears to have been ascertained in recent depositions and, as observed by the plaintiff and as reflected in prior court orders, the defendant previously delayed in providing document discovery to the plaintiff.

The plaintiff also seeks further limited discovery in regard to KeySpan, as well as an additional deposition of Natalie Gilliard, an employee of the defendant, since the witness produced by the defendant, a National Grid attorney, had insufficient knowledge. That branch of the motion is granted to the extent that such depositions shall be conducted on or before January 28, 2020.

In considering a motion to extend the time to file a Note of Issue, the court “may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay [and] whether the moving party was in default before seeking the extension.” Grant v City of New York, 17 AD3d 215, 217 (1st Dept. 2005) quoting Tewari v Tsoutsouras, 75 NY2d 1,12 (1989). In this case, discovery was ongoing for more than one year and the Note of Issue deadline was extended several times, finally to June 14, 2019. This motion was filed June 10, 2019. Moreover, the plaintiff has been recalcitrant in providing discovery in accordance with court orders. For those reasons, the extension granted must be minimal, allowing enough time only to conduct the limited additional discovery granted in the previous paragraph. The defendant does not oppose this branch of the motion. Thus, the Note of Issue deadline is extended to February 13, 2020, and there shall be no further extension.

The cross-motion of defendant National Grid USA Service Company, Inc. seeking dismissal of the complaint pursuant to CPLR 3211 and 3212 is denied upon the movant’s failure to establish entitlement to that relief. The gravamen of the defendant’s motion is that it is merely

a servicing company that provides accounting, payroll, legal and other administrative services to other National Grid entities, and does not provide gas or utility services to customers. To the extent the defendant seeks dismissal pursuant to CPLR 3211, it appears to be arguing that the complaint fails to state a cause of action as against it. See CPLR 3211(a)(7). Initially, the court notes that the movant does not explain its delay in making this motion until more than two years after service of the complaint and a year of discovery. In any event, it is without merit.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977). While the plaintiff may not prevail against this defendant at trial, under this liberal standard, dismissal of the complaint pursuant to CPLR 3211(a)(7) is not warranted.

Nor is relief warranted pursuant to CPLR 3212. On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v

Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970). The plaintiff’s submissions, which include the depositions of plaintiff’s witness and defendant’s witness Reshmi Das, and an affidavit of Das, are insufficient to meet this burden in the first instance. Thus, the motion must be denied regardless of the sufficiency of the opposing papers.

Accordingly, it is

ORDERED that the branch of the plaintiff’s motion which is to amend the Summons and Complaint is granted to the extent that the caption shall be amended and claims against the additional defendant added as per the proposed Amended Summons and Complaint, and it is further,

ORDERED that the caption shall read as follows:

VERIZON NEW YORK, INC.

v

**NATIONAL GRID USA SERVICE
COMPANY, INC., NATIONAL GRID NY,
NATIONAL GRID NEW YORK and
KEYSPAN GAS EAST CORPORATION**

And it is further

ORDERED that the plaintiff shall serve the Amended Summons and Complaint on all defendants within 20 days of this order, and it is further,

ORDERED that the defendants shall serve and file an answer to the Amended Summons and Complaint within 20 days of service thereof, and it is further,

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are to mark the court's records to reflect the additional party and the amendments, and it is further,

ORDERED that the branch of the plaintiff's motion which is to compel additional discovery is granted to the extent that the plaintiff may depose one witness from KeySpan Gas East Corporation, and one additional witness from defendant National Grid USA Service Company, Inc., on or before January 28, 2020, and it is further


ORDERED that the branch of the plaintiff's motion which is to extend the Note of Issue deadline is granted to the extent that the deadline is extended to February 13, 2020, and shall not be further extended, and it is further

ORDERED that the cross-motion of defendant National Grid USA Service Company, Inc. to dismiss the complaint pursuant to CPLR 3211 and 3212 is denied in its entirety, and it is further

ORDERED that all parties shall appear for a status/settlement conference on February 27, 2020, at 11:00 a.m, and shall bring a copy of this order to the conference.

This constitutes the Decision and Order of the court.

12/17/2019
DATE


NANCY M. BANNON, J.C.
HON. NANCY M. BANNON

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input checked="" type="checkbox"/> GRANTED IN PART | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |