Roness v The City of New York
2019 NY Slip Op 33989(U)
December 30, 2019
Supreme Court, Kings County
Docket Number: 501807/2016
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 501807/2016

Part 91

DEVORAH RONESS,

Plaintiff,

against

THE CITY OF NEW YORK, CABLEVISION SYSTEMS CORPORATION, KING CARROLL LLC, JEK COMMUNICATIONS, INC., AND ADC CONSTRUCTION, LLC,

Defendants.

JEK COMMUNICATIONS, INC.,

Third-Party Plaintiff,

against

ADC CONSTRUCTION, LLC,

Third-Party Defendant.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1 - 5
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	6 - 19
Replying Affidavits	20 - 26
Exhibits	
Other	

Upon the foregoing papers, the motions for summary judgment of defendant and third-party plaintiff JEK Communications, Inc. ("JEK") (Mot. Seq. 006), defendant Cablevision Systems Corporation ("Cablevision") (Mot. Seq. 007 and 009), ADC Construction, LLC ("ADC") (Mot. Seq. 008), and King Carroll LLC ("King Carroll") (Mot. Seq. 010)[1] are decided as follows:

Factual Background

Plaintiff brought this action against defendants for damages allegedly sustained on

[1] The court will not consider the reply filed by King Carroll in support of its cross-motion, as such papers are not permitted (CPLR 2214[b]).

December 4, 2014, when she tripped and fell. In her Second Amended Verified Complaint, plaintiff alleges that "she was caused to trip and fall in and upon a tree well with a fixed metal cable box that sits half in the tree well and half on the sidewalk; said tree well is uneven with the sidewalk elevation as a result of the negligence of the defendants . . . in the ownership, operation, management, maintenance and control of the aforesaid sidewalk/tree well" (Second Amended Verified Complaint at ¶ 93).

Each of the defendants asserts cross-claims against the other co-defendants for negligence and/or indemnification. JEK also asserts a third-party claim against ADC for common law indemnification and/or contribution, and ADC asserts counterclaims against JEK for negligence, contribution and indemnification. By stipulation, plaintiff discontinued her claims against the City of New York.

At her deposition, plaintiff testified that, on the day of the accident, she was walking with her family on her way home from a wedding. At approximately 10:00 pm, they were walking on a sidewalk that plaintiff described as narrow and, as a result, plaintiff walked in a tree well in front of 358 Kingston Avenue, in Brooklyn, New York. Plaintiff testified that, while walking in that tree well, her left foot hit a cable box and she tripped and fell. At her deposition, plaintiff circled a photo where she fell. She drew a circle around a cable box that was partly in the sidewalk and partly in a tree well.

At his deposition, Wayne Wood, the construction manager for Cablevision at the time of the accident, testified that Cablevision owned covers for its cable boxes. Mr. Wood testified that, if Cablevision received notice from the Department of Transportation to fix a defective cable box cover, or if one of their technicians happened to see a defective cover, then Cablevision would

replace that cover. Mr. Wood testified that he did not know when the tree well was expanded to include part of the cable box. Mr. Wood acknowledged that the cable box, partly exposed by the tree well, was a tripping hazard, and he testified that, had he been aware of the cable box, he would have asked Cablevision to move the cable box out of the tree well and into the sidewalk. Mr. Wood also testified that it was JEK's practice to advise Cablevision of any problems with cable boxes, including boxes that were partly in a tree well.

Joseph Briody, the president of JEK, testified at his deposition that Cablevision was a client of JEK, and that JEK performed work on the subject cable box. Mr. Briody states that he was not aware of any instance in which a JEK employee reported to Cablevision that a cable box was partly in a tree well.

Mr. Briody also submitted an affidavit, in which he describes the work that JEK performed on the subject cable box in and around March 2010. He states that Cablevision hired JEK to perform work on the subject cable box. He states that the cover for the cable box was removed to perform the work, and then replaced flush with the cement of the sidewalk. He states that JEK performed no work on the cable box from that time until the date of plaintiff's accident. He also states that, in March 2010, no part of the cable box was within a tree well. Additionally, he states that no part of JEK's work required the cutting or removal of sidewalk flags. This was contrary to what Mr. Briody testified to at his deposition the day prior. He explains that, during his deposition, he confused the work that JEK performed on the subject cable box located at 358 Kingston Avenue, with a cable box located nearby at 351 Kingston Avenue. He states that, at the nearby cable box, JEK cut and removed sidewalk flags, but did not do so at the subject cable box. Finally, he states that JEK did not own or otherwise control the area at 358 Kingston

Avenue, and that JEK was never advised by Cablevision or anyone else about a problem with the cable box.

Michael Schneider, a project manager with ADC, testified at his deposition that ADC won a contract from the City of New York to install new water and sewer mains, excavate the subsurface utility work, then install the curb and sidewalk, and then finally to replace the roadway. Mr. Schneider testified that the City of New York provided the plans for the project, which included renovating the sidewalks. Mr. Schneider testified that ADC began its work after October 14, 2011, and completed its work on November 18, 2011. He also testified that ADC performed its work in accordance with plans approved by the City of New York. Mr. Schneider testified that a representative of the City of New York inspected the work and approved it.

Mr. Schneider also explained the Call 53 process, in which ADC would call a "call center" and give the call center the area in which they are working. The call center would, in turn, contact all of the utilities, including Cablevision, with equipment in the area. Mr. Schneider testified that ADC contacted the call center about the project, and ADC provides a copy of the sheet evidencing the call. Mr. Schneider testified that Cablevision never contacted ADC about its cable box.

Finally, Mr. Paul Jean-Pierre, the building superintendent for King Carroll, testified at his deposition that King Carroll was the owner of the premises located at 358 Kingston Avenue. He testified that he was responsible for cleaning the sidewalk and clearing it of snow, taking care of the garbage and performing certain building maintenance. Mr. Jean-Pierre testified that he removed garbage from the tree well and, depending upon conditions, he also cleared the tree well of snow. Mr. Jean-Pierre was never told that King Carroll had done any structural or repair work

to the sidewalk.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Each of the defendants came into contact with the area of the accident. In premises liability cases such as this one, liability is "generally predicated upon ownership, occupancy, control, or special use of the property. Liability can also be imposed upon a party that creates a dangerous condition on the property" (*McManamon v Rockland County Ancient Order of Hibernians*, 166 AD3d 955, 957 [2d Dept 2018] [internal citations omitted]). The court will address each defendant's liability in turn.

JEK's Liability

JEK argues that it is not liable because Cablevision, and not JEK, owns the cable box. Based on the affidavit of Mr. Briody, JEK contends that it performed work in the cable vault in March 2010 and replaced the cable box cover when it was done. Mr. Briody also states in his affidavit that JEK performed work on the cable box only when the box was wholly within the sidewalk, and that no part of it was exposed in the tree well. Mr. Briody also states that JEK performed no other work on the cable box following the work performed in March 2010.

In their respective oppositions, plaintiff and ADC argue that JEK had a duty to, and was in a position to, report to Cablevision about the exposure of the cable box to the tree well.

However, plaintiff acknowledges that JEK was under no contractual duty to do so. Additionally, neither plaintiff nor ADC dispute Mr. Briody's testimony that JEK performed no work on the cable box following ADC's work that exposed the cable box.

Plaintiff and ADC also argue that there is an issue of fact about whether JEK performed work after ADC enlarged the tree well. However, there is no evidence of such work. Rather, there is only speculation from Mr. Wood and Mr. Briody that, had Cablevision or JEK noticed any issue with the cable box, such as exposure in a tree well, JEK likely would have been hired to address it. Speculation is not sufficient to raise a triable issue of fact (*Scher v Kiryas Joel Hous. Dev. Fund Co.*, 17 AD3d 660, 661 [2d Dept 2005]). In contrast, the evidence shows that JEK performed its work in March 2010, before ADC performed its work in 2011.

Plaintiff and ADC also argue that there is an issue of fact in that Mr. Briody's affidavit contradicts his deposition. However, they do not refer specifically to any such contradiction. In his affidavit, Mr. Briody seeks to modify one portion of his deposition testimony, in which he claims he mistakenly testified that JEK's work at the subject cable box included cutting portions of the sidewalk. Mr. Briody now states that the sidewalk was cut for a different job that was nearby. Additionally, no party contends that JEK cut the sidewalk in a way that exposed the cable box to the tree well. Indeed, plaintiff acknowledges that it was ADC's work which exposed a portion of the cable box to the tree well. Consequently, Mr. Briody's correction to his testimony is corroborated by additional facts and uncontested by plaintiff.

Cablevision's Liability

As an initial matter, Cablevision moved for summary judgment twice. Cablevision made its first motion (Mot. Seq. 007), which it describes a "place holder", in an effort to comply with

the deadline for summary judgment motions, even though certain depositions were not complete. However, Cablevision made substantive arguments in its motion, without reference to evidence or case law. Plaintiff submitted a substantive opposition to Cablevision's motion, with reference to both evidence and case law. Thereafter, Cablevision sought to withdraw its first motion and submit a second motion for summary judgment (Mot. Seq. 009), with reference to evidence and case law. However, successive motions for summary judgment are generally not permitted (*Vinar v Litman*, 110 AD3d 867, 868 [2d Dept 2013]). Additionally, a party may not withdraw an earlier motion for summary judgment, after having seem the opponent's opposition, in favor of an improved motion for summary judgment. Accordingly, the court will consider only Cablevision's first motion for summary judgment (Mot. Seq. 007), and Cablevision's second motion for summary judgment (Mot. Seq. 009) is rejected.

That said, between Cablevision's motion for summary judgment and its oppositions to the motions by its co-defendants, Cablevision's potential liability has been thoroughly discussed. Thus, Cablevision argues that it is not liable under 34 RCNY § 2-07(b), which states, in relevant part:

> (1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating, or concrete pad, if such pad is installed.
>
> (2) The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating. Such owner must obtain a permit to maintain a steel plate that is covering such cover or grating or such street condition.
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> (3) Street hardware shall be flush with the surrounding street surface.

Additionally, pursuant to 34 RCNY § 2-01, the term "street" includes the sidewalk.[2]

Cablevision contends that it is not liable because 34 RCNY § 2-07(b) does not include defects in tree wells, which are not a part of the sidewalk. Cablevision references *Vucetovic v Epsom Downs, Inc.* (10 NY3d 517 [2008]), which held that New York City Administrative Code § 7-210 did not impose a duty to keep tree wells within sidewalks in a reasonably safe condition. Cablevision argues that, because the alleged defect is the difference in elevation between the cable box and the surrounding ground in the tree well, it was not responsible for remedying it.

While Cablevision may not have a duty to keep a tree well area reasonably safe, it still has a duty, pursuant to § 2-07(b), to monitor the cable box cover and the area that extends twelve inches around the cover. This duty was in effect that the time ADC renovated the area and expanded the tree well. Indeed, as Mr. Schneider testified, there was an infrastructure in place for advising Cablevision and other utilities to assist them in monitoring the area around their equipment. Mr. Schneider explained that ADC contacted the call center, which should have then advised all utilities with equipment in the area to review their equipment in light of the work to be performed. Although the call sheet ADC provides shows that ADC called the center, Mr. Wood testified that Cablevision was never notified of any work to be done. Thus, there is an issue of fact as to whether Cablevision received notice of the work and the possible creation of a dangerous condition near its cable box.

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[2] For the first time in its reply papers, Cablevision argues that plaintiff may not assert a claim for violation of 34 RCNY § 2-07(b) because plaintiff did not allege it in her bill of particulars until after the note of issue was filed. The court will not consider the argument raised for the first time on reply (*Davis v New York City Hous. Auth.*, 172 AD3d 815, 817 [2d Dept 2019]).

ADC's Liability

As an initial matter, ADC seeks permission to file a motion for summary judgment after the sixty-day deadline, in accordance with *Brill v City of New York* (2 NY3d 648 [2004]). ADC argues that it was not able to file its motion until after depositions were complete. Once depositions were complete, ADC filed its motion for summary judgment a week later. Accordingly, there is good cause to consider this motion for summary judgment (*Khan v Macchia*, 165 AD3d 637, 639 [2d Dept 2018]).

ADC argues that it is not liable for any condition caused by the tree well and cable box because it performed its work pursuant to the plans approved by the City of New York, and because the City of New York approved the work after it was completed. "A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (*Gee v City of New York*, 304 AD2d 615, 616 [2d Dept 2003], quoting *Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43, 46 [1924]).

The Second Department has provided guidance in how to implement this rule. For example, in *Gee*, the Second Department held that the contractor was not liable because it demonstrated that it followed the plans prepared by the Department of Transportation, and the Department of Transportation inspected and approved the work (*Gee*, 304 AD2d at 616). The court in *Gee* further held that plaintiffs did not raise a triable issue of fact as to whether the contractor failed to conform with the contract or whether the plans were defective (*id.*). Likewise, in *Hartofil v McCourt & Trudden Funeral Home, Inc.* (57 AD3d 943 [2d Dept 2008]),

the Second Department held that the contractor made a prima facie showing that it was not liable because it relied upon the contract plans provided by the local government (*Hartofil*, 57AD3d at 945). The court further held that the plaintiff failed to raise a triable issue of fact as to whether the contract plans were so clearly defective that a contractor of ordinary prudence would not have performed the work (*id.* at 945-46).

In accordance with *Gee* and *Hartofil*, ADC has proved, prima facie, that it was not negligent because it relied on the plans provided by the City of New York and on the City of New York's approval of the work after completion. The burden is now shifted to plaintiff to prove that the plans were so defective that ADC should have known they were likely to cause injury. There is no dispute that the plans created a dangerous condition by allowing the cable box to remain in the tree well. Indeed, Mr. Wood testified that the cable box and tree well created a tripping hazard, and that the Department of Transportation would have given Cablevision a ticket because of the hazard. Thus, there are triable issues of fact as to whether ADC should have known that the plans would create a tripping hazard.

ADC also argues that its contractual relationship with the City of New York does not make it liable because: (1) it did not fail to exercise reasonable care in the performance of its duties by launching a force of harm; (2) the plaintiff did not detrimentally rely upon on the continued performance of ADC's duties; and (3) ADC did not displace the owner's and manager's duty to safely maintain the premises.

Plaintiff does not argue in favor of options 2 and 3 in this case. As for option 1, ADC argues that it exercised reasonable care in this case because it performed in accordance with the plans and worked approved by the City of New York. As explained above, there are triable

issues of fact as to whether ADC should have known that the plans would create a tripping hazard.

Lastly, ADC argues that it did not cause the accident because: (1) plaintiff chose to walk off of the sidewalk and into the tree well; and (2) ADC completed the work three years before the accident and it argues that others removed dirt from the tree well, which created the tripping hazard. The issue of proximate cause is best left for the jury to decide (*Riccio v Kid Fit, Inc.*, 126 AD3d 873, 873 [2d Dept 2015]). In any event, ADC's contention that others caused the difference in elevation between the topsoil and the cable box, as shown by dirt on the cable box cover, is not sufficient to disrupt the nexus between ADC's actions and the accident (*Maheshwari v City of New York*, 2 NY3d 288, 295 [2004]).

King Carroll's Liability

King Carroll argues that it is not liable because it did not own the cable box and it was not responsible for the condition inside the tree well. King Carroll is correct that it did not own the cable box. King Carroll is also correct that its duty to maintain the sidewalk does not, as an initial matter, extend to the tree well (*Vucetovic*, 10 NY3d 517 [2008]). However, Mr. Jean-Pierre testified that he removed garbage from within the tree well and cleared snow from the tree well. In doing so, King Carroll assumed a level of maintenance for the tree well *(Jones v New York City Hous. Auth.*, 171 AD3d 904 [2d Dept 2019]). Additionally, there are triable issues of fact as to whether King Carroll's actions disturbed the topsoil in the tree well, as evidenced by the presence of dirt on the cable box cover, to cause a further misleveling between the cable box and the tree well.

Conclusion

For the foregoing reasons, JEK's motion for summary judgment (Mot. Seq. 006) is granted, Cablevision's motions for summary judgment (Mot. Seq. 007 and 009) are denied, ADC's motion for summary judgment (Mot. Seq. 008) is denied, and King Carroll's motion for summary judgment (Mot. Seq. 010) is denied.

The parties shall immediately contact JCP to schedule an appearance.

This constitutes the decision and order of the court.

December 30, 2019
DATE

DEVIN P. COHEN
Justice of the Supreme Court