

Mason v DJ Crystal Kat, Inc.
2020 NY Slip Op 32441(U)
July 20, 2020
Supreme Court, Kings County
Docket Number: 518146/2016
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 518146/2016
Motion Date: 7-6-20
Mot. Cal. No.: 21-22

-----X

CHRISTOPHER MASON,

Plaintiff,

-against-

DJ CRYSTAL KAT, INC., and TIME WARNER
CABLE NEW YORK CITY LLC, OLD HDE INC.,
HYLAN DATACOM & ELECTRICAL LLC and
HYLAN DATACOM & ELECTRICAL INC.,

Defendants.

-----X

DJ CRYSTAL KAT, INC.,

Third-Party Plaintiff,

-against-

TIME WARNER CABLE NEW YORK CITY LLC,

Third-Party Defendant.

-----X

TIME WARNER CABLE NEW YORK CITY LLC,

Second-Third-Party Plaintiff,

-against-

OLD HDE INC., individually and as successor in
interest to HYLAN DATACOM & ELECTRICAL INC,
and HYLAN DATACOM & ELECTRICAL LLC,
individually and as successor in interest to, HYLAN
DATACOM & ELECTRICAL INC., and HYLAN
DATACOM & ELECTRICAL INC., individually.

Second-Third-Party Defendants.

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DECISION/ORDER

2020 JUL 21 AM 10:30
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ms # 05 - xmd

The following papers numbered 1 to 10 were read on these motions:

<u>Papers:</u>	<u>Numbered:</u>
Notices of Motion and Cross-Motion	
Affirmations/Affidavits/Memo of Law.....	1-2
Answering Affirmations/Affidavits/Memo of Law.....	3-7
Reply Affirmations/Affidavits/Memo of Law.....	8-10
Other.....	

Upon the foregoing papers, the motions are decided as follows:

In this action to recover damages for personal injuries, defendant, third-party defendant and second third-party plaintiff, TIME WARNER CABLE NEW YORK CITY LLC, (collectively hereinafter “Time Warner Cable”) moves for an Order: a) dismissing plaintiff’s complaint and all cross-claims against it; and b) awarding it summary judgment on their cross-claims against the Hylan defendants/third-party defendants; and c) for such other and further relief as this Court deems just and proper.

By notice of cross-motion, defendants/second-party defendants, HYLAN DATACOM & ELECTRICAL, INC., HYLAN DATACOM & ELECTRICAL, LLC and OLD HDE, INC. (collectively hereinafter the “Hylan Defendants”), move for an Order: a) dismissing plaintiff’s Second Amended Verified Complaint, dated April 23, 2019 and all common law cross-claims against it; and b) for such other and further relief as this Court deems just and proper.

Both motions are consolidated for disposition.

Background:

Plaintiff, CHRISTOPHER MASON, commenced this action alleging that on April 30, 2016, he suffered injuries as a result of a trip and fall accident that occurred on the public sidewalk abutting the building located at 218 Prospect Park West, Brooklyn, New York, which is owned by defendant, DJ CRYSTAL KAT, INC., (“DJ CRYSTAL”). The sidewalk in the area of the accident was composed of small rectangular bricks. Plaintiff initially brought his action against only DJ CRYSTAL, alleging that the accident was due to its negligence in failing to properly maintain the sidewalk. Plaintiff thereafter amended the complaint adding TIME WARNER CABLE and the Hylan defendants as direct defendants alleging that these entities caused and created the conditions that caused his accident when they installed a cable box and cable lines in the area of the accident in June of 2011.

A. Defendants’ Motions for Summary Judgment Dismissing Plaintiff’s Complaint:

In support of their motions for summary judgment dismissing plaintiff’s complaint, the moving defendants rely primarily on the deposition testimony of the plaintiff, DJ CRYSTAL, TIME WARNER CABLE and the Hylan defendants.

Plaintiff’s Deposition:

Plaintiff testified that on the day of the accident, he was walking along the sidewalk in front of the building located at 218 Prospect Park West with the curb to his right when the front of his left foot hit a rise in one of the bricks that composed the sidewalk. As a result, he fell to the ground. Plaintiff was shown a photograph of the area

of the accident at his deposition and circled the general area where the accident occurred. The photograph shows that some of the bricks in the area were uneven and raised. The photograph also shows there is a tree located a few feet from where he fell.

Deposition of DJ CRYSTAL:

Defendant DJ CRYSTAL produced Scott Nagel for a deposition. Mr. Nagel is a co-owner of the building located at 218 Prospect Park West as well as the owner of an optical business on the ground floor level. He testified that the brick sidewalk was installed by the Brooklyn Economic Development Corporation (“BEDC”) many years prior to the accident over the objections of many of the neighboring businesses including the Prospect Park West Merchants Association of which he served as President. He testified that both the City and the BEDC informed him on more than one occasion that it would be his obligation to maintain the subject brick sidewalk area in front of his property – an obligation he attempted to fulfill by hiring someone to do repairs on 30 to 40 occasions. He also made complaints to the City and the BEDC on more than one occasion asking them to address a tree root condition that he believed was pushing up the bricks as well as a cable line from a Time Warner Cable box. Neither entity took any remedial measures.

Deposition of Time Warner Cable:

Defendant Time Warner Cable produced John Piazza for a deposition. Mr. Piazza testified that he has been employed by Time Warner Cable as a Construction Manager for approximately nine years. Mr. Piazza performed a search of the electronic files maintained by Time Warner Cable before coming to his deposition and uncovered a

document evidencing that Time Warner arranged for a sidewalk cable box and cable lines to be installed in the area of the accident. The actual installation was assigned to “Hylan”, one of Time Warner’s contractors, on or about June 8, 2011. He testified that “[t]he reason for the job was a trip and fall condition.”

Mr. Piazza was shown the photograph identified by the plaintiff as showing the area where he fell and opined that the roots of the nearby tree caused the bricks of the sidewalk to rise and become uneven and that this condition had nothing to do with the cable box and cable lines that were installed on behalf of Time Warner’s behalf. He maintained that the Parks Department was responsible for remedying such conditions and that whenever one of Time Warner Cable’s contractors encountered such a condition, they would contact the Parks Department. Time Warner’s contractors have no authority to cut tree roots.

Mr. Piazza maintained that Hylan would have installed the cable box about two feet underground. He further testified that once the box is installed, cables were run from the cable box through a conduit located below the box. The conduit is then covered with dirt backfill and sometimes with concrete. He maintained that a contractor retained by the City of New York to install the brick sidewalk would then install another surface, perhaps sand, with the bricks on top.

Mr. Piazza never went to the subject location and all of his testimony was based on his review of the documents he located and his knowledge of Time Warner’s customs and practices.

Deposition of the Hylan defendants:

The Hylan defendants produced Nadine Loggia, a record searcher, for a deposition. She testified that based on the records she uncovered, Hylan was asked to install the cable box in the area of the accident on June 8, 2011. Hylan obtained a permit to do the work on June 13, 2011 and completed the job by June 14, 2011. It was her understanding that the purpose of the work Hylan performed was to correct an existing hazard due to the condition of the vault. Ms. Loggia did not have any personal knowledge as to the work actually performed by Hylan in the area of the accident but testified that Hylan would normally remove some area around the cable box and replace that area as well. She noted that the records reflect that Hylan furnished up to two yards of concrete as part of the job and invoiced Time Warner for installing “3/4-inch stone” at or under the bricks.

Discussion:

Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property. Here, only DJ CRYSTAL, the owner of the property abutting the sidewalk, had this duty. While the moving defendants did not have a duty to maintain and repair the sidewalk, they can be held liable if an affirmative act of negligence on their part resulted in the creation of the dangerous conditions of the sidewalk that caused plaintiff's accident (see *Zorin v. City of New York*, 137 A.D.3d 1116, 1117–18, 28 N.Y.S.3d 116, 118; *Huerta v. 2147 Second Ave., LLC*, 129 A.D.3d 668, 669, 10 N.Y.S.3d 547; *Santelises v. Town of Huntington*, 124 A.D.3d 863, 865, 2 N.Y.S.3d 574; *Lewis v. City of New*

York, 82 A.D.3d 1054, 919 N.Y.S.2d 351). Thus, in order to establish their entitlement to summary judgment dismissing plaintiff's complaint insofar as asserted against them, the moving defendants had the burden of demonstrating as a matter of law that they did not cause and create the alleged defect in the sidewalk that plaintiff claims caused his accident (*see Holmes v. Town of Oyster Bay*, 82 A.D.3d 1047, 1048, 919 N.Y.S.2d 207; *Grier v. 35-63 Realty, Inc.*, 70 A.D.3d 772, 773, 895 N.Y.S.2d 149; *Morelli v. Starbucks Corp.*, 107 A.D.3d 963, 964-65, 968 N.Y.S.2d 542, 544). The moving defendants failed to meet this burden.

The moving parties did not demonstrate, as a matter of law, that the installation of the cable box and cable lines in the area of the accident did not contribute to the conditions which caused plaintiff's accident. Neither Mr. Piazza nor Ms. Loggia were present at the location of the accident, at any point in time, and the only evidence submitted to show that the conditions which plaintiff claims caused his accident were caused solely by tree roots pushing up the brick sidewalk was the opinion testimony of Mr. Piazza and Mr. Nagel. Neither of these witnesses was shown to be qualified to render an opinion that the cable box and cable installation did not contribute to the alleged defective condition of the sidewalk. While plaintiff seems to concede that the conditions on the sidewalk were attributable, in part, to tree roots, plaintiff did not concede that the work performed by and on behalf of the moving defendants did not contribute to these conditions.

"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 eliminate

any material issues of fact ... Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316; *see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923). Inasmuch as the moving defendants failed to make a prima facie showing of their entitlement to summary judgment, their motions must be denied regardless of the sufficiency of plaintiff’s opposition papers. The Court has considered the moving defendants’ remaining arguments made in support of their motions, including the argument that their motions must be granted because plaintiff could not precisely identify where he fell, and find them to be unavailing.

B. Defendant Time Warner’s Motions for Summary Judgment Against the Hylan Defendants for Contractual Indemnification:

Turning to that branch of defendant Time Warner’s motion for summary judgment against the Hylan defendants on its cross-claim for contractual indemnification, the contract between Time Warner Cable and the Hylan defendants contains the following indemnification provision:

VIII. INDEMNIFICATION AND INSURANCE

Contractor shall indemnify, defend and hold harmless TWCNYC and its directors, officers, agents, employees, representatives, partners, parents, affiliates and each of them, against and from; claims, demands, damages, 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), losses, liabilities, causes of action at law or in equity (including, without limitation, injury to or death of any person(s) and damage to or destruction of any property) threatened, brought or instituted, arising out of or in any way connected with the acts or omissions of Contractor, its employees, agents, representatives, or consultants in the performance of the work or arising out of or in any way connected with a breach by Contractor of any covenant contained in this

Agreement, **except to the extent attributable to the negligence of TWCNYC or TWCNYC's agents, representatives or employees** (*emphasis added*).

Since this provision does not require Hylan to indemnify Time Warner for its own negligence and Time Warner has not demonstrated its freedom from negligence as a matter of law, Time Warner is not at this time entitled to summary judgment against Hylan on its cross-claim for contractual indemnification (*see Correia v. Prof'l Data Mgmt., Inc.*, 259 A.D.2d 60, 65, 693 N.Y.S.2d 596, 600; *McKenna v. Lehrer McGovern Bovis*, 302 A.D.2d 329, 331, 756 N.Y.S.2d 181; *Hurley v. Best Buy Stores, L.P.*, 57 A.D.3d 239, 240, 868 N.Y.S.2d 657, 658).

The court has considered the remaining arguments proffered in favor of dismissing plaintiff's complaint, including plaintiff's inability to identify the precise brick that caused him to fall, and find them unavailing.

Accordingly, it is hereby

ORDRED that both motions are **DENIED** in their entirety.

This constitutes the decision and order of the Court.

Dated: July 20, 2020

2020 JUL 21 AM 10:30
KINGS COUNTY CLERK
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PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020