Casiello v Yellow Freight Sys. Inc.
2012 NY Slip Op 30764(U)
March 19, 2012
Sup Ct, Nassau County
Docket Number: 1015/10
Judge: Thomas P. Phelan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice

TRIAL/IAS PART 2
NASSAU COUNTY

NICHOLAS CASIELLO,
Plaintiff(s),

-against-

ORIGINAL RETURNDATE:11/17/11
SUBMISSION DATE:01/19/2012
INDEX No.: 1015/10

YELLOW FREIGHT SYSTEMS INC.;
JOEY T. HARDY and YRC, Inc.,
Defendant(s).

Motion Seq. # 1,2,3,4,5

YRC, INC., and JOEY T. HARDY
Third Party - Plaintiff

-against-

CABLEVISION SYSTEMS CORPORATION
Third Party - Defendant(s).

YRC, INC. and JOEY T. HARDY
Second Third Party - Plaintiff

-against-

VERIZON NEW YORK, INC.
Second Third Party - Defendant(s).

The following papers read on this motion:

Notice of Motion to Strike note of Issue	1
Notice of Motion	2, 3, 4
Notice of Cross Motion	5
Affidavit in Opposition	6, 7, 8
Reply	9, 10, 11
Memorandum of Law	12

Motion pursuant to 22 NYCRR § 202.21(e) by defendants/third-party

plaintiffs/second third-party plaintiffs YRC, Inc. (incorrectly s/h/a Yellow Freight Systems, Inc. and YRC, Inc.) ("YRC") and Joey T. Hardy ("Hardy") to vacate the note of issue and statement of readiness filed by plaintiff on or about October 4, 2010, to strike the action from the trial calendar and to compel plaintiff to appear for an orthopedic and neurological independent medical examination is denied as moot. YRC and Hardy have cross moved for summary judgment dismissing the complaint apparently abandoning their request for an extension of time to so move.

Motion by defendant/second-third party defendant Verizon New York, Inc. ("Verizon") pursuant to CPLR 3212 to dismiss all claims, third-party claims and cross claims asserted against said defendant is denied.

Motion by defendants/third-party plaintiffs/ second third-party plaintiffs YRC and Hardy pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint and any and all cross claims as to said defendants is denied.

Motion by defendant CSC Holdings, LLC, (incorrectly s/h/a Cablevision Systems Corporation) ("Cablevision"), pursuant to CPLR 3212 for summary judgment dismissing the complaint, the third-party complaint and all cross claims asserted against said defendant is granted.

Cross motion by plaintiff pursuant to CPLR 3212, for summary judgment against defendants YRC, Hardy and Verizon on the issue of liability is denied.

In this action, plaintiff seeks to recover for injuries he sustained on March 17, 2009, while he was washing his car in the driveway in front of his home[1] located at 70 Northridge Avenue, North Merrick, New York. Plaintiff, who was twenty years old at the time of his injury, alleges that an 18 wheeler tractor trailer delivery truck, *owned by YRC and operated by Hardy, hit a suspended wire and/or utility line while driving down Northridge Avenue after delivering some type of engine equipment at a neighboring home. The truck allegedly caused the wire/utility line to snap and, in the process of falling to the ground, the wire struck plaintiff's head injuring him. The subject wire/utility line that snapped was attached to the left

*Defendant Hardy testified at his deposition that the trailer portion of his truck was 13 feet 6 inches in height and 48 feet long.

side of the house south of plaintiff's house as one faces the house.

On a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of a material issue of fact as a matter of law. *Shu-Juan Qi v Rahman*, 29 AD3d 566, 567 [2d Dept 2006]. The failure to proffer such evidence warrants denial of the motion regardless of the sufficiency of the opposing papers. *Shafi v Motta*, 73 AD3d 729, 730 [2d Dept 2010]. An unsworn accident report is inadmissible and cannot be considered by the court. *Rodriquez v Ryder Truck, Inc.*, 91 AD3d 935 [2d Dept 2012]. The affirmation of an attorney having no personal knowledge of the underlying facts is not evidence and offers nothing more than hearsay. A defendant who moves for summary judgment must submit evidence which negates, *prima facie*, an essential element of plaintiff's cause of action. *Rosabella v Metropolitan Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005].

The elements of a cause of action sounding in negligence are: 1) a duty owed by defendant to plaintiff; 2) a breach of that duty; and 3) injury proximately resulting from the breach. *Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]. In order to establish a *prima facie* case of negligence, a plaintiff must demonstrate that a defendant (1) created the alleged defective condition which caused the accident or (2) had actual or constructive notice of the defective condition. In alleging constructive notice, plaintiff must prove that the dangerous condition was visible, apparent and existed for a sufficient period of time to permit defendant to remedy it. *Ferrigno v County of Suffolk*, 60 AD3d 726, 727 [2d Dept 2009].

In order to establish causation, plaintiff must show that a defendant's negligence was a substantial cause of events which produced the injury. *Kush v City of Buffalo*, 59 NY 2d 26, 32 [1983]. When a plaintiff fails to establish the cause of an accident and multiple causes can be attributed to the accident claimed, any determination as to the cause of the accident is nothing more than speculation. *Amadio v Pathmark Stores,* 253 AD2d 834 [2d Dept 1998]. Although the issue of proximate cause is generally one for the jury, in order to impose liability it is not sufficient that defendant's negligence furnished a condition or occasion for the occurrence but was not one of its causes. *Peralta v Manzo*, 74 AD3d 1307, 1308 [2d Dept 2010].

Verizon seeks summary judgment dismissing all claims asserted against it based on what it claims is an absence of any evidence that the object that came into contact with plaintiff was owned or controlled by Verizon or that Verizon was responsible for maintaining it. Verizon contends that admissions contained in plaintiff's deposition testimony confirm that plaintiff has no idea what hit him and there is no evidence that it was, in fact, a wire that came in contact with plaintiff rather than branches. Contrary to this assertion, plaintiff's bill of particulars states that "plaintiff sustained 16 staples to the back of his head as a result of the cable striking plaintiff." In this regard, the court notes that the driver of the tractor trailer testified that, when he looked into his side view mirror after pulling away from the curb, he saw a wire on the ground. He assumed "he caught the tractor" on the wire. He saw a "guy" holding his head who asked him to call the cops. He assumed that the wire must have hit him.

Verizon argues alternatively that even if it owned, maintained or controlled the subject wire, it neither created the defective condition nor had actual or constructive notice of said condition.

Plaintiff counters that YRC and Hardy, as owner and operator respectively of the tractor trailer in question, together with the party that owned the utility wire, are collectively responsible for plaintiff's injuries. Plaintiff states that the evidence points to Verizon as the owner of the wire/utility line in question and not Cablevision and notes that there is a common configuration of all utility poles in and around Nassau County. Power lines supplying electricity are located at the top of the pole. Cablevision wire is placed above Verizon telephone wires which are usually located at the lowest portion of the utility pole. This description is confirmed by the testimony of the Verizon field manager who testified on behalf of Verizon.

In support of their motion for summary judgment dismissing plaintiff's complaint and all cross claims asserted against them, *defendants YRC and Hardy argue satisfied there is no proof that the YRC truck actually came into contact with the alleged overhead wire/utility line or that the subject overhead wire/utility line did, in fact, strike plaintiff. Moreover, even if this were the case, there is, according to YRC

*Inasmuch as YRC and Hardy make no further mention of the need for an independent medical examination of plaintiff, the court assumes that the request has been satisfied.

and Hardy, no proof that Hardy negligently operated the truck. In this regard, Hardy testified that, as he pulled away from the curb after making his delivery, he drove down the middle of Northridge Avenue in order to avoid hitting low-hanging tree branches. When he looked in his rear view mirror, however, he noticed that a wire had fallen. He did not hear the wire snap or fall.

If, in fact, there was a low hanging wire, defendants YCR and Hardy argue it was the responsibility and duty of defendant Verizon to maintain and repair the wire. Notwithstanding their arguments to the contrary, YRC and Hardy have failed to establish entitlement to summary dismissal of the complaint. A driver has the duty to see that which he should see through the proper use of his senses. Gordon v Honig, 40 AD3d 925 [2d Dept 2007]. Whether a driver's determination, from a visual inspection of the road, that his truck could clear wires was erroneous, and, if so, the degree to which it, as well as the driver's failure to see and hear what was to be seen and heard, caused the accident herein are issues of fact for a jury. *Agli v Turner Const. Co., Inc.*, 257 AD2d 469, 470 [1st Dept 1999].

Cablevision seeks summary judgment dismissing all claims against it on the ground that the wire allegedly involved in plaintiff's incident was not a Cablevision facility. The affidavit of a field service area operations manager for Cablevision states that in March 2009:

> "Cablevision service to 1511 Northridge Avenue, Merrick, New York, was provided by an aerial cable/wire that ran from the west side of Northridge Avenue and attached to the south side of the building at 1511 Northridge Avenue. Cablevision service to 70 Northridge Avenue, Merrick, New York, was provided by a cable/wire which extended from the west side of Northridge Avenue and attached to the north side of the structure at 70 Northridge Avenue. There were no complaints of disruptions or service outages received by Cablevision between February 1, 2009 and April 1, 2009 concerning 1511 or 70 Northridge Avenue. There were no repairs or replacements of the Cablevision aerial facilities extending from the west side of Northridge Avenue to 1511 and 70 Northridge Avenue between February 1, 2009 and April 1, 2009.
>
> Based upon the records maintained by Cablevision and my inspection of the accident location, if an aerial wire, which

> extended across Northridge Avenue in the vicinity of 70 and 1511 Northridge Avenue, Merrick, New York was involved in plaintiff's incident, then it was not a wire/cable owned and maintained by Cablevision."

The Cablevision wire which runs from the west side of Northridge Avenue to 1511 attaches to the south side of the house at that location. By plaintiff's own testimony, the wire which allegedly snapped was attached to the north side of 1511 Northridge Avenue. A field manager on behalf of Verizon testified that a Verizon repair work order for 1511 Northridge Avenue indicates that there was a report by the homeowner of an interruption of service on March 28, 2009, followed by an aerial repair/replacement of a dropped wire possibly caused by a motor vehicle. There was, however, no indication in the work order when the problem initially occurred. The only way Verizon would discover a problem on the line is when it received a complaint from a customer or police office as Verizon has no procedure in place whereby it routinely travels through an area to inspect wires to see if they are in proper condition/height.

Defendant Cablevision established its entitlement to summary judgment as a matter of law by submitting evidence that it did not own, install, maintain or repair the wire in question. The court notes that plaintiff agrees that the evidence in this case points to Verizon as to the owner of the wire in question and not Cablevision. The record is devoid of any evidence sufficient to raise a triable issue of fact as to Cablevision's ownership of the subject wire/utility line or duty to maintain/repair said wire. Cablevision's motion for summary judgment dismissing all claims against it is, therefore, granted.

Generally, a telecommunications company which does not own, install, maintain or repair low hanging wire, or does not have actual or constructive notice of the condition, will not be held liable for injuries caused/sustained by a person struck by a wire while on the sidewalk. *Guzman v CSC Holdings, Inc.*, 85 AD3d 1113, 1115 [2d Dept 2011]. Notwithstanding plaintiff's assertion to the contrary, a telephone company must have notice of a dangerous condition such as a sagging or low hanging telephone line. *Gallagher v TDS Telecom*, 294 AD2d 860 [4th Dept 2002].

Here, however, defendant Verizon failed to submit evidence establishing the height of the line when it was installed, that the wire/utility line in question was not a Verizon facility, or that Verizon did not create the alleged dangerous

condition. *Gallagher v TDS Telecom, supra*. While the court agrees that the affidavit of plaintiff's mother is insufficient to establish constructive notice of a sagging wire, notice of an allegedly dangerous or defective is not an element of a cause of action based on negligent creation/cause of such a condition. Verizon's motion for summary judgment dismissing all claims against it is denied.

Given the existence of factual issues with respect to the negligence of YRC, Hardy and Verizon, plaintiff's cross motion for summary judgment on the issue of liability must be denied. Plaintiff has not established their liability as a matter of law.

Contrary to plaintiff's contention, he is not entitled to judgment in his favor based on the doctrine of *res ipsa loquitur* which permits an inference of negligence to be drawn when the nature of the accident is such that it would not ordinarily happen without negligence. When the doctrine is applicable, it creates a *prima facie* case of negligence sufficient for submission to the fact finder, who may, but is not required to, draw a permissive inference or negligence. *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986].

The doctrine of *res ipsa loquitur,* however, is not applicable under the facts at bar as they do not support a finding that the accident was caused by an instrumentality within the exclusive control of said defendants. The doctrine applies only when plaintiff can establish that 1) the event is the kind which ordinarily does not occur in the absence of someone's negligence; 2) the event was caused by an agency or instrumentality within the exclusive control of defendant; and 3) the event was not due to any voluntary action or contribution on the part of plaintiff. *Bodnarchuk v State*, 49 AD3d 581, 582 [2d Dept 2008], *lv denied* 10 NY3d 714 [2008].

This decision constitutes the order of the court.

Dated: March 19. 2012

HON THOMAS P. PHELAN
[signature]
J.S.C.

ENTERED
MAR 21 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorneys of Record

Jeffrey A. Sunshine, P.C.
Attorneys for Plaintiff
3000 Marcus Avenue, Suite 2E5
Lake Success, NY 11042

Fogarty, Felicione & Duffy, P.C.
Attorney for Defendant
185 Willis Avenue
Mineola, NY 11501

DeSena & Sweeney, LLP
Attorney for Defendant
YRC Inc. (I/s/h/a Yellow Freight Systems, Inc. and YRC INC.)and Joey T Hardy
1383 Veterans Memorial Highway Suite 32
Hauppauge, New York 11788

William J. Fitpatrick
Attorney for Defendant Cablevision Systems Corporation
525 Townline Road - Suite 1
Hauppauge, NY 11788

Monfort, Healy, McGuire 7 Salley, Llp
Attorney for Defendant Verizon New Yrok, Inc.
840 Franklin Avenue
Garden City, New York 11530