[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN, Justice PART 21

Index Number : 113589/2007
NUNEZ, DOMINGA
VS
CONSOLIDATED EDISON
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. 113589/07
MOTION DATE 5/26/10
MOTION SEQ. NO. 003
MOTION CAL. NO. 69

FOR THE

The following papers, numbered 1 to 16 were read on this motion and cross motions for summary judgment

	Papers Numbered
Notice of Motion— Affirmation — Exhibits A-Q	1-2
Notice of Cross Motion—Affirmation — Exhibits A-L [Affidavit], M-N	3-5
Notice of Cross Motion—Affirmation — Exhibits A-H	6-7
Notice of Cross Motion—Affirmation — Exhibits A-G	8-9
Affirmation in Opposition to Motion and Cross Motions—Affidavit–Exhibits A-E	10-11
Affirmation in Opposition and in Reply–Exhibits R-V; Reply Affirmation; Reply Affirmation	12; 13; 14
Supplemental Expert Affidavit–Exhibit A	15
Response to Plaintiff's Supplemental Expert Affidavit	16

Cross-Motion: X Yes (3) ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the annexed memorandum decision and order.

Dated: 9/7/10
New York, New York

, J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

DOMINGA NUNEZ,

Plaintiff,

Index No. 113589/2007

- against -

CONSOLIDATED EDISON OF NEW YORK, THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY, NICO ASPHALT, INC., ROADWAY CONTRACTING INC. and SAFEWAY CONSTRUCTION ENTERPRISES, INC.,

Decision and Order

Defendants.

----------X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third- Party Plaintiff,

- against -

NICO ASPHALT, INC., ROADWAY CONTRACTING INC. and SAFEWAY CONSTRUCTION ENTERPRISES, INC.,

Third-Party Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action arising out of a trip and fall near a manhole, a contractor moves for summary judgment dismissing the complaint, third-party complaint and all cross claims. Consolidated Edison of New York (Con Ed) cross-moves also moves for summary judgment dismissing the complaint, and for summary judgment in its favor on its third-party indemnification claims. The City of New York and another contractor each cross-move for summary judgment dismissing the complaint and any cross claims. This decision addresses the motion and all three

cross motions.

BACKGROUND

The complaint alleges that, on December 23, 2006, plaintiff had been attempting to board a BX 15 bus at a bus stop located at West 125th Street between St. Nicholas Avenue and Morningside Avenue in Manhattan. Plaintiff testified at her deposition that, as she was stepping off the sidewalk, she tripped on a hole in the street and fell face down and hit her head. Carpenter Affirm., Ex F [Nunez EBT], at 20, 22-23. The bus stop is located in front of 357 West 125th Street.

At her deposition, plaintiff was shown photographs marked for identifications as Exhibits A through J. Nunez EBT, at 32; *see also* Carpenter Affirm., Ex G [marked photographs]. When plaintiff was looking at the photograph marked as Exhibit F, she was asked, "Where is the spot that caused your accident?" *Id.* Plaintiff pointed to a manhole cover seen in the photograph. *Id.* at 32. The manhole cover bears the stamp, "Con Edison Co." Carpenter Affirm., Ex G. As seen in the photographs, the manhole is located in the street in an area of concrete known as a "bus pad." Ex G.

On October 9, 2007, plaintiff commenced this action against Con Ed, the City of New York, the New York City Transit Authority (NYCTA), and the Metropolitan Transportation Authority (MTA). On March 10, 2008, Con Ed impleaded Nico Asphalt, Inc. (Nico), Roadway Contracting Inc. (Roadway), and Safeway Construction Enterprises (Safeway). By a supplemental summons and amended verified complaint dated April 22, 2008, plaintiff named Nico, Roadway, and Safeway as direct defendants.

In its answer, defendant Safeway Construction Enterprises (Safeway) admitted to allegations that it had entered into a contract with Con Ed to perform work near the location where plaintiff

allegedly tripped and fell, prior to plaintiff's alleged accident. *See* Carpenter Affirm., Ex D [Verified Answer] ¶ Second. Pursuant to a purchase order, Con Ed hired defendant Safeway Construction Enterprises to perform "excavation and trenching for installation and repairs of electric distribution facilities, telecom, obstructed streetlights and service shunts for Con Edison in the Borough of Manhattan." Carpenter Affirm., Ex I. Guido DiRe, who is secretary/treasurer and operations manager of Safeway Construction, testified at his EBT that the Con Ed contract to install underground electrical conduits was a blanket contract for multiple locations, including a location on West 125th Street between Morningside and St. Nicholas Avenue. Carpenter Affirm., Ex Q [DiRe EBT], at 11.

At his deposition, DiRe testified that Safeway's work at the West 125th Street was started and completed on August 16, 2006. *Id.* at 12. DiRe stated that Safeway "excavated the roadway, installed underground pipping [*sic*], and then we replaced the soil–backfilled the soil, compacted the soil, and we poured – repoured the bus stop, and repoured some base concrete on the outside." *Id.*

Craig Hartage, a Con Ed "construction rep," testified at his EBT that he saw the work that Safeway performed on August 16, 2006, and that he returned the next day, "Just [to] take a visual look to make sure it's fine." Carpenter Affirm., Ex H [Hartage EBT], at 25. When asked how did it look, Hartage answered, "It looked fine." *Id.*

DISCUSSION

> "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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

which require a trial of the action."

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

Nico's Cross Motion for Summary Judgment

Nico claims that it did not perform any work in the bus stop. In support of its cross motion, Nico cites the deposition testimony of its superintendent, John Denegall. Adler Affirm., Ex H [Denegall EBT]. According to Denegall, Nico's work consisted of applying approximately 12 inches of binder asphalt and 1½ inches of top asphalt. Nico put the asphalt border around the concrete bus pad, but its work did not include the concrete area. *Id.* at 28, 42.

Nico also cites deposition testimony of Craig Hartage, whose responsibilities included overseeing contractors to make sure that contractors follow company rules and regulations. Adler Affirm., Ex F [Hartage EBT], at 11. Hartage also testified that Nico's work did not involve the concrete portion of the bus stop. *Id.* at 75.

The co-defendants do not oppose Nico's cross motion. Plaintiff's counsel does not oppose Nico's cross motion. *See* Rosenberg Affirm. ¶ 2. An engineer whom plaintiff hired, Donald Sacks, submits an affidavit purportedly in opposition to Nico's cross motion. Sacks Aff. ¶ 2. However, as Nico indicates, the affidavit makes no mention of how Nico's asphalt restoration work would have played any role in the creation of the alleged condition that caused plaintiff's accident. Therefore, Nico's cross motion for summary judgment is granted.

Because Nico may not be held liable for plaintiff's injuries, Con Ed's third cause of action of the third-party complaint, alleging Nico's negligence, is dismissed.[1] The cross claim of

[1] Con Ed's third-party complaint also alleged causes of action against Nico for contractual indemnification and breach of an agreement to procure insurance. Nico did not address these causes of action in its cross motion papers.

defendants New York City Transit Authority and Metropolitan Transportation Authority , and the first and second cross claims of the third-party answer of third-party defendant Safeway Construction Inc., for contribution and indemnification, are dismissed as against Nico. Nico's own first cross claim, sounding in common-law indemnification and/or contribution, is dismissed against all co-defendants.[2]

City of New York's Cross Motion for Summary Judgment

As the City indicates, the subject manhole cover was the responsibility of Con Ed to maintain, including a 12-inch perimeter around the manhole cover. Section 2-07 (b) (1) of Title 34 of the Rules of the City of New York state, "The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware." Here, it is undisputed that Con Ed owned the manhole cover in the bus pad. Because plaintiff's accident allegedly resulted from a defect alleged to be within the 12-inch perimeter of the Con Ed manhole cover, repair of the alleged defect would not have been the City's responsibility. *See Cruz v New York City Tr. Auth.*, 19 AD3d 130, 131 (1st Dept 2005)("the defective area is, at least in part, inside the 12-inch area that is within defendant's zone of responsibility").

In addition, summary judgment is granted to the City because of a lack of prior written notice to the City about the alleged defect, as required under Administrative Code § 7-201 (c). Plaintiff concedes that "its [*sic*] clear that plaintiff has no proof of specific written notice of this defect per se," but argues that records of pothole repair in front of 353 West 125th Street would have put the

[2] Nico asserted cross claims against all co-defendants seeking contractual indemnification and alleging breach of an agreement to procure insurance. The co-defendants did not address these cross claims in their motion papers.

City on written notice of this defect.

This is unavailing. "Prior written notice provisions, enacted in derogation of common law, are always strictly construed." *Gorman v Town of Huntington*, 12 NY3d 275, 279 (2009). Here, the defect at issue is in front of 357 West 125th Street, apparently two buildings away from 353 West 125th Street. *See* Rosenberg Opp. Affirm. ¶ 11; Rosenberg Opp. Affirm., Ex F. That City workers might have seen the defect while working on a pothole in front of another building does not constitute written notice to the City of the defect at issue. The two exceptions to the prior written notice requirement, i.e., special use or an act of affirmative negligence, do not apply here.

Therefore, summary judgment dismissing the complaint as against the City is granted. Because the City may not be held liable for plaintiff's injuries, Con Ed's cross claim, the cross claim of defendants New York City Transit Authority and Metropolitan Transportation Authority, the first and second cross claims of the third-party answer of third-party defendant Safeway Construction Inc., for contribution and indemnification, are dismissed as against the City.

Lastly, the City's cross claims against Con Ed, NYCTA, and MTA for contribution are also dismissed.

Safeway's Motion and Con Ed's Cross Motion for Summary Judgment

Safeway argues that it is not liable for plaintiff's injuries because it performed the concrete bus pad work pursuant to Con Ed's specifications. Con Ed argues that it is not liable because it did not perform the work on the bus stop pad, and that it did not have actual or constructive notice of the alleged defect.

In opposition to Safeway's and Con Ed's motion, plaintiff relies upon the affidavit of Donald

Sacks, P.E., an engineer whom plaintiff hired. Safeway and Con Ed argue that the Court should reject Sacks's affidavit as untimely, because plaintiff did not disclose him as an expert for trial pursuant to CPLR 3101 (d), citing *Construction by Singletree, Inc. v Lowe* (55 AD3d 861 [2d Dept 2008]) and its progeny.

In *Construction by Singletree, Inc.*, the Appellate Division, Second Department upheld the motion court's decision to decline to consider the affidavits of purported experts because they were not identified during pretrial disclosure, and because the affidavits were served after the note of issue was filed. However, the First Department has taken a different approach, ruling,

> "The motion court properly considered the affidavit of plaintiff's expert witness in opposition to summary judgment, notwithstanding plaintiff's failure to disclose the expert's identity previously pursuant to CPLR 3101(d)(1)(i), there being no showing of willfulness in or prejudice caused by the failure to disclose earlier."

Downes v American Monument Co., 283 AD2d 256 (1st Dept 2001). Therefore, Sacks's affidavit will be considered.

Sacks opined in his affidavit that

> "It is clear to me in my professional opinion with a reasonable degree of engineering certainty, that the backfill reported to have been installed was insufficiently compacted to resist settlement at the margins of the existing pavement and therefore the work, was not performed in accordance with the requisite code and sound engineering practice.
>
> It is my further opinion to a reasonable degree of engineering certainty, that Con Ed contractors' failure to properly backfill in accordance with the Code cited caused the pavement to settle producing the cracks forming the defect which caused plaintiff's accident."

Sacks Opp. Aff. ¶¶ 12-13. Sacks also opined the concrete did not have an adequate time to cure or set up, making it further vulnerable to failures. According to Sacks, "several days should have passed before traffic was permitted to flow in accordance with customary practices. This haste was

another departure from good construction practices, contributing to this roadway failure." *Id.* ¶ 14.

In support of his opinion, Sacks cited "Volume 11 of the New York City Official Codes, Title 33, Section 2-33" for the pertinent standards for street opening practices and procedures. According to Sacks, the most pertinent provision is subdivision (b) (4), which "describes that if a repair sinks more than 1" from the surrounding, existing pavement, it is 'deemed a failure of the compaction of backfill.'" Sacks Opp. Aff. ¶ 7. Sacks also relied upon handwritten notes on a purchase order with Nico concerning soil conditions in the trench which had been opened at 357 West 125 Street from St. Nicholas Avenue to Morningside Avenue. Sacks Opp. Aff., Ex E. In the lower left hand corner of the purchase order, handwritten notes state 'TRENCH UNEVE[N] MAY BE SINKING 6-07-06 (LC)." *Id.*

Sacks's reliance on "Volume 11 of the New York City Official Codes, Title 33, Section 2-33" is misplaced. First, Sacks meant to cite to Section 2-33 (b) of Title 34 of the Rules of the City of New York, i.e., 34 RCNY 2-33 (b). *See* Sacks Suppl. Aff., Ex A. Second, the provisions that Sacks cited were not in effect at the time of plaintiff's alleged accident. Sacks apparently cited from a 1992 edition of the Rules of the City of New York. *See* Sacks Suppl. Aff., Ex A. However, Chapter 2 of the Rules of the City of New York was repealed and replaced in its entirety on May 1, 1998, effective May 31, 1998. The current chapter does not contain the provisions that Sacks cited.

Safeway contends that the handwritten notes on Nico's purchase order refer to a different job that occurred and was completed before Safeway's work, citing the deposition testimony of Gary Heuser, another Con Ed "construction rep." Ex H, at 8. Heuser testified that Lionel Canton was the Con Ed employee that supervised the work on June 8, 2006. *Id.* at18. When asked about the handwritten notes, "TRENCH UNEV[N] MAY BE SINKING," Heuser answered,

"that's telling me, yeah, that there was a trench that, you know, it appears to be going below street grade.
Q. What material is a trench?
A A trench is asphalt."

Id. at 27. Later, Heuser was asked, "So when the trench is sinking, it's referring to the asphalt, correct? A. That's Correct." *Id.* at 29. Based on Heuser's testimony, Safeway contends that the asphalt work performed where sinking was noted was entirely separate from the concrete bus pad work performed by Safeway on August 16, 2006, and that the sinking refers to asphalt, not concrete.

"It is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness." *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 (1st Dept 2008), citing *Cassano v Hagstrom*, 5 NY2d 643, 646 (1959). Even if the Court were to disregard the evidence upon which Sacks relied to corroborate his theory of inadequate compaction of backfill, Sacks's opinion still remains the same: the cracking is the result of inadequate compaction of backfill, and the concrete was weakened due to inadequate time for the concrete to cure. The cracks in and around the manhole in the concrete bus pad can be seen in the photos which were submitted on this motion and cross motions. In the Court's view, the affidavit of the plaintiff's expert was "neither so conclusory or speculative, nor without basis in the record, as to render it inadmissible." *Espinal v Jamaica Hosp. Med. Ctr.*, 71 AD3d 723 (2 Dept 2010).

Safeway's argument that Sacks is not a "geotechnical engineer" is unavailing. "[T]he expert's alleged lack of experience is a factor which goes to the weight to be given to his opinion, and not to its admissibility." *Espinal*, 71 AD3d 723, *supra*; *Williams v Halpern*, 25 AD3d 467, 468 (1st Dept 2006). Although Safeway faults Sacks for not taking measurements of the crack and not mentioning whether he personally visited the accident, Safeway submits no affidavit of an expert

challenging Sacks's opinion. Con Ed argues that "it is preposterous" that plaintiff's expert opines that the concrete did not have adequate time to cure, because Hartage testified at his deposition that only twenty-four hours was required for the concrete to cure. Hartage EBT, at 24-25. However, this argument raises a triable issue of fact that cannot be decided as a matter of law.

Therefore, Safeway's cross motion for summary judgment is denied.

The fact that Con Ed did not perform the work at the bus pad does not lead to the conclusion that it has no liability in this case. As discussed above, owners of manhole covers have a duty to "monitor [] the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware." 34 RCNY § 2-07 (b) (1). Here, Con Ed did not submit any evidence establishing that it monitored the area around the manhole cover after the work is completed. The absence of complaints about the apparent cracks around the manhole cover at issue is not sufficient to establish that Con Ed discharged its responsibility to monitor the condition of the manhole cover. Therefore, the branch of Con Ed's cross motion for summary judgment dismissing the complaint is denied.

Con Ed is granted conditional summary judgment against Safeway on its first cause of action of the third-party complaint against Safeway, for contractual indemnification. Paragraph 36 of the Con Ed's Standard Terms and Conditions of Construction Contracts dated January 7, 2003 provides, in pertinent part:

> "To the fullest extent allowed by law, Contractor agrees to defend, indemnify and save Con Edison . . . harmless from all claims, damage, loss and liability, including costs and expenses, legal and otherwise, for injury to or the death of persons . . . resulting in whole or in part from, or connected with, the performance of the Work by Contractor, any subcontractor, their agents, servants, and employees, and including claims, loss, damage and liability arising from the partial or sole negligence of Con Edison or non-parties to this Contract."

Jacobs Affirm., Ex I. In its answer to the third-party complaint, Safeway admitted to Con Ed's allegations that it had entered into a contract with Con Ed, Con Edison Purchase Order No. 433039, and that the Standard Terms and Conditions of Construction Contracts dated January 7, 2003 were part of the contract. *See* Jacobs Affirm., Ex B [Verified Answer to Verified Third Party Complaint ¶¶ "Fourteenth"- "Fifteenth"].

Plaintiff asserts that Safeway failed to adequately compact the backfill and did not provide adequate time for the concrete to cure, which resulted in cracks in the concrete bus pad around the manhole upon which plaintiff tripped. If plaintiff proves these allegations at trial, Safeway's alleged negligence would be within the scope of the indemnity. Therefore, Con Ed is granted conditional summary judgment as to liability on its first cause of action against Safeway for contractual indemnification against Safeway. That is, Con Ed is entitled to summary judgment as to liability on condition that Safeway is found negligent at trial.

The Court is not persuaded by Safeway's argument that Con Ed may not seek indemnification against it because "signed off" on the work and paid Safeway. According to Con Ed, when it signed off on Safeway's paving work on the bus pad, it "was simply representing that the work had been completed in compliance with proper measurements so that Safeway could be paid." Jacobs Affirm. ¶ 23.

Finally, Safeway's reliance upon General Obligations Law § 5-322.1 is unavailing. Although the indemnification provision purports to require Safeway to indemnify Con Ed for the latter's own negligence, the language "to the fullest extent allowed by law" permits partial indemnification to the extent that Safeway may be found negligent. *Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 (2008). The Court does not address Safeway's argument, raised for the first time in its response to the

supplemental affidavit of plaintiff's expert, that it owes no duty to plaintiff for the alleged breach of a contractual duty. *Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002]; *cf. Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept 1992]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Safeway Construction Enterprises Inc. is denied; and it is further

ORDERED that the cross motion for summary judgment by defendant Consolidated Edison of New York is granted only to the extent that defendant Consolidate Edison is granted conditional summary judgment as to liability on the first cause of action of the third party complaint against Safeway Construction Enterprises; and it is further

ORDERED that the cross motion by defendant Nico Asphalt Paving, Inc., sued herein as Nico Asphalt, Inc. is granted, and the complaint, the third party complaint, and the cross claims of defendants New York City Transit Authority and Metropolitan Transportation Authority are dismissed as against this defendant; and it is further

ORDERED that the cross motion by defendant City of New York. is granted, and the complaint and the cross claims of defendants New York City Transit Authority and Metropolitan Transportation Authority are dismissed as against this defendant; and it is further

ORDERED that the cross claims by defendant City of New York against defendants Consolidated Edison of New York, New York City Transit Authority and Metropolitan

Transportation Authority are dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 7, 2010
New York, New York

ENTER:

J.S.C.