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

PRESENT: _____ PART _____

Index Number : 105739/2001

WILLIAMS, CECELIA

VS

CONSOLIDATED EDISON

Sequence Number : 4

OTHER RELIEFS

EX NO. _____

ION DATE _____

ION SEQ. NO. _____

ION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

FILED

OCT 20 2005

Dated: 10/19/05

_____ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

CECILIA WILLIAMS

Plaintiff,

- against -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEDERLANDER THEATRICAL CORPORATION, THE CITY OF NEW YORK, MORGAN CONSTRUCTION CORPORATION and MONTICELLO CONSTRUCTION, 206 West 41ST STREET HOTEL ASSOCIATES, L.P., CLIFTON PLACE DEVELOPMENT GROUP, INC., ANDERSON ASSOCIATES DEVELOPMENT GROUP AND THOMAS ANDERSON,

Defendants.

Index No. 105739/01

DECISION AND ORDER

Nicholas Figueroa, Justice:

Motion sequences 004 and 005 are consolidated for disposition in the accompanying decision and order.

In motion sequence 004, defendants Nederlander Theatrical Corporation, 206 West 41st Street Hotel Associates, L.P. and Anderson Associates Development Group and Thomas Anderson, move to set aside the jury verdict in favor of plaintiffs for past pain and suffering of $155,000 and future pain and suffering of $288,000, based on a nine year duration. Defendants argue that there should be a new trial on damages, unless plaintiff stipulates to a reduced award of $100,000 for past pain and suffering and $100,000 for future pain and suffering.

In motion sequence 005, defendants Morgan Construction Company move to set aside the verdict on the ground that the court's jury instruction on liability, based on special use of the sidewalk, was error, and that the charge allowed to jury to find that an entity other than the owner of the premises adjacent to the sidewalk where the accident occurred could be held liable under the special use doctrine. Moreover, it asserts that the court failed to adequately inform the jury of the precise nature of the special use. Defendant Morgan further argues that there was no evidence that it placed the metal plate on the sidewalk where plaintiff tripped and fell. Morgan asserts that the court erred by not asking the jury to determine the liability of another party, Monticello Construction. A default judgment had been entered against Monticello, prior to trial.

Morgan contends that the jury finding that plaintiff's negligence was not a substantial factor in causing the accident was not based on a fair interpretation of the evidence.

Finally, Morgan argues that the award was excessive and that the future damage component should be reduced to $50,000.

Defendant Clifton Development Group, Inc., asserts that there was no evidence that it placed the metal plate on the sidewalk, and that it had no notice that the plate was a hazard. Clifton argues that the plate was placed at the accident site in 1999, before it had any involvement with the adjoining premises. Continuing, it asserts that because the court did not specifically instruct the jury that the metal plate covered a cellar door on the owner's premises, the jury could not know what the special use was.

Defendants Nederlander Theatrical Corporation, 206 West 41st Street Hotel Associates, L.P., Anderson Associates Development Group and Thomas Anderson oppose Morgan's motion to the extent that it seeks to set aside the liability verdict. These defendants argue that Morgan

was the general contractor on the site for four months before the accident. Therefore, it had constructive notice of the defect. Moreover, the work Morgan was responsible for involved replacing the sidewalk doorway to the owner's building's basement.

Plaintiff opposes the motion, arguing that a witness, Benjamin Solemani, testified that under an agreement with defendants Clifton Place Development Group, Inc. and Hotel Associates, Inc., Morgan exercised control and supervision over the accident site. Additionally, Solemani testified, according to plaintiff, that the metal plate covered the cellar door that Morgan was to have replaced.

Contrary to defendants' arguments, the court's charge did not confuse the jury. The evidence demonstrates that although the metal plate was placed before Morgan and Clifton began their work at the site, it was in place during the time they worked there. Therefore, the defendants possessed both the requisite access to and control over the plate and the accident site allowing a jury finding negligence based on the special use of the property (cf. *Kaufman v. Silver*, 90 NY2d 204, 208). Moreover, the four month period, during which the defect was visible, was sufficient time for defendants to have acquired notice of it (see *Plantamura v. Penske Truck Leasing, Inc.*, 246 AD2d 347). Nor did the court err by not describing the defect in detail. As the jury was well aware of the object causing the accident, there was no need to marshal the evidence.

As Morgan assumed Monticello's duties prior to the accident, there was no basis for any apportionment of liability against Monticello; therefore, there was no basis for the jury to consider whether it had any degree of culpability for the accident.

Although defendants now challenge the jury finding that plaintiff's negligence was not a substantial factor in causing her injury, they waived this argument by not raising a challenge to the allegedly inconsistent verdict, prior to the jury's discharge (see *Caprara v. Chrysler Corp.*, 7 AD2d 515, 523, 524, affd. 52 NY2d 114).

Plaintiff's damages claim was based on her testimony and Dr. Robert Goldstein's, an orthopedic surgeon.

Plaintiff testified that she was in pain when she arrived at St. Clare's hospital after the accident. She used a wheelchair and then a walker, during her five day hospitalization. Her pain remained after she returned home. Plaintiff testified that she received home care for approximately four and a half years and had six weeks of physical therapy. Plaintiff continues to use a walker and a cane. She testified that she can no longer shop or perform household tasks.

Dr. Goldstein based his testimony on his examination of plaintiff and his review of her medical records. He testified that plaintiff suffered fractured inferior and superior public rami, located on the left side of her pelvis. This injury is painful. The fracture disrupts the soft tissue in the area, resulting in an injury to a large area of the abdomen in the pelvic area.

Dr. Goldstein noted that plaintiff used a cane. While her range of motion was normal, plaintiff had "weakness to palpation to the anterior sides of her pelvis". She exhibited weakness in her groin area that resulted from callus affecting the soft tissue in the area. This condition also causes permanent tenderness, discomfort and an impaired ability to walk.

Dr. Goldstein also testified that plaintiff has permanent back pain, as a result of the accident. This back pain also impairs her mobility.

Given the permanent nature of plaintiff's injuries, the award, although substantial, does

not deviate materially from what would be reasonable compensation (see CPLR 5501(c); *Lind v. City of New York*, 270 AD2d 315).

Accordingly, it is

ORDERED that the motion s are denied.

This constitutes the decision and order of this court.

Dated: October 14, 2005

ENTER:

J.S.C.