

**Verizon N.Y. Inc. v Consolidated Edison, Inc.**

2007 NY Slip Op 32100(U)

June 28, 2007

Supreme Court, New York County

Docket Number: 0118461/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

VERIZON NEW YORK INC.,

Plaintiff,

- v -

CONSOLIDATED EDISON, INC.,

Defendant

INDEX NO. 118461/06  
MOTION DATE  
MOTION SEQ. NO. 001  
MOTION CAL.NO.

The following papers, numbered 1 to 4 were read on this motion to/for : dismiss complaint.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2
Answering Affidavits - Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4
Cross Motion: [ ] Yes [X] No	

**FILED**  
JUL 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is denied, for the reasons et forth below.

Background

Plaintiff Verizon New York Inc. (Verizon) brings this action to recover approximately \$390, 805.00 in damages to its property, including telecommunications cables, equipment, poles and facilities, located at the intersection of East 64<sup>th</sup> Street and Second Avenue in New York, New York. The complaint alleges that the damage occurred on or about February 6, 2004 and was caused by a steam leak from the equipment and facilities of defendant Consolidated Edison, Inc. (Con Edison). The complaint contains causes of action sounding in negligence and trespass (Affirmation of William F. Tietjen, Esq. in Support of Motion [Tietjen Aff. in Support], Ex. A [Verified Complaint]).

Con Edison has moved for an order, pursuant to CPLR 3211 (a) (5), to dismiss the action as time-barred by the three-year Statute of Limitations in CPLR 214 (4). In support of its motion, Con Edison has submitted an affidavit from John F. Lind, a Section Manager of Litigation and Claims in

the company's Law Department, who is responsible for investigating all claims and suits against Con Edison for personal injuries and property damage (Tietjen Aff. in Support, Ex. C [Lind Aff.]). Lind states that he searched the company's records for a period of two years prior to the date of February 6, 2004, alleged in the complaint. He found only one report of a steam incident at the location of East 64<sup>th</sup> Street and Second Avenue during this period, which occurred on September 26, 2003 (Lind Aff., at ¶ 6). According to Con Edison's emergency ticket, Verizon allegedly notified Con Edison of a steam incident on September 26, 2003, and Con Edison installed a stack to vent the steam, directing the flow of steam away from Verizon's facilities and above pedestrian and vehicular traffic (Lind Aff., at ¶ 7; and Ex. C-1). Another report from Con Edison indicates that Verizon claimed that 150 of its customers in the area lost telephone service, as a result of the September 26, 2003 incident (Lind Aff., Ex. C-3). After installing the stack to vent the steam, Con Edison repaired the equipment at the location of the reported steam leak. According to Lind, Con Edison's report indicates that the repairs were completed on December 10, 2003 (Lind Aff., at ¶ 9; and Ex. C-3). The top portion of Con Edison's report, however, lists the "Compl Date" as December 16, 2003, suggesting that repairs were completed on that date (Lind Aff., Ex. C-3).

Verizon's Report of Property Damage to Outside Plant lists February 6, 2004, as both the "Date of Damage" and the "Date Discovered" (Lind Aff., Ex. C-4). The handwritten description of the alleged incident on the Verizon report states, in pertinent part, "cable was damaged by previous steam" (*id.*). Lind asserts, based upon the documents he reviewed from Con Edison's files, that the only previous steam incident reported at the location at issue was on September 26, 2003 and, thus, if the damage Verizon was referring to was caused by Con Edison's steam system, it would have occurred on that date (Lind Aff., at ¶¶ 10-12). Verizon first reported its property damage claim to Con Edison on or about August 28, 2004 (Lind Aff., Ex. C-2).

Verizon commenced the instant action, by filing the summons and complaint, on or about December 13, 2006 (Tietjen Aff. in Support, Ex. A). According to Con Edison, the three-year Statute of Limitations for property damage actions based upon negligence and other torts in CPLR

214 (4), accrued on September 26, 2003, the date of the alleged reported steam incident, or, at the latest, on December 10, 2003, the date that the repairs at the location of the incident were purportedly completed. Therefore, Con Edison asserts that the action commenced on December 13, 2006 is time-barred.

### Discussion

Although Con Edison's motion is denominated as a motion to dismiss, Con Edison has supported its motion with evidence which could be considered in a motion for summary judgment, an affidavit by an employee and documentary evidence (see CPLR 3211 [c]). In addition, this Court notes that Con Edison has served its answer.

If this Court considers the motion to be a motion for summary judgment, the following general principles apply. Summary judgment is a drastic remedy, which is the procedural equivalent of trial, and should not be granted where there is any doubt as to the existence of triable issues of fact (*see S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Epstein v Scally*, 99 AD2d 713, 714 [1<sup>st</sup> Dept 1984]). 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 from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Further, in order to obtain summary judgment, the movant must "establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212 [b]) and he must do so by tender of evidentiary proof in admissible form" (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1063, 1067 [1979]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Wright v C.H. Martin of White Plains Rd., Inc.*, 23 AD3d 295 [1<sup>st</sup> Dept 2005]). 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 require

a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form” (*Zuckerman v City of New York*, 49 NY2d at 562).

On the record before this Court, Con Edison has not established that it is entitled to summary judgment. Con Edison has failed to submit an affidavit by an individual with personal knowledge of the facts, as is required by CPLR 3212 (b). The affidavit of Con Edison’s employee, John Lind, and the annexed documents reveal the existence of triable issues of fact relevant to determining the appropriate Statute of Limitations applicable to this matter, the date of accrual of the limitations period, as well as whether Con Edison is liable for the damage allegedly sustained by Verizon, including: (1) the nature of the alleged damage to Verizon’s equipment and the cause of the damage; (2) the date when the damage occurred; and (3) the date when Verizon discovered the damage to its equipment. Summary judgment is premature in the instant case, as discovery has not been completed, which could reveal evidentiary proof in admissible form crucial to resolving the above factual issues (*see* CPLR 3212 [f]; *George v New York City Tr. Auth.*, 306 AD2d 160 [1st Dept 2003]; *Arez v Twin Parks Northeast Houses, Inc.*, 294 AD2d 266, 267 [1<sup>st</sup> Dept 2002]; *Schachat v Bell Atl. Corp.*, 282 AD2d 329, 330 [1<sup>st</sup> Dept 2001]; *Esposito v Metropolitan Transp. Auth.*, 264 AD2d 370 [1<sup>st</sup> Dept 1999]).

The major legal issue raised on the instant motion is whether the Statute of Limitations provision in CPLR 214 (4) or CPLR 214-c is applicable to the instant matter. As noted above, Con Edison asserts that general limitations provision in CPLR 214 (4) for actions to recover for damages to property, based upon causes of action sounding in tort, applies to the instant matter. Therefore, the three-year limitations period began to run on September 26, 2003, the date on which Con Edison asserts that any damage to Verizon’s equipment resulting from Con Edison steam operations would have occurred, or, at the latest on December 10, 2003, when repairs at the location of the alleged steam incident were completed (*see Verizon-New York, Inc. v Reckson Assocs. Realty Corp.*, 19 AD3d 291 [1<sup>st</sup> Dept 2005]; *Manhattanville Coll. v James John Romeo Consulting Engr., P.C.*, 5

AD3d 637, 241 [2d Dept 2004]).

Verizon, asserts, however, that this action is governed by the special Statute of Limitations provision in CPLR 214-c (2), which provides:

“Notwithstanding the provisions of section 214, the three year period in which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed *from the date of discovery of the injury by the plaintiff of from the date when or from the date when through the exercise reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.*” (Emphasis supplied)

According to Verizon, the three-year limitations period for this action accrued, pursuant to CPLR 214-c (2), on February 6, 2004, when the alleged steam damage to its equipment was discovered. Therefore, Verizon argues that this action, which was commenced on or about December 13, 2006, is not time-barred.

There is a substantial legal question, however, as to whether the limitations provision in CPLR 214-c (2), triggered by the discovery of the injury or damage, is applicable to this action, if disclosure reveals that Verizon’s equipment was damaged by steam, meaning water vapor. If either party moves for summary judgment upon the completion of discovery, they should address this legal issue, in detail, including the decisions by the Court of Appeals and the Appellate Divisions concluding that CPLR 214-c is intended to apply only to personal injury or property damage resulting from the latent effects of exposure to toxic or hazardous substances (*see Blanco v American Tel. and Tel. Co.*, 90 NY2d 757, 766-767 [1997], *rearg denied* 91 NY2d 922 [1998] [language of CPLR 214-c, read as a whole, and the legislative history of the bill adding this provision indicate that it is intended to cover injury or damage resulting from exposure to toxic substances]; *see also Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson, AIA*, 100 NY2d 202, 205-207 [2003] [amendment adding CPLR 214-c was intended to remedy the inequities that arose from applying the common-law rule that the limitations period for so-called “toxic tort” cases accrued from the date of exposure to toxic substances, by tolling the limitations period until a party discovers

or should have discovered the harm resulting from the latent effects of exposure to a toxic substance]; *Patterson v City of New York*, 289 AD2d 213, 214-215 [2d Dept 2001], *lv denied* 98 NY2d 614 [2002] [CPLR 214-c inapplicable to action by employees to recover for injuries caused by the improper regulation of compressed air in a device used in a sewer tunnel project; “CPLR 214-c was not intended to apply to nontoxic substances [including air] which may, through improper use, cause latent injuries” [parenthetical supplied]]; *Rochester Gas & Elec. Corp. v City of Rochester*, 258 AD2d 945 [4<sup>th</sup> Dept 1999] [CPLR 214-c inapplicable to action by utility to recover for property damage caused by water main break; water is not a toxic substance within the meaning of CPLR 214-c]; *Martzloff v City of New York*, 238 AD2d 115, 117 [1<sup>st</sup> Dept 1997], *lv dismissed* 90 NY2d 935 [1997] [CPLR 214-c not applicable to action by firing range instructors injured by sound of gunfire; sound, a phenomenon which is normally benign, “is readily distinguishable from the injurious substances contemplated by CPLR 214-c [2]”].

Therefore, in view of the factual and legal issues which must be resolved, Con Edison’s motion to dismiss this action is denied.

Accordingly, it is

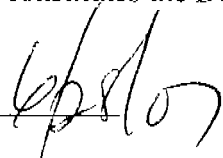
ORDERED that the motion by defendant Consolidated Edison, Inc. to dismiss this action is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on Friday, July 27, 2007 at 9:30 A.M. in Room 279 at 80 Centre Street in New York, NY; and it is further

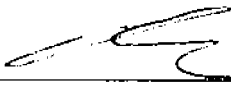
ORDERED that, within 30 days of entry, plaintiff shall serve a copy of this decision and order, together with notice of entry, upon defendant.

This constitutes the Decision and Order of the Court.

Dated: \_\_\_\_\_



ENTER: \_\_\_\_\_



Doris Ling-Cohan, JSC

**FILED**  
 JUL 11 2007  
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Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check If Appropriate:  DO NOT POST  REFERENCE