

**Consolidated Edison Co. of N.Y. v The
Hallen Constr. Co.**

2007 NY Slip Op 33347(U)

October 9, 2007

Supreme Court, New York County

Docket Number: 0104173/2004

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

Consolidated Edison Co of NY, Inc. (sm0021-045)

INDEX NO. 104173/04

MOTION DATE _____

MOTION SEQ. NO. (001)

MOTION CAL. NO. _____

The Hallen Construction Co. Inc, et al

The following papers, numbered 1 to 8 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

5

Cross-Motion: Yes No

*interim orders dated 6/25/07 & 7/27/07
9/5/07 submission*

6, 7
8

Upon the foregoing papers, It is ordered that this motion *for summary judgment* is decided in accordance with the attached *memorandum decision*.

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

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/9/07

[Signature]
HON. DORIS LING-COHAN J.S.C.

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 36

-----X
CONSOLIDATED EDISON COMPANY OF NEW YORK
(SM0021-04),

Plaintiff,

-against-

Index № 104173/04
Motion Seq. No.: 00

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

THE HALLEN CONSTRUCTION COMPANY,
KEYSPAN ENERGY CORP. & EASTERN LOCATING
SERVICE, INC.,

Defendants.

-----X
DORIS LING-COHAN, J.:

Defendant Eastern Locating Service, Inc. (Eastern) moved
pursuant to CPLR §3212 (a), for summary judgment dismissing
plaintiff's complaint.

The complaint alleges that on or about April 16, 2003, while performing certain excavation work, at 43-11 Ithaca Street in Queens (the Location), defendants The Hallen Construction Company (Hallen) and Keyspan Energy Corporation (Keyspan) damaged certain underground electrical facilities belonging to plaintiff. As against Eastern, the complaint alleges that Eastern entered into a contract with plaintiff, pursuant to which Eastern was required to mark out plaintiff's electrical facilities at and near the Location, and that Eastern either failed to mark out the facilities, or failed to mark them out properly. In addition to plaintiff's claims, defendants Hallen and Keyspan have asserted a cross-claim against Eastern for contribution and/or indemnification, for its alleged negligence in causing damage to the subject facilities.

Plaintiff's verified bill of particulars, served in response to the joint demand of Hallen and Keyspan, alleges that those defendants "had actual notice of the presence of plaintiff's

facilities because they were marked". [See ¶12-14, Bill of Particulars, Exh. C, Notice of Motion]. In addition, plaintiff's response to Eastern's notice to admit, admits that a Field Report of Damage to Company Property, prepared by employees of plaintiff, in the ordinary course of plaintiff's business, reflects, the fact that plaintiff's facilities at the Location were marked and marked correctly. [Notice of Motion, Exh. E & F]. Accordingly, plaintiff has admitted that Eastern fulfilled its contractual obligation, and that it did so without any negligence, warranting summary judgment.

Plaintiff's sole ground for opposing Eastern's motion is that, while plaintiff believes that its facilities were marked correctly, the mere fact that Hallen and Keyspan's answer contains a cross claim against Eastern indicates that those defendants may have information showing that plaintiff's facilities were not properly marked.

It is axiomatic that a party opposing a motion for summary judgment must lay bare its proof. See Zuckerman v City of New York, 49 NY2d 557 (1980). It is undisputed that plaintiff admitted, in its response to Eastern's notice to admit, that Eastern fulfilled its contractual obligations, without any negligence. Such admissions is "analogous to pleading, and therefore binds to the same degree". Siegel, NY Prac §364, at 604 (4th ed)(citations omitted). It is noted that this was an affirmative admission made in plaintiff's response to a notice to admit, rather than an admission based on a mere failure to respond to the notice to admit. Significantly, plaintiff has not moved pursuant to CPLR 3123(b) to amend or withdraw such admission. Further, plaintiff filed its complaint more than three years ago. Plaintiff's current speculation that Hallen and

Keyspan may have facts contradicting its own admissions as to the marking out of its facilities is not a sufficient ground for denying Eastern's motion. See Global Minerals and Metals Corp. v Holme, 35 AD3d 93 (1st Dept 2006) (party opposing summary judgment must show evidentiary basis supporting request for further discovery); Jones v New York City Tr. Auth., 166 AD2d 293 (1st Dept 1990). Moreover, plaintiff has admitted that Eastern has fulfilled its contractual obligations, and that Eastern did so without any negligence, and has offered no admissible evidence to the contrary. Thus, Eastern is entitled to summary judgment of dismissal of plaintiff's complaint.

With respect to the cross-claim asserted against Eastern by Hallen and Keyspan, the Court notes that Eastern's moving papers fail to seek summary judgment of dismissal of such cross-claim. Moreover, in opposition, defendants Hallen and Keyspan have raised a triable factual issue as to Eastern's alleged negligence asserted in the cross-claim. Specifically, opposing defendants have submitted an affidavit from John Kotarski (Kotarski), a Hallen employee, who was present at the scene of the excavation at issue, and indicates that the facilities which were damaged were not properly marked. Also submitted is a copy of a Hallen "Form for Reporting Property Damage" prepared by Kotarski, dated April 21, 2003, which indicates, *inter alia*, as follows: "Crew hit line...Line that was hit was outside the tolerance zone [more than] 2 [feet]". [9/5/07 Submission]. Thus, as to the cross-claim asserted by Hallen and Keyspan, a factual issue is presented as to whether the subject electrical facilities were properly marked by Eastern.

Summary judgment as to the cross-claim is premature, since the moving party has not been deposed and has not yet responded to

outstanding discovery requests which could reveal evidentiary proof in admissible form crucial to the issue of its liability for the claimed damage. See CPLR 3212 (f); Arez v Twin Parks Northeast Houses, Inc., 294 AD2d 266, 267 (1st Dept 2002); Schachat v Bell Atl. Corp., 282 AD2d 329, 330 (1st Dept 2001); Esposito v Metropolitan Transp. Auth., 264 AD2d 370 (1st Dept 1999).

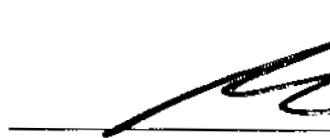
Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted to the extent that plaintiff's complaint is severed and dismissed as against defendant Eastern Locating Service, Inc., and the Clerk is directed to enter judgment of dismissal of the complaint in favor of said defendant with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; however, Eastern remains a party for the purposes of the cross-claim asserted by defendants Hallen and Keyspan; and it is further

ORDERED that the remainder of this action shall continue; and it is further

ORDERED that within 30 days of entry of this order, movant shall serve a copy upon all parties with notice of entry.

Dated: 10/9/07

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Doris Ling-Cohan, J.S.C. OFFICE