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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice

PART 5

Bless, C

INDEX NO. 110271/06

MOTION DATE

- v -

MOTION SEQ. NO. 05

Con Ed

MOTION 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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 27 2008

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 2/25/08

EILEEN A. RAKOWER 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 5

----------X

CALVIN BLISS,

Plaintiff,

Index No. 110271/06

Motion Seq. 4 and 5

- against -

Decision and Order

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), NICO ASPHALT PAVING, INC. and THE CITY OF NEW YORK,

Defendants.

----------X

EMPIRE CITY SUBWAY COMPANY (LIMITED),

Third-Party Plaintiff,

Third-Party Index No. 591050/06

- against -

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

----------X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Fourth-Party Plaintiff,

Fourth-Party Index No. 590707/07

- against -

NICO ASPHALT, INC. and MANETTA INDUSTRIES,

Fourth-Party Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for damages he alleges he suffered when he slipped and fell on West 55th Street between Fifth and Sixth Avenues in the County and State of New York, on December 14, 2005. Specifically, plaintiff alleges that he put his left foot down, it started to slip, he tried to catch himself and his right foot hit the curb. While on the ground, he noticed he had slipped on black ice in the roadway near the curb, and close to a manhole in front of the building known as 1350 Sixth Avenue. Plaintiff was unable to give the dimensions of the icy area.

Consolidated Edison Company of New York, Inc. ("Con Ed") owned the manhole cover near the alleged defective area. Its contractor, Manetta Industries ("Manetta") excavated that area of the roadway, and Nico Asphalt Paving, Inc. ("Nico"), also a contractor for Con Ed, paved the area around the manhole.

Nico moves for summary judgment dismissing plaintiff's claims and all cross and counterclaims as against it. Con Ed partially opposes the motion. To the extent Nico's motion fails, Con Ed seeks indemnification from Nico arising from work Nico performed. Plaintiff opposes the motion. Empire City Subway Company (Limited) ("Empire") brings a separate motion, also seeking summary judgment dismissing plaintiff's claims and all cross and counterclaims as against it. Plaintiff opposes Empire's motion. City submits no papers.

Empire, in support of its motion, submits the following: the pleadings; plaintiff's notice for trial; plaintiff's verified bill of particulars, plaintiff's notice of claim; the deposition of Calvin Bliss; the deposition of Mario E. Smith; a photograph presented to plaintiff at his deposition, in which Mr. Bliss circles the area containing the alleged defect; the deposition of Leonard Ferguson as well as an affidavit by Mr. Ferguson prepared after he visited the accident site; Empire work records; the deposition of John Denegall; and Con Ed work records.

Plaintiff, in opposition to both Nico's and Empire's motions, provides an attorney affirmation referencing deposition testimony contained in the movants' submissions. Further, plaintiff provides the expert opinion of Norman Wesler, P.E. as well as additional photographs of the alleged defect at the accident site.

Empire argues that its work did not cause or create the alleged defect. Rather, a Con Edison manhole was in the vicinity of plaintiff's accident, and excavation and

paving work was done around that manhole, but not by Empire. Empire's work did not encompass the defective area identified by plaintiff in photographs shown to him at his deposition.

With regard to Empire, Mr. Wesler found that Empire was responsible for a patch parallel to the curb, closer to the center of the roadway, and adjacent to Con Ed's work area.

> Storm water striking the Empire City Subway roadway patch gets thrusted [sic] towards the Con Edison defective area, which in turn sets up the trapped water condition that turns to black ice. Therefore, Empire City Subway's roadway patch was also a proximate cause of plaintiff's accident.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

It is uncontested that Empire's patch work was five feet from the curb and parallel to the area in question. Most notably, there is no allegation that Empire's work area was defective. Further, it is well settled that affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief. (*Castro v. New York University*, 5 A.D.3d 135[1st Dept. 2004]). Mr. Wesler does an on site inspection wherein he merely notes the "three foot wide cut in the roadway running for a distance of nominally 30 feet, and parallel to the curb" which is attributable to Empire. Here, the affidavit of Mr. Wesler lacks probative value since it fails to identify the information used in reaching his opinion that Empire's patch was a proximate cause of plaintiff's accident, or how such information was acquired. (*Id.* at 136).

Nico, in support of its motion, submits the following: the pleadings; plaintiff's verified bill of particulars; the deposition of Calvin Bliss; photographs of the alleged defect and site of the accident; the deposition of John Denegall, Nico's Superintendent; the deposition of Mario E. Smith, Senior Coordinator with Con Ed; Con Ed work records; the deposition of Leonard Ferguson, a Specialist for Empire; and the report of Civil Engineer, Joseph C. Cannizzo. Con Ed provides Con Ed's General Specification No. 117 for the Restoration of Pavements in New York City and Westchester Country dated November 6, 1992 and incorporated by reference in the Invitation to Bid CC-02-0725 ("specifications for restoration").

Nico argues that any work it performed was not located where plaintiff fell. Additionally, Nico urges that it is not responsible for black ice, the defect which plaintiff claims caused his fall. Nico argues that, in any event, it owed no duty to plaintiff. Finally, Nico's paving was not the cause of any road condition which might have allowed water to accumulate. Rather, it was a deterioration of the road surface, which City was responsible to maintain.

Nico is shown to have done paving work for Con Ed at or near the site of plaintiff's accident. Specifically, Nico placed asphalt around the perimeter of the subject manhole cover in an area approximately 4.5 feet long and 4.0 feet wide. The restoration was not continuous to the curb and ended approximately 8" from it. According to the testimony of Mr. Denegall, the asphalt applied by Nico was approximately one inch in depth. Plaintiff's expert, Mr. Wesler, opines that the failure of Nico to pave in a manner that would have provided a level surface contributed to the depression in the roadway. Nico claims that plaintiff did not slip on ice in the area where it paved around manhole cover. Plaintiff disputes this claim and argues that he does not recall exactly how far the black ice extended from the curb and that it could have extended into the area where Nico paved.

The exact location of the black ice is secondary to the inquiry regarding Nico of what, if any, duty Nico owed to plaintiff. No duty of care is owed to a non contracting third party except in three limited circumstances. Those circumstances are: first, where one engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk; second, where the plaintiff has suffered injury as a result of reasonable reliance upon defendant's continuing performance of a contractual obligation; and third, where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*Church v. Callanan Industries, Inc.*, 99 NY2d 104 [2002]).

Under the first exception, the question is whether Nico's alleged negligent paving of the area surrounding the manhole cover created or increased an unreasonable risk of harm to others or that it took actions which "launched a force or instrument of harm."(*H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160*[1928]).

Plaintiff's engineer rendered an opinion that a proximate cause of this accident was a one inch depression in the roadway surface adjacent to the Con Edison manhole cover. He stated that this was a direct result of failing to properly compact the backfilled earth displaced during their street opening "to a density whereas it could withstand, the highly foreseeable weight of motor vehicles." Wesler, in his December 12, 2007 affidavit, expands upon this to include, "[t]he uneven roadway surface was also created by the failure to properly apply asphalt restoration over the opening in the roadway in a manner that would have been level with the surrounding grade of the roadway."

Wesler acknowledges Mr. Denegall's testimony that Nico applied one inch of asphalt to a cut measuring 4.2 feet by 4.2 feet. Wesler contradicts defendant's expert and asserts that Nico's work area, even if not the area where black ice accumulated, affected the areas closer to the curb where the surface of the asphalt was eroded. Finally, Wesler attributes to Nico the responsibility, "when paving the area to use a pavement base adequate for maintaining traffic loads." Absent, is proof that Nico put down the pavement base. Indeed, while Nico's contract with Con Ed made it responsible to inspect the backfill prior to applying the pavement, Mr. Denegall states affirmatively that Nico does not do backfill. Mr. Denegall also responded to counsel's question at his deposition:

> Q: If Nico gets to a job with its foreman and they have been asked to put in three inches of asphalt and that is found in some way to be inadequate to do the job, can Nico use more or less asphalt?
>
> A: We can use more, as long as the Con Edison inspector approves it. (Denegall deposition, page 23, line 18-24.)

Nico's alleged contribution to plaintiff's accident, as attributed to Nico by Wessler, does not rise to the level of risk required by *Church*. Plaintiff submits no evidence that Nico paved the area in a manner that "launched a force or instrument of harm." Absent such a showing, Nico owed no duty to plaintiff, because Con Ed

explicitly retained the right to inspect Nico's work. (*Church* at 113). Con Ed does not concede that it inspected the area after or during Nico's work. However, Section 23(A) of Con Ed's "Standard Terms and Conditions of Construction Contracts states, in relevant part:

> All parts of the Work shall, throughout the time of performance of the Contract, be subject to inspection by Con Edison. Con Edison shall be the final judge of the quality and acceptability of the Work, the materials used therein, and the processes of manufacture and methods of construction employed in connection therewith.

Con Ed, by its own contract, assumed the responsibility for checking and approving the quality of its subcontractors' work.

Nico cannot be said to have taken actions which launched a force of harm. Similarly, liability cannot be placed on Nico under the second exception in *Church*. There is no allegation by plaintiff that Nico failed to complete the paving work and thus, plaintiff has no basis with which to claim he reasonably relied upon Nico's continuing performance. Finally, although Nico was obligated to repair and maintain its work after completion, Con Ed was still obligated to inspect. In the specifications for restoration, it states, in relevant part:

> The Contractor (Nico) shall promptly repair, replace, restore or rebuild, at its own expense . . .any finished work in which defects of materials or workmanship may appear or which excessive wear or damages may occur because of such defects, during the three year period subsequent to the date of completion of restoration. This provision shall survive termination of the contract.

The section continues:

> If the contractor shall fail to repair, replace, rebuild or restore any defective or damaged work within five working days *after receiving notice by Con Edison*, Con Edison shall have the right to have the work done by others . . . (emphasis added).

The fact that Nico's duty to repair is triggered by notification from Con Ed, further demonstrates that Nico did not entirely displace Con Ed's duty to inspect and

maintain the area safely. Therefore, as Nico's duty was to Con Ed, and not to plaintiff, his cause of action as against Nico must fail.

Con Ed only opposes Nico's motion to the extent that it seeks indemnification. The indemnification clause contained in Con Ed's construction contract states, in relevant part:

> To the fullest extent allowed by law, Contractor agrees to defend, indemnify and save Con Edison . . . harmless from all claims . . . for injury . . . resulting in whole or in part from, or connected with, the performance of the Work by Contractor . . . and including claims, loss, damage, and liability arising from the partial or sole negligence of Con Edison or non-parties to this Contract.

Initially, that part of the clause which calls for indemnification for claims arising from the sole negligence of Con Edison is void as contrary to General Obligations Law §5-322.1 (*Itri Brick & Concrete Corp. v Aetna Ca. & Sur. Co.*, 89 N.Y.2d 786[1997]). However, the clause is not entirely unenforceable, as the phrase "to the fullest extent allowed by law" salvages the clause to the extent that it imposes indemnification for claims which are caused in whole or in part by the performance of Nico's work. (*Dutton v. Charles Pamkow Builders, Ltd.*, 296 A.D.2d 321[2002]). In any event, summary judgment on the issue of indemnification is premature since that part of the clause that is enforceable is conditioned upon a finding that Nico was negligent. (*Correia v. Professional Data Management*, 259 A.D.2d 60[1st Dept. 1999]). If issues of fact exist as to the negligence of the party responsible for indemnification, summary judgment must be denied. *(Zeigler-Bonds v. Structure Tone, Inc.*, 245 A.D.2d 80 [1st Dept. 1997]).

Wherefore it is hereby

ORDERED that defendant Empire City Subway Company (Limited)'s motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant Empire City Subway Company (Limited); and it is further

ORDERED that defendant Nico Asphalt, Inc.'s motion is granted to the extent that the complaint in the main action is hereby severed and dismissed as against

defendant Nico Asphalt, Inc.; and it is further

ORDERED that the remainder of the action shall continue.

DATED: February 25, 2008

EILEEN A. RAKOWER, J.S.C.