

**Van Tulco, Inc. v City of New York**

2008 NY Slip Op 31100(U)

April 14, 2008

Supreme Court, New York County

Docket Number: 0100243/1995

Judge: Karen Smith

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

PRESENT: HON. KAREN SMITH

PART 62

Justice

Index Number : 100243/1995

**VAN-TULCO, INC.**

VS.

**CITY OF NEW YORK**

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

7

INDEX NO. 10024395

MOTION DATE 1/17/08

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

were read on this motion ~~to~~ for summary judgment

PAPERS NUMBERED	
1	_____
2-6	_____
7	_____

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 is denied in accordance with the annexed memorandum decision and order

**FILED**

APR 17 2008

COUNTY CLERK'S OFFICE

NEW YORK

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

Dated: 4/14/08

KSS

**HON. KAREN SMITH** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 62

-----X  
VAN TULCO, INC.,

Plaintiff,  
-against-

Index No.: 100243/1995  
Motion Seq.: 001  
Motion Date: 01/17/2008

THE CITY OF NEW YORK, NEW YORK TELEPHONE  
COMPANY, CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC. AND COLONIAL ORNAMENTAL  
IRON WORKS, INC.

Defendants.

**DECISION AND ORDER  
FILED**

APR 17 2008

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

Defendant, Consolidated Edison Company of New York, Inc.'s (Con Ed) motion for summary judgment dismissing the complaint and all cross-claims asserted against it is denied.

Plaintiff ("VTI") is a contractor who entered into a contract with defendant, The City of New York ("CNY"), to provide certain construction and renovation services to the 21<sup>st</sup> Street Bridge in Queens, New York. VTI brought this action to recover costs it allegedly incurred as the result of months of delay in the progress of its work. VTI alleges its work was delayed by the failure of defendants Con Ed and New York Telephone Company ("NYT") to promptly move their underground lines and equipment when notified that said facilities were interfering with the bridge renovation project.

Con Ed now moves for summary judgment dismissing the complaint and all cross-claims asserted against it in this action on the basis that; 1) it never received proper notification to relocate or protect its equipment and, 2) it resolved all issues concerning its equipment as soon as the impediment to its work, caused by the proximity of NYT's conduits to Con Ed's gas line, was resolved. Thus, Con Ed contends it is not responsible for any of the delay costs being claimed

by VTI in this action.

In its current motion, the only issues Con Ed seeks to place before the court are whether; "...a question of fact existed as to whether Con Edison received proper notice from the City to remove its facility ..." and whether "...a question of fact existed as to whether Con Edison breached its common law duty to relocate its facility" (Affirmation in Support, paragraph 15). Con Ed takes this position because it previously moved for summary judgment and, on January 9, 2006, the Hon. Doris Ling-Cohan issued a decision denying Con Ed's prior summary judgment motion concluding that there were questions of fact on those two issues. Con Ed contends it made the prior motion before any discovery had taken place and, now that discovery has been completed, it has the necessary documents and deposition testimony to resolve the two open questions.

In the current motion, Con Ed's counsel contends; "[t]his Court, by its Order of September 27, 2007 ... has permitted Con Edison to remake its motion for summary judgment on the issue of liability" (Affirmation in Support, paragraph 10). This contention has been thoroughly addressed in the record of the proceedings before the court on January 17, 2008 and will not be considered further.

While both the interests of judicial economy and the general rule discouraging serial summary judgment motions (*National Enterprises Corp. et al v Dechert, Price and Rhoads*, 246 AD2d 481 [1<sup>st</sup> Dept, 1998]) favor not considering the instant motion at all, the court cannot ignore the fact that discovery has provided additional information which resolves some of the issues in this case.

Con Ed contends that §19-143(b) of the New York City Administrative Code ("the

Code”) which states, in part, that a utility company; “... shall, upon receipt of the notice provided for in the preceding subdivision, remove or otherwise protect their pipes, mains and conduits, and all other fixtures and appliances connected therewith or attached thereto, where necessary, **under the direction of the commissioner**” (emphasis added), requires a written order by the commissioner to a utility company before the utility company may be held liable for the costs or expenses of resolving interferences caused by the utility company’s equipment. However, there is nothing in the language of the provision which requires that any specific written direction be issued by the commissioner before a utility company is required to remove or protect its equipment. The language of this provision simply means that utility equipment removal or protection is subject to the supervision and approval of an appropriate commissioner for the New York City Department of Transportation.

The only prerequisite “notice” in connection with a contractor’s excavation of public streets referred to in NYC Administrative Code § 19-143 is in subdivision (a) which requires that; “[w]henver any street ... in which the pipes, mains or conduits of public service corporations are laid, **the contractor** ... shall give notice thereof in writing to such corporations, at least forty-eight hours before breaking ground ...” (emphasis added)<sup>1</sup>. At oral argument on the instant motion, it was acknowledged that both Con Ed and NYT, in fact, received the necessary pre-excavation notice for this project from VTI (see page 14 of the transcript of the proceedings). It was this notice which triggered Con Ed’s codified duty to remove or protect its underground

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<sup>1</sup> § 19-151 Code actually provides for a different type of “notice” to be given by the City when the City seeks to charge the utility companies for the work the City performs to correct a problem caused by the interference of the utility line.

facilities which interfered with the progress of the bridge renovation project. Therefore, Con Ed's request for summary judgment on the issue of notification is denied. Further, in searching the record of the proceedings before it, the court determines it is appropriate to award summary judgment to VTI, limited to the factual finding that Con Ed received the administratively required notice that VTI was going to begin excavation. Accordingly, the court determines, as a matter of law, that Con Ed's codified duty to remove or protect such of its equipment as interfered with the bridge renovation project had been triggered under the circumstances presented herein.

The remaining branch of Con Ed's motion seeks a determination that Con Ed did not breach its common law duty to remove or protect its facilities which were interfering with the progress of the bridge renovation project. Since questions of fact exist on this issue, as more fully discussed below, this prong of Con Ed's motion for summary judgment must also be denied.

First, Con Ed argues it had no common law duty because the language of the contract between VTI and CNY, including the plans and specifications provided in the bidding process for the contract, specifically indicated the existence of Con Ed's equipment and provided that all utility services were to be maintained, without interruption, throughout the progress of the bridge renovation project. However, the Appellate Division, First Department, has already determined that, under such circumstances Con Ed is; "...at most an 'incidental' as opposed to an 'intended' beneficiary of the contract between the city..." and CNY's contractor on a public works project (*City of New York v Consolidated Edison Company*, 114 AD2d 217, 223 [1<sup>st</sup> Dept, 1986]). Therefore, Con Ed may not rely upon the contract between VTI and CNY to insulate Con Ed

from its common law or statutory obligations to remove or protect its equipment.

Con Ed cites the case of *Corbetta Construction Company, Inc. et al v Consolidated Edison Company of New York, Inc.* (33 Misc. 2d 765 [Supreme Court New York County, 1962]) to support the conclusion that VTI was responsible for the costs of removing or protecting Con Ed's equipment. However, a thorough reading of *Corbetta* indicates that it is not applicable to the instant case. In *Corbetta*, the terms of a public works contract (construction of a portion of the New York State Thruway passing through Yonkers, New York) contained language; 1) contemplating that the contractor would be responsible for protecting existing utilities during the contractor's work, 2) providing for low-impact blasting, within certain parameters; a) when the blasting was to take place near utility equipment and b) if directed to undertake such blasting by the State's engineer and 3) calling the contractor's attention to the existence of utilities in the area as well as plans and specifications showing the proximity of the utilities to the work being encompassed within the contract bid proposal. An essential part of the holding in *Corbetta* was the fact that, had the contractor exercised due diligence prior to submitting his bid, by reviewing plans and specifications provided in the contracting process and/or publically available records, the contractor could have determined the existence of specified utility equipment and the proximity thereof to blasting work which was to be undertaken as part of the contract. Therefore, when the contractor sought to hold Con Ed liable for incremental costs allegedly incurred as a result of being directed by the State's engineer to engage in extremely low-impact blasting (even though such blasting remained within the parameters set forth in the contract), the court held in favor of Con Ed.

The *Corbetta* case does not abrogate a public utility's common law duty to remove or

protect any of its equipment which interferes with a given public works project. Instead, the court in *Corbetta* determined that; 1) the alleged "incremental" costs sought by the contractor were actually costs which were contemplated in the bid proposal, 2) the contractor could and should have calculated them into his bid and, 3) he was not entitled to charge the utility company for his failure to thoroughly review the bid proposal and properly consider all costs and expenses which were going to be required for him to complete his work under the contract.

Unlike *Corbetta*, in the instant matter, the actual field conditions at the job site turned out to be different than those depicted in the plans and specifications utilized in the bidding process for the bridge renovation contract. Additionally, the field locations of the utilities are different than the locations depicted in the plans and specifications provided with the bid proposal, which VTI claims caused the interference, resulting in VTI's alleged delay costs. Furthermore, the existence of the discrepancies appears to have been unknown to all parties involved in the bidding process rather than a contemplated part of the project costs. While Con Ed contends that the bridge renovation contract required VTI to discover the discrepancies before submitting its bid on its project, the deposition testimony of Con Ed's own employee raises a question of fact as whether it was reasonable, or even possible, for VTI, or anyone else, to do so until demolition work started on the project (see July 18, 2007 deposition of Lawrence Kramer at pages 16-23). In order for Con Ed to prevail upon its interpretation of the terms and conditions of bridge renovation contract, it would be necessary for a finder of fact to conclude that, at the time of the bidding process, it was reasonably anticipated by CNY and the potential bidders that each bidder would, at their own cost and expense, obtain appropriate permits, conduct significant demolition work at the site, physically locate all utility equipment existing at the site and restore the site

prior to submitting a bid on the contract. Without any factual evidence in admissible form before the court to support this conclusion, it cannot be said, as a matter of law, that such extraordinary measures were contemplated by CNY, VTI or any other potential bidders involved in the contract bidding process.

As a secondary argument, Con Ed contends that, after being notified of interferences allegedly caused by its equipment it was determined that the interference was actually caused by the location of NYT's equipment rather than Con Ed's and, after NYT cleared the interferences caused by its equipment, Con Ed promptly rectified any and all problems allegedly caused by its equipment. Thus, Con Ed argues, it is not responsible for any delays to VTI's resuming its work on the project.

In contrast to Con Ed's assertions, VTI's employee, testified at his deposition, that the location and arrangement of Con Ed's gas main was part of the problem and that Con Ed and NYT each blamed the other for the problems resulting from the proximity of their respective equipment (see deposition of Gerard Tully, Jr. dated July 17, 2007 at pages 43 - 52 which was attached to Con Ed's papers as Exhibit K). VTI's contention is corroborated, to some degree, by the deposition testimony of an employee of NYT (see deposition testimony of Joseph Maresca, dated August 29, 2007 at page 58). Therefore, questions of fact exist as to which entities were involved in causing the delay attributable to the dispute over the interferences created by the proximity of the respective equipment of Con Ed and NYT. Accordingly, Con Ed's motion for summary judgment on this issue is also denied and it is;

ORDERED that Con Ed's motion for summary judgment is denied in all respects, and it is further;

ORDERED that the court grants partial summary judgment to VTI to the limited extent that it is determined that Con Ed's codified duty, pursuant to New York City Administrative Code §19-143, to remove or protect such of its equipment as interfered with the public works project involved in this matter had been triggered by the pre-excitation notice it received in connection with the bridge renovation project for the 21<sup>st</sup> Street bridge.

The foregoing constitutes the decision and order of this court.

Dated: April 17, 2008

ENTER:



Hon. Karen S. Smith, J.S.C.

**FILED**  
APR 17 2008  
COUNTY CLERK'S OFFICE  
NEW YORK