[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 25

Index Number : 100985/2008

KEITH, CAROLYN FAGIN

VS.

WHGA LENOX HOUSING

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of Second Third-Party Defendant New York Paving, Inc. for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Second Third-Party Complaint of Second Third-Party Plaintiff Consolidated Edison Company of New York, Inc., is denied; and it is further

ORDERED that counsel for New York Paving shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

FILED

AUG 11 2009

COUNTY CLERK'S OFFICE NEW YORK

Dated: 8/10/09

HON. CAROL EDMEAD 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

CAROLYN FAGIN-KEITH,

Plaintiff,

-against-

WHGA LENOX HOUSING ASSOCIATES, L.P.,

Defendant.

WHGA LENOX HOUSING ASSOCIATES, L.P.,

Third-Party Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PYTHAGORAS GENERAL CONTRACTING CORP. And MAJOR SEWER & WATER CONTRACTORS, INC.,

Third-Party Defendants.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Second Third-Party Plaintiff,

-against-

NEW YORK PAVING, INC.,

Second Third-Party Defendant.

EDMEAD, J.S.C.

Index No. 100985/08

DECISION/ORDER

Third-Party Index No. 590936/08

Second Third-Party Index No. 590132/09

MEMORANDUM DECISION

Second Third-Party Defendant New York Paving, Inc. ("New York Paving") moves for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Second Third-Party Complaint of Second Third-Party Plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed").

Background

On May 28, 2005, Con Ed entered into a construction contract with New York Paving by way of Con Ed Purchase Order 5501507 which required that New York Paving "furnish supervision, labor, material, tools and equipment for the restoration of sidewalk, curbs and concrete roadway at various locations in Manhattan for the period May 21, 2005 through May 6, 2006. Said work was completed on February 4, 2006 and approved by Con Ed on March 3, 2006.

An additional restoration job was assigned to New York Paving by Con Ed, also in connection with Purchase Order 5501507, in connection with the final restoration work. After the requisite sidewalk opening work - performed by another contractor - was completed, New York Paving was retained on July 26, 2006 to perform the final paving restoration at 629 Lenox Avenue. All of this paving and restoration work was completed on August 9, 2006, and approved by Con Ed on August 23, 2006

Plaintiff Carolyn Fagin-Keith ("plaintiff") commenced this action based on personal injuries purportedly sustained on May 23, 2007, resulting from an alleged trip and fall on the sidewalk in front of 633 Lenox Avenue, New York, New York (the "subject premises").

New York Paving's Contentions

The documentary evidence demonstrates that New York Paving did not perform any work or repairs to or in the area of the plaintiff's purported accident at or about the time of the alleged occurrence. New York Paving was retained by Con Ed in connection with work performed in the vicinity of the alleged incident, but having no connection to the accident itself due to the distance in time between the two events. As such, New York Paving did not owe or breach any duty to the plaintiff or any other party in this litigation.

In addition, New York Paving is entitled to dismissal of Con Ed's indemnification and breach of contract causes of action alleging New York Paving's failure to procure insurance insofar as (a) New York Paving did not perform work in or around the time of plaintiff's alleged accident, as evidenced by the documentary evidence; and (b) the Purchase Order entered into between Con Ed and New York Paving, did not obligate New York Paving to provide indemnification and/or procure insurance coverage for Con Ed relative to the incident in question.

Although the location of the Opening Ticket PS317028 and the corresponding Paving Ticket is the same location where plaintiff was purportedly injured, the Paving Order specifically shows that New York Paving's work was completed on February 4, 2006 and approved by Con Ed on March 3, 2006, fourteen months prior to plaintiff's alleged accident.

And, although the Paving Ticket reference for the July 26, 2006 work references Purchase Order 55010507, the work of New York Paving was performed at a location separate from the subject premises. Further, even if the work had been performed at or in the vicinity of the subject premises, the Paving Ticket provides that all paving and restoration work was completed on

August 9, 2006, and approved by Con Ed on August 23, 2006, nine months prior to plaintiff's alleged accident.

With respect to Con Ed's claim that New York Paving failed to procure the requisite insurance, the Certificate of Insurance submitted by Con Ed in connection with this claim does not apply to the case at bar as it was issued on November 30, 2006, months after the expiration of Purchase Order 5501507. Further, the Certificate of Insurance provided that "Consolidated Edison Co. Of NY Inc. is Additional Insured as respects to work performed by named insured on P.O. 607033-006" which is different from the Purchase Order upon which it seeks to recover.

Con Ed's Opposition

New York Paving admits doing work for Con Ed within 18 months of the date of plaintiff's claimed accident, at the location (in fact at two adjacent buildings) where plaintiff claims to have fallen. Both areas of work done by New York Paving are at or very close to the location where plaintiff claims her accident took place. These locations are close enough that, at present, neither can be readily ruled out as the site of that claimed accident.

Further, the Standard Terms and Conditions of Construction Contracts dated December 16, 1998 expressly states that Con Ed's inspection of New York Paving's work does not relieve New York Paving of its responsibilities and duties under Purchase Order No.: 5501507.

Con Ed and New York Paving must sink or swim together. Moreover, the Con Ed contract with New York Paving contains additional insured and indemnification clauses that would most likely cast New York Paving into full liability if the accident arose out of its work on behalf of Con Ed.

In addition, the "insurance coverage issue" raised by New York Paving's counsel is

illusory. That issue can be resolved if New York Paving is required to produce the "claims made" policy GL09253694, which is under the control of New York Paving's carrier.

New York Paving's Reply

New York Paving reiterates that it did not perform any work or repairs to or in the area of the plaintiff's purported accident at or about the time of the alleged occurrence.

The indemnification clause contained in subsection 36 of the Con Ed Master Contract provides that New York Paving's liability is limited to claims "resulting in whole or in part from, or connected with, the performance of the Work by [New York Paving]." However, it is clear that New York Paving was not engaged in any work in or around the scene of the alleged accident at or about the time plaintiff allegedly fell and, therefore, plaintiff's alleged accident did not "result from" nor was it "connected with" the performance of New York Paving's work at the subject premises.

And, because the Purchase Order which incorporated the terms and conditions of the Con Ed Master Contract had expired, Con Ed has no viable claim for indemnity or breach of contract against New York Paving.

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a

matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

CPLR 3211(a)(7): Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings

must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

On a motion to dismiss for failure to state a cause of action, where the parties have submitted evidentiary material, including affidavits, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279 [1996]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*" (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Analysis

New York Paving's basis for dismissal hinges on the argument that it did not perform any work or repairs to or in the area of the plaintiff's purported accident at or about the time of the alleged occurrence.

New York Paving is correct in arguing that mere proof that at some point in time in the past some repair work may have been performed in the location where the accident is alleged to have occurred without proof of any negligence or any demonstration of a relationship between the purported prior repair and the claimed defect at issue in the subject case warrants granting a dismissal, *Witte v Inc. Village of Port Washington*, 114 AD2d 359, 361, 493 NYS2d 879 (2d Dept 1985). However, we are unable at that juncture in this litigation to be able to conclude with certainty that there may not be some proof of negligence or a demonstration of a relationship between the work of New York Paving and the claimed defect at issue herein.

In the *Witte* case, the lack of written notice was pleaded in defendant's answer served in August 1982. In the ensuing 14 months prior to the subject motion, plaintiff deposed one village official, but made no other attempt to obtain the information she sought to obtain from defendant concerning prior repairs. Under the circumstances, plaintiff was not permitted to assert her need for additional disclosure as a bar to summary judgment. In the instant case, there has been no dilatory conduct on the part of Con Ed with respect to seeking discovery. And, there is more than "mere proof that at some point in time in the past some repair work may have been performed in the

location where the accident is alleged to have occurred...." There are actual dates and specific locations attributable to New York Paving.

And New York Paving's reliance on *Ahmed v City of New York*, 14 AD3d 388, 788 NYS2d 91 (1st Dept 2005), is misplaced. In *Ahmed*, although it was uncontroverted that Lehrer McGovern's worked at the Ramaz School was completed more than three months prior to plaintiff's alleged trip and fall on a sidewalk abutting the school's premises, it was also uncontroverted that the block plaintiff allegedly tripped over was, at the time of the accident, used as a door stop at the Ramaz premises. And, the City has failed to articulate any colorable claim against Lehrer McGovern, nor had the City demonstrated that it either conducted or sought discovery from Lehrer McGovern prior to Lehrer McGovern's motion. In the instant case, the issue is sidewalk reconstruction, not a "door stop," and Con Ed has sought discovery, including depositions.

Finally, the case of *Maloney v Consolidated Edison Co., of New York,* 290 AD2d 540, 541, 736 NYS2d 630 (2d Dept 2002), the motion was for summary judgment, and the plaintiff failed to demonstrate that the prior work performed by the defendant or its contractors was in any way connected to the condition of the crosswalk on the date of the accident (*citing Witte v Incorporated Vil. of Port Washington N.,* 114 AD2d 359).

New York Paving has failed to establish its entitlement to dismissal based on CPLR 3211(a)(7).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005], quoting *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]). With respect to indemnification, the Standard Terms and Conditions of Construction Contracts, dated December 1, 1998, which are incorporated by reference in Con Ed's Purchase Order No.: 5501507, and the Invitation to Bid, expressly states that New York Paving is obligated to indemnify Con Ed and procure insurance naming Co Ed as an additional insured. Thus, New York Paving's hold harmless agreement with Con Ed precludes granting summary judgment in favor of New York Paving in the instant action, at this time.

Further, York Paving is not entitled to dismissal of the contractual indemnification claim from Con Ed at this juncture, inasmuch as it has not established that it is free from liability resulting in whole or in part from, or connected with, the performance of its work. (General Obligations Law § 5-322.1; *Cuevas v City of New York*, 32 AD3d 372, 374 [1st Dept 2006]).

Conclusion

At best, New York Paving's motion is premature. Depositions have not been held of any party. Plaintiff's deposition has been adjourned pending outstanding motions. The exact location of the accident cannot be determined from the pleadings.

Based on the foregoing, it is hereby

ORDERED that the application of Second Third-Party Defendant New York Paving, Inc. for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the Second Third-Party Complaint of Second Third-Party Plaintiff Consolidated Edison Company of New York, Inc., is denied; and it is

further

ORDERED that counsel for New York Paving shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: August 10, 2009

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD