[* 1]

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

PRESENT: PART 7

Index Number : 109761/2006

GAVIGAN, IAN

VS

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 109761/06

MOTION DATE 9/10/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-N	1-2
Answering Affidavits — Exhibits A-G; Cross Motion - Ex A,B	3-5
Replying Affidavits Affirm in Opp - Exs A-C + papers on Reply	6-7

Cross-Motion: ☒ Yes (2) ☐ No

Upon the foregoing papers, it is ordered that this motion and two cross-motions are decided in accordance with the memorandum decision and Order filed herewith.

FILED
DEC 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN

Dated: 12/8/09

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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

----------X

IAN GAVIGAN,

Plaintiff,

Index No.: 109761/06

- against -

Decision and Order

THE CITY OF NEW YORK, PETROCELLI ELECTRIC COMPANY, INC., and CONSOLIDATED EDISON OF NEW YORK, INC.,

Defendants.

----------X

Hon. Michael D. Stallman, J.:

In this personal injury action, defendant Petrocelli Electric Company, Inc. (Petrocelli) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissal of all claims and cross claims brought as against it (motion sequence no. 001). Plaintiff, Ian Gavigan, cross-moves for an order directing: (1) that Petrocelli's and defendant City of New York's (the City) respective answers be stricken from the record based on repeated failure to comply with the court's discovery orders; (2) pursuant to CPLR 3212 (f), a continuance of discovery until its completion; and (3) that Petrocelli and the City provide and exchange a copy of the maintenance contract.

In motion sequence number 002 (motion seq. no. 002), defendant the City moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing all causes of action and cross claims raised as against it, and in the alternative, granting the City full indemnification from Petrocelli.

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Motion sequence numbers 001 and 002 are consolidated for disposition.

Background

On October 8, 2005, plaintiff, then an employee of the City's Department of Sanitation, at approximately 8 P.M., while performing his duties as a sanitation worker, suffered a severe electric shock on the sidewalk of the southeast corner located at East 5th Street and Avenue A, New York, New York (the Accident). Specifically, plaintiff claims that he had just emptied a garbage can near a lamppost located on the aforementioned corner, when he attempted to lift an umbrella that was leaning against the pole with his left hand, at which point he was shocked. Plaintiff sustained a number of injuries as a result, including an electrical burn. Plaintiff alleges that defendants were negligent in failing to properly maintain and/or repair the lamppost and that defendants had actual and/or constructive notice of the defective condition.

According to Consolidated Edison of New York, Inc.'s (Con Edison) employee, Beresford Fergus, on the evening in question, Fergus was called to the scene of the Accident by the New York City Fire Department. Upon arrival, Fergus opened the base of the lamppost and observed that a section of wire was exposed and touching the side of the base, due to the attachment of "pig tail" wires, which are sometimes used to supply power to Con Edison and/or construction crews. These pig tail wires may also be used

illegally by others to steal electricity. Theft of electricity in this fashion is referred to as an "unauthorized tap". According to Fergus's report of the Accident, the "root cause" of the problem was "internal city wiring in the base (DOT)," referring to the City's Department of Transportation (DOT), and that responsibility was the City's (*see* Con Edison "B" Ticket, Novick Aff. in Opposition, Ex. A).

Sometime thereafter, George Bermudez, deputy chief inspector for the City's DOT, dispatched an investigator to the scene of the Accident. After the investigation, the inspector advised Bermudez that an unauthorized tap was sticking out of the lamppost and an exposed wire energized the lamppost. Bermudez instructed the inspector to remove the tap.

At the time of the Accident, Petrocelli had an Agreement with the City for the maintenance and inspection of all lampposts in Manhattan, including the subject lamppost (*see* Agreement dated October 22, 2004). Pursuant to the Agreement, Petrocelli was to make inspections of the lampposts throughout the City every 10 days (*see* Agreement, V.I). The Agreement specifically provides as follows:

"V. Patrolling and Patrol Performance

I. Patrolling

> Each lighting unit under maintenance shall be continuously inspected during the lighting time, as hereinafter specified. Each lighting location shall be physically visited once every ten (10)

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> consecutive calendar days. The inspection is for the primary purpose of finding and correcting lamp outages and other defects as expeditiously as possible and for noting any conditions requiring maintenance or repair by the daytime crews. The inspection, therefore, will concern itself with the defects listed in Sect. III ... ."

Section III lists various conditions warranting correction, which include, but are not limited to: missing or malfunctioning controls; defective wiring; dangerous conditions and removing illegal taps to lampposts (*see* Agreement, Section III at C-2).

In addition, with respect to indemnification, the Agreement provides the following:

> "If any person or property of the City or other sustains loss, damage or injury resulting from the operations of the Contractor [Petrocelli] ... in their performace of this contract, or from the Contractor's ... failure to comply with any of the provisions of this Contract or of the Law, the Contractor shall indemnify and hold harmless from any and all claims and judgments for damages and from costs and expenses to which the City may be subjected or which it may suffer or incur by reason therefore"

(*see* Agreement, Article 6. D., at D-7).

Discussion

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman*, 49 NY2d at 560). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp., Inc.*, 298 AD2d 224, 226 [1st Dept 2002]).

In order to prove that any of the defendants was negligent, plaintiff must prove that: (1) each owed a duty to him; (2) their respective duty was breached; (3) the breach of their duty proximately caused his injuries; and (4) he sustained damages as a consequence of the respective defendant's negligence (*see Kenney v City of New York*, 30 AD3d 261 [1st Dept 2006]).

Petrocelli claims that it did not owe a duty to plaintiff in connection with the Accident and therefore cannot be held liable. "[T]he existence and scope of a duty is a question of law requiring

courts to balance sometimes competing public policy considerations" (*Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 138 [2002]). Under New York law, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons" (*id.* at 140). First, where the contracting party fails to exercise reasonable care in the performance of his duties, and thereby "'launche[s] a force or instrument of harm'" (*ibid.*, quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). Second, "where the plaintiff detrimentally relies on the continued performance of the contracting party's duties" (*ibid.*, citing *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). Third, "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*ibid.*, citing *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]).

At issue is whether Petrocelli failed to exercise reasonable care in the performance of its duties so as to launch a force or instrument of harm. In order to establish this, plaintiff must show that Petrocelli either created or exacerbated a dangerous condition (*Salvati v Professional Sec. Bureau, Ltd.*, 40 AD3d 735 [2d Dept 2007]).

Although plaintiff argues that the that removing illegal taps was a part of Petrocelli's responsibilities, there is nothing in

the record to suggest that Petrocelli created or exacerbated a dangerous condition.

Accordingly, the motion for summary judgment by Petrocelli is granted.

Con Edison submits no opposition to the motion for summary judgment; therefore, any cross claims as raised against Petrocelli are hereby dismissed.

With respect to plaintiff's cross motion, in light of the fact that the Agreement, the subject of plaintiff's cross motion for discovery, has been turned over to all respective parties, the cross motion is moot and, is therefore denied in its entirety.

The court now turns to the motion for summary judgment by the City. The City claims that the complaint, as well as any cross claims, should be dismissed as against it, or alternatively, that the City be granted full indemnification from Petrocelli, since it had expressly contracted with Petrocelli to inspect for and correct the allegedly dangerous condition.

The City contends that it had no duty to correct the alleged dangerous condition because it expressly contracted with Petrocelli to do so. Although the Agreement clearly provides that Petrocelli had a duty, in this regard, the contract is ambiguous as to whether such a duty was exclusively Petrocelli's (*see* Agreement, IV., Goals, at C-2). Specifically, Section IV of the Agreement provides, "[t]he goal of this contract is to provide prompt repairs

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based on the contractor's efforts and work orders received from the [DOT], Department of Parks and Recreation and Con Edison" (*id.*). Moreover, the City's own witness testified that such an inspection would not be within the purview of Petrocelli's responsibilities (Bermudez dep., at 54, 59, Notice of Motion, Ex. J), and further, that the City never contacted Petrocelli as a result of the Accident because Bermudez determined that it was not a maintenance issue. Ultimately, it was the City that made the repair.

The City argues that plaintiff fails to present any evidence that the City had actual or constructive notice of the alleged defect and therefore, summary judgment should be granted in its favor. To establish a prima facie case of negligence, plaintiff must demonstrate that the defendant either created the condition which caused the accident, or had actual or constructive notice of the condition (*Luciani v Waldbaum, Inc.*, 304 AD2d 537 [2d Dept 2003]). However, in order to succeed on a motion for summary judgment, the defendant is required to make a prima facie showing affirmatively establishing that it did not create the dangerous condition or the absence of notice as a matter of law (*Pomerantz v Culinary Institute of Am.*, 2 AD3d 821, 823 [2d Dept 2003]). It cannot "'carry its burden merely by citing gaps in the plaintiff's case'" (*id.*, quoting *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]), as the City has done here. Indeed, questions of fact exist as to whether the City had notice of a defect in the

wiring, particularly due to the two prior citizen complaints concerning issues with lampposts at that intersection the month prior to the Accident.

The City further argues that an unknown third party illegally tapped into the wires, and therefore the illegal activity breaks any causal chain that may exists between the City and plaintiff. However, "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed" (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 315 [1980]). Liability is dependent upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. Defendants conceded that generally illegal taps as alleged here are forseeable, but that it could not be forseeable in this particular instance. However, a reported light outage and open control box one month prior may raise forseeability issues in this regard. This is for the jury to determine (*see e.g. Mason v U.E.S.S. Leasing Corp.*, 274 AD2d 79 [1st Dept 2000], *aff'd* 96 NY2d 875 [2001]). Moreover, as plaintiff counters, Con Edison, the first to inspect the lamppost, made no reference to any foreign attachment or illegal tap in its investigation report, i.e, the B Ticket. As such, questions of fact remain on this issue.

Summary judgment of dismissal as to the City is therefore denied.

The court now turns to the City's argument for indemnification from Petrocelli. "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" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). "Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment" (*American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990] [citation omitted]). While there is no dispute that there is a valid indemnification clause, the City's argument is premature as there are triable issues as to whether Petrocelli was in control of the lamppost pursuant to the Agreement, and if so, whether it failed to comply with the law or the Agreement (*id.; see also Barraco v First Lenox Terrace Assocs.*, 25 AD3d 427 [1st Dept 2006]). As such, the City's motion on this ground is denied.

As there exist a number of questions of fact, the motion for summary judgment by the City must be denied as a matter of law.

Conclusion

Accordingly, it is

ORDERED that the motion by Petrocelli Electric Company, Inc. for summary judgment is granted and the complaint is hereby severed

and dismissed as against it (motion sequence no. 001), and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements to defendant as taxed by the Clerk; and it is further

ORDERED that the cross motion by plaintiff Ian Gavigan is denied as moot (motion sequence no. 001); and it is further

ORDERED that the motion by defendant the City of New York for summary judgment dismissal of all claims and cross claims (motion sequence no. 002) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: December 8, 2009
New York, NY

ENTER:

FILED
DEC 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

MICHAEL D. STALLMAN
J.S.C.