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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 110796/2009
VERIZON NEW YORK
VS.
CONSOLIDATED EDISON INC
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
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 motion is resolved as per annexed decision + order filed. PC set for July 22, 2010 @ 9:30 a.m.

FILED
JUN 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

JUN 09 2010

Dated: 6/9/10

HON. JUDITH J. GISCHE 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 10

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VERIZON NEW YORK,

Plaintiff (s),

-against-

CONSOLIDATED EDISON, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and SAFEWAY CONSTRUCTION ENTERPRISES INC.,

Defendant (s).

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DECISION/ ORDER

Index No.: 110796/2009

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's n/m (3215) w/ RPE affid., SGO affirm., exhs and proof of service	1

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Plaintiff, Verizon New York ("Verizon"), asserts two causes of action, the first for negligence and the second for trespass, against Consolidated Edison, Inc., Consolidated Edison Company of New York, Inc. (collectively known as "ConEd") and Safeway Construction Enterprises Inc. ("Safeway"). Presently before the court is plaintiff's motion for entry of a default

judgment against Safeway, in the sum of $58,141.06, based upon Safeway's failure to answer the complaint.

This action was commenced by the filing of a summons and complaint with the court on July 29, 2009. The summons and complaint were served upon the defendant by personal service on Jason Kilcleski, an assistant authorised by appointment to receive service on behalf of Safeway on August 6, 2009 (CPLR § 311, BCL § 306). No answer has been interposed by the defendant and the time to do so has expired. A copy of the motion and the supporting papers, which include an additional copy of the summons and complaint, were served upon the defendant by first-class mail on March 10, 2010. (CPLR 3215 [g] [4]). No opposition has been interposed to the motion.

Plaintiff has established that service of the underlying summons and complaint on defendant is consistent with the requirements of section 306 of the Business Corporation Law (this is a domestic corporation), and that this motion is brought within one year of defendant's default in answering, thus it has shown that the defendants have defaulted in this matter and that it is entitled to a judgment if it can otherwise establish a *prima facie* case. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd Dept 2001); Zelnik v. Bidermann Industries U.S.A., Inc., 242 AD2d 227 (1997). Safeway's default in answering the complaint constitutes an admission of the relevant factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984).

Discussion

The facts put forth by Verizon in the verified complaint, the attached NYCLI One Call Ticket, the Verizon revised billing statement and through the sworn affidavit of Robert P. Evans, Verizon's Specialist for Verizon Services Operations Credit, Recoveries & Special Projects Billing, establish the following:

ConEd engaged Safeway to install an electric conduit near Verizon cable, equipment and facilities ("Verizon Facilities") and ConEd equipment and facilities ("ConEd Facilities") near 146 West 67th Street, between Amsterdam Avenue and Broadway, New York, New York, the work to be commenced on August 12, 2006. Verizon alleges that Safeway, using a backhoe, negligently excavated into the ground, thereby damaging and trespassing upon the Verizon Facilities. Verizon personnel subsequently identified the location and extent of the damaged property and repaired it. Verizon incurred $58,141.06 in damages, which included 263.5 labor and 8 engineering hours, as well as material and contractor costs.

Property Damage

To establish a cause of action in negligence the plaintiff bears the initial burden of demonstrating (1) the existence of a duty flowing from defendant to plaintiff; (2) a breach of this duty; (3) a reasonable close causal connection between the contact and resulting injury; and (4) actual loss, harm or damage. Febesh v. Elcejay Inn Corp., 157 A.D.2d 102, 104 1978, 55 N.Y.S.2d 46. Verizon alleges that Safeway, without reasonable care, excavated the area

containing the Verizon Facilities. While Plaintiff has established actual loss in this motion, it has not established that Safeway's actions were necessarily negligent.

Trespass to Chattels

The elements of trespass to chattel are (1) intent, (2) physical interference with (3) possession, resulting in (4) harm. The intent required is the intent to cause the interference, or to do an act with the knowledge that such interference is substantially certain to result, but intent merely to do the act is not sufficient. Socony-Vacuum Oil Co. v. Bailey, 202 Misc. 364, 109 N.Y.S.2d 799 (Defendant who ran bulldozer through particular plot of land, but did not know plaintiffs pipeline was buried there, not liable); but see Buckeye Pipeline Co. v. Congel-Hazard, Inc., 41 A.D.2d 590, 340 N.Y.S.2d 263 (trespass found because excavation activity that severed the plaintiff's pipeline went forward with full knowledge by the defendant of the presence of the line and without a delay to permit plaintiff to stake out the location of the line). Verizon alleges that "Defendants" intentionally dug into the ground near the Verizon Facility, and by such intentional conduct intruded onto Verizon's property, thereby interfering with the Verizon Facility. However, it is not clear, pursuant to the current record, whether Safeway had the requisite intent to interfere with Verizon's property. For instance, it is unclear whether Safeway was supplied with the proper coordinates to do its work and whether such coordinates properly marked.

Conclusion

Accordingly, the motion is granted only to the extent that the court finds that Safeway has

defaulted in answering. Plaintiff shall be entitled to proceed to an inquest to prove liability and damages against Safeway. The inquest shall be held simultaneously with the trial on the underlying case against ConED since many of the issues raised at the trial and inquest will be identical.

In accordance with the foregoing,

IT IS HEREBY

ORDERED that plaintiff's motion is granted to the extent that the court holds that defendant Safeway is in default answering the complaint; and it is further

ORDERED that the court directs an Inquest to be held at the same time as the trail of the underlying case; and it is further

ORDERED that a preliminary conference is set for the appearing parties in this action for **July 22, 2010 at 9:30 am.** Plaintiff shall notify all appearing parties. No further notice will be sent; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York

June 9, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.