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

PRESENT: SALIANN SCARPULLA Justice PART 19

Index Number : 105658/2007
VERIZON NEW YORK
VS.
CONSOLIDATED EDISON
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

FILED
JAN 07 2011
NEW YORK
COUNTY CLERK'S OFFICE

motion and cross-motion are decided in accordance with accompanying memorandum decision.

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

Dated: 1/3/11

Saliann Scarpulla J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19
---------- X
VERIZON NEW YORK, INC.,,

Plaintiff,

- against-

Index No.:105658/2007
Submission Date:10/20/10

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

DECISION AND ORDER

Defendant.
---------- X

For Plaintiff:
Law Offices of Howard M. Adelsberg
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Cedarhurst, NY 11516

For Defendant:
Richard W. Babinecz
4 Irving Place, Room 1800
New York, NY 10003

Papers considered in review of this motion for summary judgment and cross motion to compel:

Notice of Motion 1
Aff in Support 2
Mem of Law 3
Notice of Motion 4
Aff in Support. 5
Reply Aff. 6

HON. SALIANN SCARPULLA, J.:

In this action to recover $1,221,186.20 in property damage, defendant Consolidated Edison Company of New York, Inc. ("Con Ed") moves for summary judgment pursuant to CPLR 3212, or in the alternative to dismiss plaintiff Verizon New York, Inc.'s ("Verizon") complaint on spoliation grounds.

This action arises from property damage Verizon alleges to have suffered, which it claims was cause by Con Ed's negligence on June 10, 2004, at or near the intersection of 51st Street and First Avenue, New York, New York. In its complaint, Verizon alleges that "an underground steam distribution system [controlled by Con Ed] located between First Avenue and Second Avenue . . . broke and caused extensive property damage to plaintiff's property, including but not limited to cables, facilities, equipment and/or machinery." Verizon further alleges that Con Ed was negligent in failing to timely locate and shut off the emergency shut-off valve, and that Verizon's negligence was a direct and proximate cause of the damage to Verizon's property.

Motion for Summary Judgment

In its motion for summary judgment, Con Ed disputes Verizon's allegations and maintains that steam was not the cause of Verizon's alleged harm. Con Ed argues that relying on Verizon's own records, steam could not have caused Verizon's problems at this location.

In support of its motion, Con Ed submits the affidavit of James Freer ("Freer"), a retired Verizon manager. Freer explains that he reviewed Verizon documents, including the Report of Property Damage to Outside plant ("PDR"), Prints 1-5, Work Operation Time Details, and As Built Reconciliations. Freer concludes that Verizon did not suffer from a failure caused by steam damage.

In support of this conclusion, Freer points to a number of factors. First, he notes that Verizon did not perform or attempt any repairs until nine (9) months after the alleged steam incident. Freer also notes that Verizon did not utilize nitrogen at the location, as nitrogen is the typical response to a steam induced failure. In addition, Freer indicated that there was no trouble ticket indicated on the PDR. Freer explains that a trouble ticked indicates which lines are affected by a particular problem. Freer explains that lack of a trouble ticket indicates that no phone lines were affected, and therefore there was no damage to Verizon's lines.

In addition, Con Ed submits the affidavit of Phil Sullivan ("Sullivan"), a former Con Ed employee. Sullivan was employed by Con Ed in the Steam Department for thirty-four (34) years. Sullivan explains that he reviewed Con Ed's records for the steam facilities in the vicinity of 51st Street add First Avenue and 328 East 51st Street, for the period of June 1, 2003 to June 10, 2004, and that there was no indication of any steam problems in the area of 51st Street and First Avenue on or around June 10, 2004.

In support of its cross motion and in opposition to Con Ed's motion for summary judgment, Verizon argues that Con Ed's motion should be denied because (1) discovery is not complete and the motion is premature; and (2) Con Ed has failed to submit evidence to sufficiently demonstrate that there are no material issues of fact in dispute.

Verizon argues that the affidavits submitted by Con Ed are premised on hearsay, and therefore cannot adequately support a motion for summary judgment. Verizon also claims

that certain discovery has not been forthcoming (the subject of its cross motion to compel), and that depositions have yet to occur. Verizon also submits the affidavit of Edgar Lugo ("Lugo"), a Verizon employee, who has worked in the Construction department since 1980.

In his affidavit, Lugo discusses the work of other, unnamed, Verizon employees. Lugo asserts that "[o]n June 10, 2004 since Verizon personnel were dispatched to the location they saw that steam damaged Verizon's property." Lugo further explains that the personnel on the scene effectuated temporary repairs, including the use of nitrogen. Lugo also asserts, contrary to statements in Sullivan's affidavit, that he "verily recall[s] that employees from Verizon called Con Edison several times requesting that Con Ed 'stack' [or vent] their manhole on East 51st street several times to alleviate heat condition in the East 51st manhole."

Lugo states that he visited the scene of Verizon's alleged damage, but does not give the date of his visit. He states that be observed that the cable was damaged in multiple sections, and that the damage was consistent with "high heat, steam." Lugo further states that he worked at the location on and off for over two (2) years, but does not state the specific dates.

Lugo also takes issue with many of the statement made in the Freer affidavit. He asserts that Freer's experience at Verizon was all in areas dealing with outside plant construction, and suggests that perhaps Freer misread certain documents upon which he relied.

Motion to Dismiss for Spoliation

In the alternative, Con Ed argues that Verizon's complaint should be dismissed on spoliation grounds. As Con Ed asserts, Verizon's action is premised on alleged damage to certain cables. In response to requests to admit, Verizon indicated that certain damaged cables had not been retained. Additionally, Lugo acknowledges in his affidavit that some of the damaged cables at issue have been removed. However, he challenges Con Ed's contention that it has been deprived of the opportunity to visually inspect and test the damaged cables, as there remain cables present at the location which Verizon claims were damaged by steam, and that Con Ed "is free to examine the remaining damaged cables at a mutually convenient time and date." Con Ed also submits a pre-action letter it sent to Verizon, requesting that Verizon "retain all Verizon and Empire City Subway Corp. Property, alleged to have been damaged, without any alteration until Con Edison's retained experts are given the opportunity by Verizon to examine and inspect the equipment."

In opposition, Verizon admits that certain cables were not retained, but that others remain in place at the location of the alleged damage, and remain available for Con Ed's inspection. Verizon also argues that dismissal of the complaint is too severe a penalty, particularly when other evidence remains to be inspected.

Cross Motion to Compel

Verizon also bring a cross motion to compel certain discovery from Con Ed. In particular, Verizon argues that Con Ed has failed to comply with Verizon's Second Notice

for Discovery and Inspection, and with compliance conference orders dated May 13, 2009 and March 18, 2010.

In opposition to the cross motion, Con Ed asserts that it has complied with the compliance conference orders and produced documents as required.

Discussion

Summary judgment is an extraordinary remedy and is only appropriate where the movant has established that there is no question of fact on any issue which would require a trial. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974). The court may grant summary judgment upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. CPLR 3212(b); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). However, summary judgment is precluded when there are genuine triable material issues of fact, raised by conflicting affidavits of the parties. *Sagittarius Broadcasting Corp. v. Evergreen Media Corp.*, 226 A.D.2d 261, 262 (1st Dep't 1996).

Here, Con Ed and Verizon submit affidavits in direct contradiction to each other. The Freer and Sullivan affidavits, submitted by Con Ed in support of its motion for summary judgment, assert that the damage Verizon alleges in this action cannot have been caused by steam. Freer notes that no trouble ticket was generated by Verizon, and also points to Verizon's failure to use nitrogen as a curative measure. Sullivan asserts that there is nothing in Con Ed's records to indicate a steam problem at or around the time of the alleged harm.

Neither Freer not Sullivan indicate that they have inspected the cables or the site of the alleged harm.

In contrast, Verizon submits the Lugo affidavit, in which Lugo asserts that, during a visit to the damages cable, he observed damage caused by steam. Lugo, however, fails to provide the date or circumstance of his inspection. Lugo also concedes that a portion of the damaged cable has been removed and is unavailable for inspection.

As there is no other evidence on this motion for summary judgment other than conflicting affidavits, summary judgment is precluded. These conflicting affidavits present a triable issue of fact. *Sagittarius Broadcasting Corp.,* 226 A.D.2d at 262. Moreover, summary judgment at this point is premature, as discovery is far from complete, and the parties have yet to submit to examinations before trial. *See Wilson v. Yemen Realty Corp.*, 74 A.D.3d 544, 545 (1st Dep't 2010) ("Moreover, in light of the incomplete state of discovery, including the fact that no party had yet been deposed, the summary judgment motion was premature").

Con Ed moves in the alternative for dismissal on spoliation grounds.

> Spoliation is the destruction of evidence. Although originally defined as intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. . . . Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. . . . [D]ismissal [may] be a viable remedy for loss of a key piece of evidence that thereby precludes inspection.

Kirkland v. New York City Hous. Auth., 236 A.D.2d 170, 173 (1st Dep't 1997). "Necessary to this burden is a showing of prejudice." *Baldwin v. Gerard Avenue, LLC*, 58 A.D.3d 484, 485 (1st Dep't 2009).

Here, Con Ed alleges that the cable Verizon alleges was damaged by steam has not been preserved, thereby preventing Con Ed from inspecting it and mounting an appropriate defense. Con Ed points to certain of Verizon's responses to Con Ed's requests to admit, in which Verizon admits that "Verizon is no longer in possession of the cable removed under" certain specified Work Orders. Con Ed also submits the pre-action letter it sent to Verizon requesting the preservation of any affected cables. In addition, in his affidavit, Lugo acknowledges that certain sections of the cable are no longer in Verizon's possession.

However, Lugo also challenges Con Ed's contention that it has been deprived of the opportunity to visually inspect and test the damaged cables, as there remains cable present at the location which Verizon claims was damaged by steam, and that Con Ed "is free to examine the remaining damaged cables at a mutually convenient time and date." There is nothing in the record to indicate that Con Ed has requested excavation or inspection of the remaining cables which Verizon is claiming were damaged by steam.

Accordingly, the sanction of dismissal is too severe where, as here, Con Ed has failed to establish that all of the cables are unavailable for inspection. *See Verizon New York, Inc. v. Consolidated Edison Company of New York, Inc.*, 54 A.D.3d 599, 600 (1st Dep't 2008) ("dismissal is too drastic a remedy where the cable were not destroyed and can be inspected

if excavated"). However, as Verizon has conceded that it removed and failed to preserve certain portions of the cable which it alleged were damaged by steam, any cost associated with Con Ed's inspection of the remaining cables should be borne by Verizon. *Verizon*, 54 A.D.3d at 600.

Turning to the cross motion, Verizon moves to compel certain discovery responses. In particular, Verizon asserts that it served a Demand for a Verified Bill of Particulars as to Affirmative Defenses, and Notice for Discovery and Inspection, each dated October 25, 2007 ("October 25, 2007 Notice"). Verizon asserts that it has not received responses to these requests.

Con Ed, however, counters these assertions, and submits a copy of its Verified Bill of Particulars as to Affirmative Defenses, dated September 11, 2009. Verizon further asserts that it responded to the requests made in the Preliminary Conference Order ("PC Order"), as well as the October 25, 2007 Notice on September 4, 2009, and submits those documents in opposition to the cross motion.

Verizon also challenges the sufficiency of Con Ed's responses to its Second Notice of Discovery and Inspection, dated December 28, 2009 ("Second Notice"), which includes 99 individual requests, some with multiple sub-parts. In response, Con Ed counters that the demands were egregious, burdensome and irrelevant. Con Ed notes that many of the requests relate to a steam explosion on July 18, 2007, which post-dates the incident at issue

here, and that other requests seek documents from 1989 to the present, and in some cases from 1924 to the present.

Many of the requests contained in Verizon's second notice are overly broad, burdensome, or seek irrelevant information. To the extent not already done so, Con Ed is to respond to the following requests, and, as applicable, provide information from 2000 to the date of the incident: 1, 7, 8, 9, 10, 11, 12, 13, 14, 21, 26, 27, 28, 29, 32, 53, 54, 55, 68, 69, 71, 72, 73, 76, 83, 84, 85, 86, 87, 88, 89, 90 and 93.

Verizon also claims that Con Ed failed to provide an affidavit in response to request 94. However, Con Ed submitted the affidavit along with its affidavit in opposition to the cross motion.

In accordance with the foregoing, it is

ORDERED that defendant Consolidated Edison Company of New York, Inc.'s motion for summary judgment to dismiss plaintiff Verizon New York Inc.'s complaint is denied; and it is further

ORDERED that Verizon is to allow and accommodate an inspection by Con Ed of the damaged cables within thirty (30) days of the date of notice of entry of this order, and that any cost associated with such inspection will be borne by Verizon; and it is further

ORDERED that the cross motion by Verizon to compel Con Ed to comply with outstanding discovery is granted only to the extent that Con Ed is ordered to respond within thirty (30) days of the date of notice of entry of this order to the following items in Verizon's

Second Notice for Discovery and Inspection, to the extent not already done so, and that such responses be limited to the period 2000 to the June 10, 2004: 1, 7, 8, 9, 10, 11, 12, 13, 14, 21, 26, 27, 28, 29, 32, 53, 54, 55, 68, 69, 71, 72, 73, 76, 83, 84, 85, 86, 87, 88, 89, 90 and 93; and it is further

ORDERED that the parties are to appear for a compliance conference on February 10, 2011, at 2:15 p.m., 80 Centre Street, Room 279.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
~~December~~ January 3, 2010

ENTER:

Saliann Scarpulla, J.S.C.

FILED

JAN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE