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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>NICI v Consolidated Edison Co. of N.Y., Inc.</b>                                                                                                                                                                              |
| 2012 NY Slip Op 32564(U)                                                                                                                                                                                                         |
| October 3, 2012                                                                                                                                                                                                                  |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 111347/2007                                                                                                                                                                                                       |
| Judge: Barbara Jaffe                                                                                                                                                                                                             |
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT:

JAFFE

Justice

PART

5

Index Number : 111347/2007

NICI, JANET

vs.

CONSOLIDATED EDISON

SEQUENCE NUMBER : 004

VACATE NOTE OF ISSUE/READINESS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

No(s).

No(s).

No(s).

Upon the foregoing papers, it is ordered that this motion is

FILED

OCT 10 2012

NEW YORK  
COUNTY CLERK'S OFFICE

RECEIVED SUPREME COURT NEW YORK  
OCT 10 2012

Dated:

10/3/12

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
JANET NICI and RICHARD NICI,

Index No. 111347/07

Plaintiffs,

Argued:

5/29/12

Motion seq. no.:

004

-against-

**DECISION AND ORDER**

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., TULLY CONSTRUCTION CO. INC.,  
THE CITY OF NEW YORK, EMPIRE CITY SUBWAY  
COMPANY, LTD., VERIZON COMMUNICATIONS,  
INC., FLEET TRUCKING INC., and NICO ASPHALT  
PAVING, INC.,

Defendants.

-----X  
TULLY CONSTRUCTION CO., INC.,

Third-Party Index No. 590106/08

Third-Party Plaintiff,

-against-

FLEET TRUCKING, INC.,

Third-Party Defendant.

-----X  
EMPIRE CITY SUBWAY COMPANY, LTD. and  
VERIZON COMMUNICATIONS, INC.,

Second Third-Party Index No.  
590139/08

Second Third-Party Plaintiffs,

-against-

NICO ASPHALT PAVING, INC.,

Second Third-Party Defendant.

-----X  
BARBARA JAFFE, JSC:

**FILED**

OCT 10 2012

NEW YORK

COUNTY CLERKS OFFICE

**For plaintiffs:**

Eric Buckvar, Esq.  
 Law Office of Morton Buckvar  
 11 Broadway, Ste. 1054  
 New York, NY 10004  
 212-267-1950

**For City:**

Leslie D. Knight, ACC  
 Michael A. Cardozo  
 Corporation Counsel  
 100 Church St.  
 New York, NY 10007  
 212-788-0627

**For Con Ed:**

Rita C. Marin, Esq.  
 Richard W. Babinecz  
 4 Irving Pl., Rm. 1800  
 New York, NY 10003-3598  
 212-460-3355

**For ECS/Verizon:**

Matthew S. Matera, Esq.  
 Conway, Farrell *et al.*  
 48 Wall St., 20<sup>th</sup> Fl.  
 New York, NY 10005  
 212-785-2929

By notice of motion dated April 5, 2012, defendants/second third-party plaintiffs Empire City Subway Company Ltd. and Verizon Communications, Inc. move pursuant to CPLR 3101 and 3121 and 22 NYCRR 202.17 and 202.21(c) for an order vacating plaintiffs' note of issue and compelling the other defendants to provide discovery responses and appear for examinations before trial (EBT), and extending their time to move for summary judgment.

Movants assert that although plaintiffs' note of issue was served on March 16, 2012 and filed on March 20, 2012, they thereafter discovered corrective action reports (CARs) that had not been disclosed by City during discovery which relate to work performed at the accident location, and that the CARs reflect a need for further discovery and EBTs. (Affirmation of Matthew S. Matera, Esq., dated Apr. 5, 2012).

Defendant Consolidated Edison Company of New York, Inc. (Con Ed) opposes to the extent of asserting that it responded to movants' discovery demand dated March 19, 2012. (Affirmation of Rita C. Marin, Esq., dated Apr. 16, 2011, Exh. A).

Plaintiffs oppose on the ground that although additional discovery may be warranted, it would be unfair to them to strike their note of issue as none of the newly-requested discovery is owed by them. (Affirmation of Eric Buckvar, Esq., dated Apr. 16, 2012).

City argues that it complied with movants' pre-note discovery requests and objects to providing any post-note discovery. (Affirmation of Leslie D. Knight, ACC, dated May 2, 2012).

In reply, movants observe that as defendant Nico failed to oppose the motion, it must be compelled to respond to movants' discovery demands, and withdraw their motion as to Con Ed. They argue, however, that as City failed to disclose the CARs and provide a manual related to pothole repairs, further discovery is needed. (Reply Affirmation, dated May 4, 2012).

Pursuant to 22 NYCRR 202.21(e), a party may move to vacate note of issue within 20 days of its service on the ground that the case is not ready for trial and it appears that a material fact in the certificate of readiness is incorrect. Moreover, "where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." (22 NYCRR 202.21[d]).

Here, as movants independently discovered the CARs in their own records after plaintiffs filed their note of issue, they have not shown that a material fact in the certificate of readiness is incorrect, nor have they established that City's response to their discovery request was insufficient as, although they may have wanted City provide a pothole repair manual, that is not what was requested in their discovery demands.

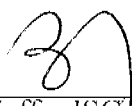
Moreover, notwithstanding Nico's failure to oppose the motion, movants' conclusory assertion that they discovered the CARs after the note of issue was filed does not constitute unusual or unanticipated circumstances absent any explanation of what efforts were made to discover them pre-note or why the documents were discovered only after the note was filed. (*See*

*eg Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403 [1<sup>st</sup> Dept 2010] [motion to vacate note of issue properly denied as untimely absent showing of special circumstances or sufficient explanation for delay]; *Colon v Yen Ru Jin*, 45 AD3d 359 [1<sup>st</sup> Dept 2007] [lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstance]).

Accordingly, it is hereby

ORDERED, that defendants/third-party plaintiffs Empire City Subway Company Ltd. and Verizon Communications, Inc.'s motion to vacate plaintiffs' note of issue and to compel is denied.

ENTER:

  
Barbara Jaffe, JSC

BARBARA JAFFE

DATED:      October 3, 2012  
                 New York, New York

OCT 03 2012

**FILED**  
OCT 10 2012  
NEW YORK  
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