[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

CARIN TRUNDLE,

Plaintiff,

- v -

225 EAST 57TH STREET OWNERS, INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and WSL EQUITIES,

Defendant.

Index No.: 110199/09

Motion Date: 05/24/13

Motion Seq. No.: 04

The following papers, numbered 1 to 3 were read on this motion for summary judgment

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Answering Affidavits - Exhibits	No(s).	2
Replying Affidavits - Exhibits	No(s).	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Defendant/fourth-party defendant WJL Equities Corp. i/s/h/a WSL Equities (WJL) moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the claims of plaintiff Carin Trundle (Trundle), the cross claims of 225 East 57TH Street Owners, Inc., and the claims of defendant/fourth-party-plaintiff Consolidated Edison Company of New York (Con Ed) as against it. Con Ed opposes the motion, but Trundle does not.

This is a personal injury action in which Trundle alleges that, on June 16, 2009, she was caused to trip, fall and sustain

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

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

injuries due to the defective condition of the sidewalk in front of a building located at 225 East 57th Street, New York, New York (the Sidewalk). According to Trundle, the sidewalk pavement immediately adjacent to a metal grating was cracked and broken and contained a poorly fitting patch, which conditions created a tripping hazard. The building 225 East 57th Street (the Building) is owned by defendant 225 East 57th Street Owners (Owners).

Trundle asserts that Con Ed performed work, repairs, construction and/or renovation in the area of the Sidewalk abutting the Building, creating, and then permitting, the hazardous condition to exist at that location. Trundle's claims against WJL are based on allegations that it negligently performed renovation work on the Sidewalk, and Con Ed's cross claims and fourth-party claims against WJL sound in contribution and indemnification, breach of contract and negligence.

At issue on this summary judgment motion is whether there is any evidence that WJL created, and/or was the party responsible for, the defective condition of the Sidewalk, rendering it liable, in part or in whole, for Trundle's accident. The following facts are either undisputed, or resolved by prior court order.

Con Ed was, and is, the owner of the sidewalk grate and a sidewalk vault in front of the Building. Con Ed is also

responsible for maintaining and repairing these fixtures and the surface of the sidewalk extending 12 inches outward from their perimeter. See Rules of City of New York Department of Transportation [34 RCNY] § 2-07 [b] [1] and [2]; Storper v Kobe Club, 76 AD3d 426, 427 [1st Dept 2010]). Con Ed, through its various in-house departments, handles temporary patchwork of sidewalk surfaces within that 12-inch perimeter. Outside contractors, employed by Con Ed, pursuant to written purchase orders, handle the final restoration work.

By purchase order No. 7-502826, dated January 2, 2008 (the Purchase Order), Con Ed hired WJL, a contractor specializing in heavy highway road construction, to "furnish supervision, labor, material, tools and equipment for the restoration of sidewalk, curbs, concrete roadway (etc) at various locations in Manhattan for the period January 1, 2008 through December 31, 2010." Con Ed was responsible for obtaining all permits for sidewalk work and generating written paving orders specific to each job and WJL was responsible for performing final restoration paving work on behalf of Con Ed, regardless of whether Con Ed called for roadway asphalt or sidewalk cement. The Purchase Order also obligated WJL to do the jobs assigned to it in accordance with Con Ed's written Standard Terms and Conditions of Construction Contracts, dated August 10, 2007. WJL's sidewalk restoration responsibilities consisted of removing and replacing concrete

flags abutting Con Ed fixtures at designated locations, including the type of grates and vaults directly in front of the Building.

According to the unrefuted records, on April 21, 2008, Con Ed received a citizen call/complaint about a large hole in the sidewalk pavement in front of the Building. The call generated Emergency Ticket No. ME08006584, which contained information pertaining to the location and nature of the complaint. The Con Ed employee dispatched to that location, identified on the ticket as "Dinand," reported back that there were gaps in the temporary asphalt around a recently installed transformer, and that more "mack," or soft asphalt, was needed to patch these openings. Dinand also reported that there were problems with the vault associated with the new transformer because, among other things, it was collapsing underfoot. Dinand handled the problem by installing temporary wooden shunt boards and barricading the location. Two days later, on April 23, 2008, Con Ed's in-house subsurface construction department (SSC) sent a crew to the site to make temporary repairs.

On May 6, 2008, Con Ed received another citizen complaint about the Sidewalk. The caller stated that the wood barriers had fallen and wanted to know when Con Ed would be finishing the job. The SSC crew dispatched to the site on May 16, 2008, reported back that the prior repair was resting below grade, requiring additional filler to bring it to sidewalk/grade level. The

report also indicated that the Sidewalk was in need of final restoration.

On July 28, 2008, the Building's property manager, Gail Wainer (Wainer), contacted Con Ed, complaining that the Sidewalk needed repair and that the barricades had been up for two months, and she wanted to know when permanent repairs were going to be made. Wainer also lodged a complaint about this situation with New York's Public Service Commission (PSC). As a result, the City of New York Department of Transportation (DOT) issued a Corrective Action Request, numbered 20084170057-01 (CAR), to Con Ed on September 11, 2008. The CAR described the problem as "poor housekeeping," and among other things, directed Con Ed to remove the barricades and restore the concrete Sidewalk, and to obtain a permit for the work.

In response, on September 17, 2008, Con Ed prepared a Report of Street and/or Sidewalk Openings, No. PS 539206C (the Opening Ticket), identifying the area of the Sidewalk needing a "plug." On October 17, 2008, Con Ed obtained the necessary permit from the DOT, permit No. M01-2008291-168 (the Permit), authorizing the final restoration of the Sidewalk between the period of October 27, 2008 to November 23, 2008. On October 31, 2008, Con Ed issued a paving order to WJL to restore the Sidewalk by furnishing and installing permanent concrete (the Paving Order).

On November 8, 2008, an inspector indicated on Con Ed's copy

of the Paving Order that there was a scaffolding shed at the site and that the sidewalk was "plugged" with a temporary patch, although there was no indication as to who did the plug work. Wainer was contacted and informed orally by Con Ed on November 7, 2008, and in writing by PSC on November 21, 2008, that the scaffolding shed must be removed in order for the restoration work to be performed. Con Ed inspectors continued to monitor the site for compliance and on December 4, 2008, Con Ed inspector Robert Ferrens (Ferrens) noted on the Paving Order that the scaffolding shed had been removed. He also noted that access to the area was available, and that the restoration was satisfactory.

While none of the above facts are in dispute and Trundle has not submitted any papers in opposition, Con Ed opposes WJL's motion, insisting that the Paving Order, together with photographs of the Sidewalk, raise material questions of fact as to whether WJL is responsible for the dangerous and defective condition which precipitated her fall, precluding summary judgment. WJL replies that Trundle's claims and Con Ed's allegations are baseless and must be dismissed. WJL contends that by the time the scaffolding shed was removed, the Permit had already expired (11 days prior), and Con Ed neither notified it that the scaffolding shed had come down, nor did it provide WJL with a new permit and/or a new paving order rescheduling the

work. Nor did it have an opportunity to perform any work on the Sidewalk.

It is well settled that in order to obtain summary judgment, WJL:

> "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

(Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

WJL supports its motion with an affirmation and documentary evidence, including the Purchase Order; Con Ed's Standard Terms and Conditions of Construction Contracts, as referenced in the Purchase Order; emergency tickets; opening ticket No. PS 539206C; CAR No. 20084170057-01; Paving Order No. PS 539206C; permit # M01-2008291-168; photographs of the Sidewalk; and a disc containing a video of Trundle's accident. According to WJL, this evidence establishes that it was not authorized or permitted, under the terms of the Purchase Order, to provide temporary patchwork and/or to "plug" gaps in the Sidewalk pavement, and that it did not have an opportunity to perform the final restoration of the Sidewalk or get paid by Con Ed for such work. WJL also argues that because Con Ed failed to obtain a new permit and/or issue a new paving order, through no fault of WJL, WJL was

unable to perform the restoration, which, under section 28 of the Standard Terms and Conditions of Construction Contracts, relieves it of certain of its obligations. Section 28 provides, in relevant part:

> Con Edison will perform any action required of it by the Contract in order to enable [WJL] to perform hereunder . . . . Unexcused nonperformance by Con Edison will, however, relieve [WJL] of its obligation to perform hereunder to the extent that it prevents [WJL] from performing. Nonperformance by Con Edison will be excused where caused by an act or omission of [WJL].

At their respective depositions, both Ferrens and WJL's general superintendent William Lougheed (Lougheed) testified that the Permit had already expired by the time the scaffolding shed had been taken. Both Lougheed and Con Ed's record searcher, Jennifer Teasley (Teasley), testified that their company's business record searches failed to reveal any documentation indicating that a new permit had been obtained, or that Con Ed had issued a new paving order for WJL to do the final restoration work. WJL also submits the sworn affidavit of Lougheed's wife, Danielle Buenaventura (Buenaventura), who is the owner of WJL and whose job responsibilities include maintaining company records, job reports, billing records and payment records. According to Buenaventura, her search of WJL's written and online records, which are created and maintained in the normal course of business, did not yield any records indicating that WJL performed work at the location of Trundle's accident. More specifically,

Buenaventura avers that her search going back a period of two years prior to the date of the accident, did not yield any invoices, billing records or invoices, nor did it uncover any record of having received payment from Con Ed for any work related to the Paving Order.

At his deposition, Ferrens confirmed that there is no indication in any of the documents, including the Paving Order, that the final restoration work had been performed prior to Trundle's accident. He also acknowledged that the photographs show temporary patchwork on the Sidewalk, rather than final restoration, both before and immediately after Trundle's fall.

In its opposition[1] to WJL's motion for summary dismissal, Con Ed appends documentary evidence of (1) the issuance of the Permit authorizing the final restoration work; (2) Ferrens' notation on the Paving Order indicating that the restoration was satisfactory; (3) the chief construction inspector's (CCI) handwritten notation on the Paving Order approving the work for payment as of December 9, 2008, with the words "BILLED DEC 12 2008" stamped onto the Paving Order; (4) the sworn affidavit from one of its construction management department's managers, Felim McTague (McTague) stating that WJL was the only paving contractor

[1] Despite its claim of prejudice due to Con Ed's untimely service of its opposition papers, the court finds that WJL has not been prejudiced since it served reply papers. Therefore, the court decides the motion on the merits.

hired by Con Ed to do sidewalk work in Manhattan.

> A contractor's duty of care to noncontracting third parties may arise out of a contractual obligation or the performance thereof in three circumstances (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139-141 [2002]; *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [2004], *lv dismissed* 4 NY3d 739 [2004]). Those circumstances are: first, "where the [contractor], while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" *Church*, 99 NY2d at 111), second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the [contractor's] continuing performance of a contractual obligation" (*id.*), and third, "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely' " (*id.* at 112, quoting *Espinal*, 98 NY2d at 140).

Powell v HIS Constrs, Inc, 75 AD3d 463, 464 (1st Dept 2010).

None of Con Ed's documents or affidavits rebut WJL's prima facie showing that it never restored, or performed any other work on the Sidewalk, or had any opportunity to perform such work and therefore Con Ed's submissions do not raise any issue of fact whether WJL's actions or omissions constituted one of the exceptions to the general rule that a contractor owes no duty of care to a third person to such contract, such as Trundle. Contrary to Con Ed's assertions, neither the issuance of a paving order nor a permit is sufficient to rebut a prima facie showing by the contractor that it did not perform any work at the subject location prior to the accident underlying the lawsuit (see Bermudez v City of New York, 21 AD3d 258, 258-259 [1st Dept

2005]). Nor does either Ferrens' December 4, 2008 notation that the restoration was satisfactory or the CCI's December 9, 2008 sign-off authorizing payment, constitute competent evidence that WJL performed any work. In fact, Ferrens responses about the Paving Order tend to support WJL's position, rather than Con Ed's. When asked what he meant when he reported on the Paving Order that the restoration was satisfactory, Ferrens stated: "[t]hat meant that when I went there, the plug that he put in for safety was still okay. And as it says in the bottom, access is available, meaning that final restoration can take place now. . . Based on this document, it states that it was ready for final restoration". When asked about the significance of the CCI sign-off, Ferrens stated that "[i]t indicates that I gave them back the paperwork. And then signed that they received it". Ferrens also testified that the Paving Order was missing certain signatures which should be present if the Sidewalk had been finally restored. He explained that the Paving Order had never been signed by anyone from WJL or Con Ed, as is required when a final paving restoration is performed, and that there was no indication on the Paving Order that the required 60-day, post-final restoration work inspection had taken place. When asked about the meaning of the stamped words "BILLED Dec 12 2008," Ferrens responded "[i]t means that for the temporary plug, they was [sic] going to be paid as of that day". Ferrens also

responded "No" to the question whether the information contained on the form indicates that it was WJL that did the plug and stated it only meant that as of that day, December 4, 2008, "the plug was still in place," and that it was ready for final restoration. Moreover, when shown the photographs of the Sidewalk taken both before and immediately after Trundle's accident, Ferrens confirmed that they depicted unrestored pavement; he described the temporary materials which had been placed around Con Ed's fixtures. He concluded that it was "definitely temporary restoration" depicted in the photographs. Finally, McTague's sworn affidavit does not conclusively establish that WJL performed the subject repair. McTague's affidavit merely states that, at the time of plaintiff's accident, WJL was under contract to perform final restoration work on Con Ed's behalf on Manhattan sidewalks, and that WJL was the paving contractor assigned to do the work in front the Building, under the Opening Ticket No. PS539206C. Con Ed's argument that WJL must have done the temporary patch work because of its obligations under the Purchase Order, is unpersuasive. Most pointedly, both Teasley and Ferrens testified that, as of June 16, 2009, the day Trundle alleges she fell, there was only a temporary patchwork at the site, and that the Sidewalk was in need of final restoration which was WJL's responsibility. These witnesses also confirmed that it was the responsibility of Con

Ed's in-house departments to take care of its sidewalk vaults and gratings, and that the in-house departments were also responsible for handling temporary patchwork prior to the completion of final sidewalk restoration by the outside contractor, which in the borough of Manhattan, between January 1, 2008 and December 31, 2010, was WJL's responsibility.

Con Ed has failed to produce competent evidence to support its cause of action against WJL for negligence, and without evidence that WJL performed final restoration, or any other work, at the Sidewalk, there can be no basis for Con Ed's causes of action against WJL for indemnification or breach of contract. Inasmuch as the indemnification provision, set forth in section 36 of the Standard Terms and Conditions of Construction Contracts, is limited to liability "resulting in whole or in part from, or connected with, the performance of the Work by [WJL]," and there is no evidence that WJL, or anyone working for it, performed any work on the Sidewalk, WJL cannot be found to owe an indemnification obligation to Con Ed in this action. Con Ed has also not put forth an independent ground for its breach of contract claim, requiring a dismissal of that claim as well.

Accordingly, it is

ORDERED that defendant/fourth-party defendant WJL Equities Corp. i/s/h/a WSL Equities's motion for summary judgment is granted and the complaint and cross claims against it are

dismissed and the fourth-party complaint is dismissed in its entirety with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant.

This is the decision and order of the court.

Dated: October 25, 2013 ENTER:

DEBRA A. JAMES J.S.C.

FILED

OCT 30 2013

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COUNTY CLERK'S OFFICE