[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 602171/2008
VERIZON NEW YORK INC.
vs
CONSOLIDATED EDISON, INC.
Sequence Number : 001
AMEND PLEADINGS

PART 19

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 _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

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

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

FILED
JAN 06 2014
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JAN 06 2014
[illegible]

Dated: 1/2/14

_____, J.S.C.
HON. SALIANN SCARPULLA

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 19

---------- X

VERIZON NEW YORK, INC.,

Plaintiff,

- against -

CONSOLIDATED EDISON, INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

---------- X

Index Number: 602171/08
Submission Date: 10/30/13

DECISION and ORDER

For Plaintiff:
Gibbons P.C.
One Pennsylvania Plaza, 37th Floor
New York, NY 10119

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

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

Notice of Motion 1
Affs. in Supp. 2
Affs. Opp. 3
Reply Aff. 4

HON SALIANN SCARPULLA, J.:

In this action to recover for property damage, defendants Consolidated Edison Inc. and Consolidated Edison Company of New York, Inc. (collectively "defendants" or "Con Ed") move pursuant to CPLR §3025(b) to amend their answer to include an affirmative defense of statute of limitations, and pursuant to § 3211(a) for summary judgment dismissing plaintiff Verizon New York, Inc.'s ("Verizon") complaint on statute of limitations grounds. Verizon does not oppose the portion of Con Ed's motion seeking to amend its answer.

On July 24, 2008, Verizon commenced this suit against Con Ed seeking to recover $208,580.73 in property damage allegedly caused by Con Ed's negligence resulting in steam damage to the Verizon facilities at or about 49th Street and Broadway, New York, NY, on July 30, 2005.

Con Ed asserts that based on a review of the records produced by Verizon in this action, Verizon knew of the problem it is alleging caused the damages by, at the latest, July 21, 2005, which would make this action, commenced on July 24, 2008, untimely on statute of limitations grounds.

In support of its motion, Con Ed submits the affidavit of Cynthia J. Hall ("Hall") a retired Verizon claims specialist. Hall states that due to her experience as a claims specialist, she is fully familiar with Verizon records associated with damage claims. Hill also states that while she was at Verizon, she personally investigated and obtained Verizon records for steam damage claims, and as such she is familiar with records relevant to the repair of Verizon facilities alleged to have been damaged by steam.

Hall further states that when Verizon believes that a third party damaged its facilities, it assigns it a customer work order number ("CWO") to keep track of the costs associated with repairing the damage. Verizon then totals the costs, and attempts to recover it from the third party. The total costs associated with a claim are shown on a document called a Billing Statement.

Hall states that Verizon assigned this claim the CWO number 4P0D8E. Hall also explains that there are a number of documents Verizon generates in connection with a claim, all which bear that claim's CWO number. Annexed to her affidavit are documents produced by Verizon in this action, including the Billing Statement, Explanation of Charges, Report of Property Damage to Outside Plant ("PDR"), PDR Packing Slip, time sheets for repair work by maintenance and construction groups, and bills for outside contractors, all of which bear CWO number 4P0D8E.

Hall notes that Verizon is claiming $93,900.45[1] in outside contractor costs. She also states that this amount includes an invoice from Atlas Acon Electric Services Corp. ("Atlas") for $422.66, for work at 50th Street and Broadway, which bears the CWO number associated with this claim, 4P0D8E. The Atlas invoice is dated July 21, 2005. In addition, the Atlas invoice is referred to on the PDR Packing Slip under the section "Contractor Costs."

From this, Hall concludes that Verizon knew of a problem at the location by July 21, 2005, the date of the Atlas invoice.

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[1] Verizon annexed a document entitled "Billing Statement" to the complaint, which indicates $93,900.45 billed for contractor costs. However, Hall refers to Exhibit G, which is a nearly identical document titled "Billing statement," except that Exhibit G indicates contractor costs as $94,182.65. This amount is also shown in the Explanation of Charges, submitted by Con Ed as Exhibit H.

Based on this, Con Ed argues that this action, which was commenced on July 24, 2008, is three days late of the three year statute of limitations, and therefore must be dismissed.[2]

In opposition, Verizon argues that Con Ed fails to make a prima facie showing of entitlement to judgment as a matter of law, asserting that Con Ed's entire motion rests on the Hall affidavit, which Verizon characterizes as conjecture and second-hand knowledge, therefore lacking evidentiary weight. Verizon maintains that Halls's statements are conclusory and unsubstantiated, and not based on personal knowledge of the facts of this action, but instead on her knowledge of those procedures she said Verizon followed at the time she worked there, which ended in 2003, and her irrelevant interpretation of Verizon documents therefore lacks merit.

Verizon also argues that even assuming that Con Ed met its burden, Verizon presents evidence sufficient to raise triable material issues of fact. In support, Verizon submits the affidavits of Thomas DeMarzo ("DeMarzo"), a Verizon Area Operations Manager since 2001, and located in Manhattan for the past six years, and Thomas Mark ("Mark"), a Reimbursable Engineer for Verizon since 2000.

Mark was the Reimbursable Engineer assigned to the claim at the basis of this action. Mark explains that the PDR, which is "normally prepared and completed on or within several days after the damaged facilities and the foregoing information [location of

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[2] The applicable three-year statute of limitations for property damage, CPLR 214(a), is not in dispute.

damaged facilities, nature of damage, identity of damager if known, etc.] have been identified and located" stated that the date of damage was July 30, 2005, and the date of discovery was August 1, 2005. Mark explained that as part of his responsibilities, he collects and assembles invoices for work performed by outside vendors. For this claim, he was provided with contractor invoices, including the Atlas invoice. Mark states that he included the Atlas invoice with the other documents for this claim "based strictly on the fact that the CWO number, 4P0D8E, was handwritten on the face of the Atlas Invoice."

Mark also states that in 2005, he was not responsible for verifying the accuracy or correctness of an outside vendor's invoice , but would only verify that the vendor's bill was charged to an existing CWO number. In 2005, the time of this claim, Mark would include an outside invoice solely because of its CWO notation. Here, Mark states, the Atlas invoice was included "because some person unknown to me wrote CWO 4P0D8E on the document." Mark concludes that based on his current review of the claim documents, "the Atlas Invoice was very likely improperly charged to CWO 4P0D8E because that expense incurred before the CWO number was even created." Mark's affidavit does not state when, or by whom, the CWO number was created.

DeMarzo, who was not employed in Manhattan in 2005 when this claim was generated, states that based on his experience as an Area Manager, he is fully aware that steam leaking from Con Ed's steam distribution system damages Verizon's cables, resulting in failing or failed cables, which results in customer service problems. When such problems occur, DeMarzo states, Verizon field technicians are dispatched to the area

of the damaged cable to perform any necessary repair work, and each field technician is responsible for completing a time sheet to reflect the work he or she performed.

DeMarzo states that the time sheets submitted for this claim reflect work performed from August 1, 2005 to August 17, 2005. DeMarzo concludes that this time range is consistent with an August 1, 2005 date of discovery, but would not be consistent with a date of discovery on or around July 21, 2005 "as it is not Verizon's business practice to wait such a long period to begin repair work when its customers are out of service."

Verizon also asserts that as there have not yet been depositions in this action, the motion is premature and should be denied on that basis.

Discussion

In its notice of motion, Con Ed purports to move "[f]or an Order pursuant to CPLR §3211(a) for summary judgment dismissing defendant's Complaint on Statute of Limitations grounds." To the extent that its motion "was based on CPLR 3211 (a) (5), defendant had 'the initial burden of establishing prima facie that the time in which to sue has expired,' *Savarese v. Shatz*, 273 A.D.2d 219, 220 (2d Dep't 2000); see *Cimino v. Dembeck*, 61 A.D.3d 802 (2d Dep't 2009), and thus was required to 'establish, inter alia, when the plaintiff's cause of action accrued.' *Swift v. New York Med. Coll.*, 25 A.D.3d 686, 687, (2d Dep't 2006). Similarly, insofar as defendant sought summary judgment based on statute of limitations grounds, defendant was required to 'make a prima facie

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.' *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985)." *Larkin v. Rochester Hous. Auth.*, 81 A.D.3d 1354, 1355 (4th Dep't 2011).

It is undisputed that Verizon creates a CWO number for damage claims, and that all documents associated with that claim are assigned the same CWO. Moreover, it is undisputed that the Atlas invoice, produced by Verizon in discovery in this action, bears CWO 4P0D8E, the CWO number assigned by Verizon to the damage claim at issue. A review of the PDR Packing Slip shows that the Atlas invoice is one of four invoices Verizon grouped together under CWO 4P0D8E, categorized as "contractor costs," and which form a portion of the cost Verizon is seeking to recover from Con Ed.

Con Ed asserts that Verizon sought to collect from Con Ed $422.66 for the Atlas invoice, relying on its inclusion on the PDR Packing Slip. In opposition, Verizon does not dispute that it was attempting to collect for the Atlas invoice in the bill sent to Con Ed. Instead, Mark states that Hall was incorrect when she states that the PDR Packing Slip is used to keep track of documents assembled for a particular claim. Mark states that the PDR Packing Slip is merely a cover sheet listing the documents being forwarded to CMR, "an independent firm that Verizon uses for billing and other administrative related purposes."

Verizon, through the Mark affidavit, now maintains that it must have been an error for the Atlas invoice to be included in the recovery sought associated with CWO number 4P0D8E, because it bears a date earlier that the discovery date indicated on the other documents. However, Verizon offers no explanation for why this is, other than that the date on it predates the discovery date. Mark states that the invoice date predates the creation of the CWO, but nothing in the record indicates the date the CWO was created, or an affidavit of the individual responsible for creating the CWO.

Verizon argues that Con Ed fails to meet its burden because Hall's affidavit lacks first hand knowledge, as she left Verizon before the incident at issue here occurred. But even were I to not consider the Hall affidavit in review of this motion, the Atlas invoice, and the CWO number it bears, speak for themselves, as does the fact that Verizon attempted to collect payment from Con Ed for this invoice. Therefore, I find that the Atlas invoice, produced by Verizon in this action and bearing the handwritten CWO number 4P0D8E establishes that this incident occurred on at least July 21, 2005.

Further, Verizon fails to show that there are material issues of fact. As noted, Mark in his affidavit states without explanation or support that the invoice must have been mistakenly marked with CWO 4P0D8E because the invoice was created before the CWO number. Such a conclusory and self serving statement in an affidavit is insufficient to create a question of fact. Similarly, DeMarzo's conclusion that the work performed by the field technicians must reflect a discovery date of August 1, 2005 and not earlier

because Verizon would never wait that long to serve customers who were without service is without any evidentiary weight. This statement, without more, is conclusory, self-serving, and mere speculation. As Verizon's affidavits merely consist of general, conclusory allegations without any factual, competent evidentiary support, they are insufficient to raise a triable issue of fact. *RCA Corp. v. American Standards Testing Bureau, Inc.*, 121 A.D.2d 890, 891 (1st Dep't 1986).

Lastly, Verizon argues that this motion is premature as deposition have not yet occurred. However, it "failed to show that facts essential to justify opposition to the motion may emerge upon further discovery. A grant of summary judgment cannot be avoided by a claimed need for discovery unless come evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Bailey v. New York City Transit Authority*, 270 A.D.2d 156, 157 (1st Dep't 2000). *See also Ruttara & Sons Construction So., Inc. v. J. Petrocelli Construction, Inc.*, 257 A.D.2d 614 (2d Dep't 1999).

In accordance with the foregoing, it is

ORDERED that defendants Consolidated Edison Inc. and Consolidated Edison Company of New York, Inc.'s motion pursuant to CPLR §3025(b) to amend the answer to add a statute of limitations affirmative defense is granted without opposition; and it is further

ORDERED that defendants' motion for summary judgment dismissing Verizon New York, Inc.'s complaint as barred by the statute of limitations pursuant to CPLR 3211(a) is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 2, 2014

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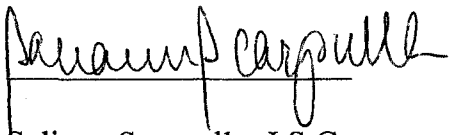

Saliann Scarpulla, J.S.C.