

**Consolidated Edison Co. of N.Y., Inc. v Paul J.
Scariano, Inc.**

2015 NY Slip Op 30382(U)

March 18, 2015

Supreme Court, New York County

Docket Number: 159244/2012

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Plaintiff,

Index No.: 159244/2012

-against-

PAUL J. SCARIANO, INC.,

Defendant.

-----X
DEBRA A. JAMES, J.:

In this complaint alleging negligence and trespass to chattel, plaintiff Consolidated Edison Company of New York, Inc., (Con Ed) claims that defendant Paul J. Scariano, Inc., damaged Con Ed's underground facilities while defendant was performing excavation work. Con Ed moves, pursuant to CPLR 3212, for an order granting summary judgment on its complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Con Ed provides gas service and electrical power to areas located in New York. Its complaint asserts that Con Ed "owns and operates a distribution network infrastructure, including but not limited to cables, pipes, equipment, machinery, facilities and other property."

At the time of the incident, Con Ed owned a 12-inch high pressure gas main and service tee and supporting equipment and

facilities (hereinafter, Gas Main). The Gas Main was located underground at approximately 400 Murray Street, New York, New York. This Gas Main provided gas service to many buildings in the areas.

On November 3, 2010, defendant entered into a contract with the Battery Park City Authority (BPCA) whereby it agreed to perform paving work located near Murray Street. According to the contract, defendant was to, among other things, "[d]emolish, excavate, and remove debris of existing material." According to the complaint herein, Murray Street is a "private street owned and controlled by Battery Park City Authority."

On April 15, 2011, while repaving Murray Street, defendant allegedly removed a metal plate that protected the Gas Main. According to the complaint, defendant "thereafter drove and/or operated a vehicle over the exposed area, causing damage to the Gas Main and service tee." In its verified bill of particulars, Con Ed alleges that as defendant allegedly drove over the exposed area, it struck the Gas Main and service tee with the tooth of the backhoe, causing damage.

In its first cause of action, Con Ed alleges that defendant was negligent, as it owed Con Ed a duty to take reasonable care to protect the Gas Main while working in the vicinity, yet failed

to do so. In the second cause of action for trespass to chattel, Con Ed claims that defendant intentionally interfered with the Gas Main. Con Ed alleges damages in the amount of \$64,752.48 in damages.

In support of its motion for summary judgment, Con Ed provides an affidavit of Pedro Corredor (Corredor), senior specialist representative and custodian of records for Con Ed. Corredor explains that Battery Park City rests on a landfill from excavation done approximately 40 years ago. As a result, the Gas Main is installed at a shallower depth compared to other gas facilities in New York City. A steel plate is in place to protect the Gas Main. According to Corredor, the installation of the steel plates complies with "current applicable engineering standards, and is approved by BPCA."

Corredor's affidavit opines that, as the street is privately owned by BPCA, New York City Building codes are not applicable. New York State rules and regulations determine the rules and obligations for parties performing excavation. Any contractor performing excavation in the area is required to notify Con Ed of its intent to excavate by utilizing the "one-call notification system." An excavator must call the one-call system at least two, but not more than 10 working days prior to commencing work.

If work is not commenced within 10 days, another call must be placed.

It is not disputed that defendant used the one-call system on November 10, 2010 and notified Con Ed of its intent to excavate in the vicinity of the Gas Main. On November 12, 2010, Con Ed located and marked the Gas Main and all facilities of the Gas Main.

According to Con Ed, defendant reported on April 15, 2011 that it had hit a gas line near the intersection of River Terrace and Murray Street. Con Ed dispatched a team to fix the Gas Main, which had been damaged and was leaking. Con Ed maintains that the damage was caused by defendant's negligence in driving over the Gas Main.

The incident occurred almost five months after defendant made the initial one-call notification. According to Con Ed, defendant's one-call notification had expired, and defendant did not re-notify Con Ed about any revised excavation plans. Con Ed writes, "[a]ny painted markout of underground facilities had likely faded/worn away during this five-month period." Con Ed further alleges that its facilities were damaged by defendant's "unauthorized use of mechanized equipment" and that it was expressly defendant's responsibility to protect Con Ed's

facilities. Con submits, in its papers in support of its motion, a copy of a letter it sent to Con Ed, prior to commencement of this lawsuit, that states that defendant had taken special care to work around the gas facilities. The letter further states, in pertinent part, "[c]ontrary to the Con Ed Report of Damage to Company Property, the damage was to the service tee. The 12" main remained intact."

In opposition, defendant provides an affidavit from Luca Toscano (Toscano), defendant's vice president of construction. According to the accident report submitted to Con Ed by Toscano, he and another employee witnessed the accident. Toscano contends that defendant commenced work on the paving project around November 15, 2010, and that the work was still continuing in April 2011. He states that, prior to defendant's paving, Con Ed "marked out the site." However, "[t]here were no mark outs that indicated any shallow buried facilities. Con Edison never made any indications on the site or communicated with Scariano of any shallow buried facilities on or near the work site."

Toscano described the incident as occurring as defendant's backhoe started to drive at the site of the shallow buried facility. As the backhoe was leaving, the pressure of the backhoe affected the tap. However, Toscano disputes the site of

the incident stating, "[t]his gas main and valve was not the one involved in this incident." He claims that defendant never moved any subsurface protection plates at this location, and that defendant put its own roadway steel plate down to act as a transition between the work and non-work area that would be removed as necessary. In sum, Toscano writes:

The facility which Con Edison has claimed was damaged was damaged due to the shallow bury, insufficient protection provided by Con Edison and the improper installation of the tap on top of the main. Again this area was not near the location of the shallow buried gas main and valve which Scariano had previously identified."

According to defendant, it complied with the proper one-call procedure, and the damage to the Gas Main, if that was the site of the accident, was incurred due to the "shallow bury" and insufficient protection by Con Ed. It argues that further discovery is necessary to obtain the evidence of such defense.

Defendant also raises credibility issues with respect to Corredor's opinion, as Con Ed identifies Corredor as a custodian of its records, but does not identify him as an attorney, engineer, or other expert with qualifications to offer an opinion. Defendant argues that Corredor provides only conclusory information about the composition of the land in question.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law."

Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" People v Grasso, 50 AD3d 535, 545 (1st Dept 2008), quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." People v Grasso, 50 AD3d at 544, citing Marine Midland Bank v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). The function of the court on a motion for summary judgment is one of issue finding, not issue determination. Ferrante v American Lung Assn., 90 NY2d 623, 630 (1997).

Con Ed argues that, as defendant's one-call notification had expired, there are no questions of fact as to defendant's

negligence. According to New York State Department of Public Service Rules for Protection of Underground Facilities, Duties of Excavators, 16 NYCRR § 753-3.1 (d) (2), whenever an excavator postpones an excavation for more than 10 working days, it must re-notify the one-call system. See also generally Protection of Underground Facilities, Duties of Excavators, General Business Law § 764. An excavator's failure to comply with the one-call notification system implementing rules and regulations "constitutes some evidence of negligence." Level 3 Communications, LLC v Petrillo Contr. Inc., 73 AD3d 865, 867 (2d Dept 2010) (internal quotation marks and citations omitted).

Defendant argues that, contrary to Con Ed's allegations, it had made the one-call notification and then continued to work from that date forward until the date of the accident. Since there was no postponement of work, defendant would not have to renotify Con Ed of its intent to excavate. Therefore, according to defendant, questions of fact remain as to whether defendant fulfilled its obligations with respect to the one-call notification, and whether there was any negligence for any alleged failure to call.

In addition to its argument that Corredor lacks qualification to opine regarding whether or not Con Ed's gas

facilities complied with various safety codes, defendant further argues that there is an insufficient factual basis for his opinion, in any event. Defendant cites Kaluga v Korytowsky (269 AD2d 566, 566 [2d Dept 2000]), which held, "defendants' expert submissions offered conclusory opinions without any factual support. Where an expert states his conclusion without reliance on any facts or data, his testimony should be given no probative force whatsoever."

This court finds that defendant has set forth an evidentiary basis for further discovery. Integrated Logistics Consultants v Fidata Corp., 131 AD2d 338, 340 (1st Dept 1987). The parties should comply with discovery conference orders setting forth a schedule for depositions of persons with knowledge as to the precise location where the incident occurred, and the depth at which Con Ed placed or area that Con Ed marked out the shallow facilities.

Accordingly, it is

ORDERED that Consolidated Edison Company of New York, Inc.'s motion for summary judgment on its complaint is denied, with leave to renew upon completion of discovery.

Dated: March 18, 2015

ENTER:

~~Debra A. James~~
DEBRA A. JAMES S.C.