SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
Justice

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ALEXANDER HALL

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,,

Defendant.

INDEX NO. 158541/2014

MOTION DATE 2/15/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35

were read on this application to/for Judgment - Summary .

Upon the foregoing documents, it is

Defendant's motion for summary judgment is denied. Plaintiff claimed that he sustained a personal injury on West 116th Street, at or near its intersection with Claremont Avenue, New York, New York (the "Roadway"). According to plaintiff Alexander Hall's ("Hall" or "Plaintiff") deposition testimony, on or about September 12, 2011, while acting as a lawful pedestrian and bicyclist he was traversing the Roadway and fell after his bicycle struck a large uneven, broken and/or "V" shaped defect causing him to suffer serious injuries. Plaintiff alleged that the accident was caused by reason of the negligent and hazardous condition and by the negligent failure by defendant Consolidated Edison Company of New York, Inc. ("Con Edison" or "Defendant") to

properly repair said defect and/or by the negligence of the defendant in causing or creating said defect.

Defendant moved for summary judgment pursuant to CPLR § 3212. Con Edison argues that as a matter of law, plaintiff cannot make out a prima facie case for negligence against it as the evidence fails to establish that Con Edison had control over or created the defect. As evidence to support their claim, defendants provided the deposition of Yesenia Campoverde ("Campoverde"), a specialist employed by Con Edison, whose duties include searching for documents and testifying to their results. Campoverde stated that prior to testifying she reviewed the results of a search conducted by George Canzaniello ("Canzaniello"), one of her co-workers. Campoverde testified, pursuant to Canzaniello's search, that the parameters of the search were for work performed on West. 116th St near Claremont Avenue in Manhattan for the period of September 12, 2009 to September 12, 2011. Additionally, she testified that the records searched in connection with this case were DOT permits, opening tickets, paving orders, corrective action request, notices of violation and emergency control tickets.

Defendant's motion seeking summary judgment is denied. Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]). The proponent of a summary judgment motion must 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 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

A defendant seeking summary judgment has the initial burden of making a *prima facie* showing that it did not create the dangerous condition, nor had actual or constructive notice of its existence (*Sabalza v Salgado*, 85 AD3d 436, 924 N.Y.S.2d 373 [1st Dept 2011]; *Garcia v Good Home Realty, Inc.*, 67 AD3d 424, 888 N.Y.S.2d 40 [1st Dept 2009]). "What constitutes a dangerous or defective condition depends on the particular circumstances of each case, and is thus generally a factual question for the jury" (*Freienstein v Mandarin Oriental N.Y. Hotel, LLC*, 44 Misc 3d 1220[A], 999 N.Y.S.2d 797, 2014 NY Slip Op 51213[U] [Sup Ct, NY County 2014] *citing Trincere v County of Suffolk*, 90 NY2d 976, 977, 688 N.E.2d 489, 665 N.Y.S.2d 615 [1997]).

Thus, to prevail, defendant has the burden to establish on a *prima facie* level that as a matter of law that it is not liable. Defendant has failed to do so. Defendant has not submitted any evidence that no condition existed on the day of the accident or if a condition existed, it was not responsible for it. Instead, defendant offered the testimony of Campoverde regarding a report she reviewed. However, Campoverde deposition is silent as to the parameters of the document search made by the defendant and does not exclude the possibility that Con Edison could have created the condition. Nowhere does ConEdison actually say that the defect that injured plaintiff was not the responsibility of ConEdison. Instead, the deposition deals with a separate and distinct project not the location in question. As such, defendants have not met their *prima facie* burden that they did

not create a dangerous and defective condition that caused the plaintiff's injury and never shifted the burden to plaintiff to raise a genuine issue of fact. Accordingly, it is therefore

ORDERED, that defendant's motion for summary judgment is denied and this action proceeds.

This constitutes the decision and order of the Court.

9/1/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE