

Noguera v City of New York

2017 NY Slip Op 32239(U)

September 28, 2017

Supreme Court, New York County

Docket Number: 152494/12

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42**

-----X
JORGE GONZALEZ NOGUERA,

Index No.: 152494/12

Plaintiff,

-against-

DECISION AND ORDER

THE CITY OF NEW YORK, EMPIRE CITY SUBWAY
COMPANY (LIMITED), CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC., MOBILITIE, LLC, LIGHT TOWER FIBER
LONG ISLAND, LLC, WESTMORELAND CONSTRUCTION, INC.,
and LEXTENT METRO CONNECT, LLC,

Defendants.

MOTION SEQ. 005,
006, 007, 008, 009

-----X
EMPIRE CITY SUBWAY COMPANY (LIMITED),

Third-Party Plaintiff,

-against-

MOBILITIE, LLC, LIGHT TOWER FIBER, LLC and
WESTMORELAND CONSTRUCTION, INC.,

Third-Party Defendants.

-----X
MOBILITIE, LLC,

Second Third-Party Plaintiff,

-against-

LEXTENT METRO CONNECT, LLC,

Second Third-Party Defendant.

-----X
EMPIRE CITY SUBWAY COMPANY (LIMITED),

Third Third-Party Plaintiff,

-against-

NICO ASPHALT PAVING, INC.,

Third Third-Party Defendant.

-----X

Bannon, J.:

Motion sequence numbers 005, 006, 007, 008 and 009 are hereby consolidated for disposition.

I. INTRODUCTION

This is an action to recover damages for personal injuries sustained by a bicycle food delivery person on November 29, 2012, when the front wheel of his bicycle hit and entered a pot hole situated in the roadway of Cedar Street, between Broadway and Trinity Place, in Manhattan.

In motion sequence number 005, third third-party defendant Nico Asphalt Paving, Inc. (Nico), moves, pursuant to CPLR 3212, for summary judgment dismissing the third third-party complaint and all cross claims against it.

In motion sequence number 006, the defendant third-party defendant/second third-party plaintiff, Mobilitie, LLC (Mobilitie), and the defendant/second third-party defendant Lextent Metro Connect, LLC (Lextent), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them.

In motion sequence number 007, the defendant Consolidated Edison Company of New York, Inc. (Con Ed) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against it.

In motion sequence number 008, the defendant third-party defendant Light Tower Fiber Long Island, LLC (Light Tower), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, as well as for summary judgment on its cross claims for contractual indemnification and breach of contract for failure to procure insurance against the defendant third-party defendant Westmoreland Construction, Inc.

(Westmoreland).

In motion sequence number 009, defendant the City of New York moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

II. BACKGROUND

A. The Plaintiff's Deposition Testimony

The plaintiff testified at his deposition that, at the time of his accident, he was riding his bicycle in the rain, while delivering food for his employer, Viet Café, which is located at 345 Greenwich Street in Manhattan. At the time, he was heading back to Viet Café after having delivered food to 20 Pine Street. Just after passing a manhole while traveling on the right side of Cedar Street, between Broadway and Trinity Place, the front wheel of plaintiff's bicycle struck the outside of a deep hole, and entered the hole, which was filled with water. The plaintiff testified that:

“[w]hen [the bicycle] went into the hole and I put my hand out because I didn't want to hit my face. I let go of the bike and I was trying to hold my fall. Everything happened so fast. I went forward, took my hand out and the weight of my body went over. I flipped over, and I don't know how it happened, but I was laying on my side”

The plaintiff also maintained that, although he bicycled through the area on previous occasions, he never noticed the subject hole because it was filled with water.

During his deposition, plaintiff reviewed and testified as to certain photographs of the accident site, which he marked during the hearing that had been conducted by the City pursuant to General Municipal Law § 50-h. He testified that the subject photographs, which depicted a sunken part of a roadway filled with water, accurately represented the condition of the accident site at the time of the accident.

B. Deposition Testimony of Jennifer Kim

At her deposition, Jennifer Kim, a specialist in document search and retrieval for Con Ed, testified as to the contents of multiple opening and emergency permits for work performed by Con Ed in Manhattan. None of the permits referred to work performed at the accident site.

C. Deposition Testimony of Denis Donovan

Denis Donovan testified that he was the area operations manager for construction for Empire City Subway Limited (ECS) on the day of the accident. He explained that ECS owns and operates underground manhole conduits throughout Manhattan and the Bronx, and rents them to companies for their underground conduit communication systems, which are accessed via manholes.

At his deposition, Donovan reviewed and identified certain ECS work records. He first identified a custom work order, dated August 11, 2010, for its customer Mobilitie, pursuant to which Mobilitie's contractor, Westmoreland, added a two-inch duct, with a point of entry at the subject manhole. Donovan then reviewed a second custom work order, dated August 4, 2010, for its customer Light Tower, pursuant to which Light Tower's contractor, also Westmoreland, ran one four-inch-diameter PVC duct from the manhole. He averred that, in order to perform both jobs, Westmoreland had to perform above-ground trenching work around the Manhole.

D. Deposition Testimony of Daniel Tergesen

Daniel Tergesen testified that he was employed by ECS as a construction manager and specialist on the day of the accident. At his deposition, Tergesen reviewed the job package for

Job Number 119813RT (the ECS Job). The ECS Job consisted of building four four-inch-diameter conduits from another ECS manhole to the subject manhole. The ECS Job required ECS to cut the roadway, excavate it to grade, install conduit, backfill the trench, and then pour a concrete base. After ECS performed this work, Nico performed the final asphalt restoration.

Notably, ECS performed its work between April 13, 2009, and June 9, 2009. Nico completed its work on June 12, 2009. Nico did not receive any notice of violation in regard to said work.

E. Deposition Testimony of John Denegall

Denegall testified that he served as Nico's superintendent on the day of the accident. He explained that Nico is in the business of handling permanent asphalt restorations in Manhattan. He explained that, on June 12, 2009, Nico performed asphalt restoration work near the accident site for ECS. After Nico restored the area, it placed a yellow, rubberized marking with the letters "ECS" and digits "09" there. According to Denegall, Nico never received any complaints in regard to its work for ECS.

During his deposition, Denegall was shown photographs of the accident site. Denegall asserted that the lack of color codes in the photographs indicated that work was performed at the accident site after Nico had performed work there, but before the photographs were taken.

F. Deposition Testimony of Mark Askelson

Mark Askelson, Mobilitie's vice-president of investments, testified that Mobilitie was the owner and operator of certain telecommunications infrastructure, such as cellular telephone

towers, distribution antenna systems, and Wi-Fi networks. Mobilitie leased the infrastructure to various wireless carriers.

Askelson asserted that, pursuant to a contract dated April 8, 2010, Mobilitie hired Lextent to design and build an antenna system in Manhattan, so that Mobilitie could lease the system to its wireless carriers. He stated that Mobilitie hired Westmoreland to perform the subject work at the accident site, but that Mobilitie did not perform any of this work itself. Askelson explained that, in order to perform said work, Westmoreland had to access the subject manhole and then make a 42-inch cut in the roadway, which stretched from the manhole to Trinity Place at Cedar Street.

G. Deposition Testimony of John Adams

John Adams testified that he was employed by Light Tower as its director of engineering on the day of the accident. He explained that Light Tower is a communications company that is responsible for the installation and maintenance of its fiber optic network. He asserted that, on October 27, 2010, Westmoreland completed a project for Light Tower, which entailed building a conduit from the subject manhole to Broadway. In order to complete the work, it was necessary for Westmoreland to obtain a permit from the New York City Department of Transportation. After obtaining the permit, Westmoreland trenched the road, placed conduit in the trench and then restored the trench. The trench began at the Manhole and ran west towards Trinity Place for 28 feet, before turning south for 15 feet.

When asked if anyone from Light Tower ever supervised or directed Westmoreland's excavation and/or restoration work, Adams responded, "No" (Adams tr at 68). Adams also

maintained that, in addition to performing the subject physical work for Light Tower, Westmoreland obtained all necessary permits, diagrams and schematics.

H. Deposition Testimony of Michael Paletta

Michael Paletta testified that, on the day of the accident, he was the sole owner of Westmoreland, a general contractor and utility contractor. He explained that Westmoreland performed two jobs at the manhole location, and that the first job, on behalf of Mobilitie, was completed on July 27, 2010, while the second job, on behalf of Light Tower, was completed on October 27, 2010. According to Paletta, both of these jobs involved cutting and excavating the roadway, installing new utility cables, piping, and wiring, backfilling, compacting dirt, re-pouring the concrete base, and restoring the final asphalt. In addition, he averred that Westmoreland completed some follow-up work for the Mobilitie job on January 25, 2011, which entailed stubbing out some conduit at the curb line, which was not in the area of the manhole, but, rather, three feet from the foundation for the light pole.

III. DISCUSSION

“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.” Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept. 2006), quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” Mazurek v Metropolitan Museum of Art, 27 AD3d 227,

228 (1st Dept. 2006), citing Zuckerman v City of New York, 49 NY2d 557 (1980); see DeRosa v City of New York, 30 AD3d 323 (1st Dept. 2006). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224 (1st Dept. 2002).

A. Nico's Motion to Dismiss ECS's Third Third-Party Complaint and All Cross Claims Against It (motion sequence number 005)

Nico moves for summary judgment dismissing ECS's third third-party complaint and all cross claims against it. In the third third-party complaint, ECS asserts claims against Nico for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance.

Initially, ECS does not oppose Nico's motion. In addition, ECS acknowledges that, after Nico paved the roadway just west of the subject manhole for ECS, Westmoreland excavated the same area on behalf of Mobilitie and Light Tower. Further, after Nico performed its restoration work, it placed a yellow, rubberized marking in the subject area. However, the photographs that plaintiff identified in his deposition, as an accurate and true depiction of the accident site, do not depict said marking.

Thus, Nico is entitled to summary judgment dismissing the third third-party complaint and all cross claims against it.

B. Mobilitie and Lextent's Motion to Dismiss the Complaint and All Cross Claims Against Them (motion sequence number 006)

Mobilitie and Lextent move for summary judgment dismissing the complaint and all cross claims against them. Initially, the plaintiff does not oppose that branch of the motion

which seeks dismissal of the complaint and cross claims as against Lexent. Since Lexent made a prima facie showing of entitlement to judgment as a matter of law by showing that it did not create a dangerous condition, or have responsibility for maintaining the roadway near the manhole, it is entitled to dismissal of the complaint and all cross claims against it.

Mobilitie argues that it is entitled to dismissal of the complaint and all cross claims against it, because, after Westmoreland completed its work for Mobilitie on July 27, 2010, Westmoreland subsequently re-excavated and restored the same trench for Light Tower on October 27, 2010. In addition, the follow-up work, which Westmoreland performed for Mobilitie on January 25, 2011, was performed across the street and down the block from the manhole. As such, this later work had nothing to do with the accident site or the accident.

A defendant in an action such as this establishes its prima facie entitlement to judgment as a matter of law where that it makes “a prima facie showing that [it] had not created the dangerous condition and had neither actual nor constructive notice of the alleged defect” Ravagnan v One Ninety Realty Co., 64 AD3d 481, 482 (1st Dept. 2009). Here, Westmoreland’s work for Mobilite was superseded by Westmoreland’s work for Light Tower. Thus, Mobilitie has shown, prima facie, that it did not create the defect or have any notice of a defect in a roadway for which it was responsible. The plaintiff’s speculation that Westmoreland’s original work for Mobilitie could have undermined Westmoreland’s subsequent work for Light Tower is insufficient to raise a triable issue of fact in this regard. See LoBianco v Lake, 62 AD3d 590 (1st Dept. 2009). Thus, Mobilitie is entitled to summary judgment dismissing the complaint and all cross claims against it.

C. Con-Ed's Motion to Dismiss the Complaint and all Cross Claims and Counterclaims Against It (motion sequence number 007)

Con Ed moves for summary judgment dismissing the complaint and all cross claims against it. As correctly argued by Con Ed, there is no evidence in the parties' submissions that it maintained and/or controlled the accident site, or that it performed any work there. Since no party opposes Con Ed's motion, it is entitled to summary judgment dismissing the complaint and all cross claims and counterclaims against it.

D. Light Tower's Motion To Dismiss The Complaint Against It (motion sequence number 008)

Light Tower moves for summary judgment dismissing the complaint against it, on the ground that it cannot be held liable in negligence because it did not owe plaintiff a duty of care. Specifically, Light Tower contends that it did not physically perform any work at the accident site but, rather, subcontracted the entirety of that work to Westmoreland.

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause." Kenney v City of New York, 30 AD3d 261, 262 (1st Dept. 2006). As "a finding of negligence must be based on the breach of a duty, a threshold question . . . is whether [Light Tower] owed a duty of care to [plaintiff]," a nonparty to the contractual arrangement between Light Tower and Westmoreland. Espinal v Melvill Snow Contrs., 98 NY2d 136, 138 (2002); see Church v Callanan Indus., 99 NY2d 104 (2002). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." Espinal, supra, at 138.

In Espinal, the Court identified three circumstances that present exceptions to this general

rule. The first circumstance, and the only one that may arguably apply to the instant case, arises “where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk.” Church, supra, at 111, citing Espinal. This conduct has also been described as ““launch[ing] a force or instrument of harm”” Church, supra, at 111, quoting Moch Co. v Rensselaer Water Co., 247 NY 160, 168 (1928).

Here, as Light Tower did not perform any of the actual work giving rise to the accident, it cannot be said that any conduct on its part created an unreasonable risk to plaintiff or increased any such risk. See Miller v Infohighway Communications Corp., 115 AD3d 713, 715 (2nd Dept. 2014) (defendant fiber optic company did not owe a duty of care to a plaintiff who fell on a roadway condition, where the defendant had subcontracted the roadway construction and excavation work to another company).

In addition, it should be noted that “[g]enerally, ‘a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor’s negligent acts.’” Brothers v New York State Elec. & Gas Corp., 11 NY3d 251, 257 (2008), quoting Kleeman v Rheingold, 81 NY2d 270, 273 (1993). “This general rule, however, is subject to various exceptions.” Brothers, supra, at 258. In their opposition to Light Tower’s motion, the plaintiff and ECS assert that one of these exceptions is when the principal owes a nondelegable duty of care created by a regulation or statute. See Kleeman supra; Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663 (1992). Under the Rules of City of New York Department of Transportation [34 RCNY] § 2-11 (e) (15) (i), Light Tower, as the permit holder for the subject work, owed a statutory obligation to plaintiff to provide a “smooth riding surface” on the restoration for a three-year guaranteed period after completion of the permitted work.

However, as correctly argued by Light Tower, this contention is undercut by the Court of Appeals's holding in Brothers, in which the Court clearly rejected the argument that a work permit was a contract pursuant to which the permit holder voluntarily assumed a nondelegable duty to comply with various federal and state worker safety regulations. The Court reasoned, in pertinent part:

“First, expanding vicarious liability to cover these work permits would make [permit holders] potentially liable to a large class of plaintiffs, thus extending its duty beyond any reasonable limit. As in this case, utilities annually obtain highway work permits covering extensive geographical areas and, for practical reasons, routinely hire independent contractors to carry out numerous construction/maintenance tasks thereby authorized Moreover, the Highway Law requires utilities to obtain permits, and they do not have the ability to bargain for terms and conditions”

Brothers, *supra*, at 260.

Moreover, as Light Tower notes, ECS owned and operated the subject manhole; thus, pursuant to 34 RCNY § 2-07 (b) (1) and (2), ECS was responsible for maintaining the roadway area within the 12-inch perimeter of the manhole, thereby displacing any duty on Light Tower's part to maintain the subject area. See Lewis v City of New York, 89 AD3d 410 (1st Dept. 2011); see also Storper v Kobe Club, 76 AD3d 426 (1st Dept. 2010); Cruz v New York City Tr. Auth., 19 AD3d 130 (1st Dept. 2005).

34 RCNY § 2-07, which refers to “Underground Street Access Covers, Transformer Vault Covers and Gratings,” states, in pertinent part, as follows:

“(b) Maintenance requirements.

“(1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware.

“(2) The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating.”

Importantly, the 12-inch rule, as set forth in 34 RCNY § 2-07 (b) (1) and (2), will not absolve a defendant from liability when that defendant’s negligence was responsible for creating the hazardous condition in the first place. See Shehata v City of New York, 128 AD3d 944 (2nd Dept. 2015). Here, Light Tower subcontracted the entirety of the subject work to Westmoreland. Therefore, no negligence on the part of Light Tower created the roadway condition that caused the accident. Notably, neither ECS nor the plaintiff opposes Light Tower’s assertion that 34 RCNY § 2-07 (b) (1) and (2) apply to the facts of this case.

Thus, Light Tower is entitled to summary judgment dismissing the complaint and all cross claims against it.

D. Light Tower’s Motion For Summary Judgment on its Contractual Indemnification Claim Against Westmoreland (motion sequence number 008)

Light Tower moves for summary judgment on its cross claim for contractual indemnification against Westmoreland. Light Tower established that, in July 2009, in connection with the installation of Light Tower’s fiber optic cable network, it entered into a contract with Westmoreland (the contract), which required that Westmoreland perform roadway trenching and restoration work at the accident site. The contract contains an indemnification provision, which provides, in pertinent part, as follows:

“To the fullest extent permitted by law, [Westmoreland] shall indemnify, defend . . . and hold harmless [Light Tower] . . . under the Scope of Work for each individual project . . . from and against any and all suits, claims,

damages, costs, fines, penalties, and fees, including but not limited to reasonable legal fees . . . arising out of, in connection with, or resulting from [Westmoreland's] obligations, liabilities, performance, breach or failure to perform under this Agreement”

“A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.’” Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 (1987), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973); see Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486 (2004); Torres v Morse Diesel Intl., Inc., 14 AD3d 401 (1st Dept. 2005). With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant.” De La Rosa v Philip Morris Mgt. Corp., 303 AD2d 190, 193 (1st Dept. 2003) (citation omitted); see Keena v Gucci Shops, 300 AD2d 82 (1st Dept. 2002).

Here, the indemnification provision provides that Westmoreland indemnify Light Tower for all actions “arising out of” or “in connection with” its work under the Contract. This work included Westmoreland’s excavation and restoration of the roadway where the plaintiff fell. Moreover, inasmuch as Light Tower subcontracted the aforementioned work to Westmoreland, no negligence on the part of Light Tower contributed or caused plaintiff’s accident.

However, Westmoreland’s work for Light Tower at the accident site was completed on October 27, 2010, and the accident did not occur until November 29, 2011. During this time, ECS was responsible for maintaining the area within 12 inches of the relevant manhole cover, which entailed at least part of the roadway condition. Therefore, a triable issue of fact exists as

to whether the roadway condition that caused the accident was actually created by Westmoreland's work on behalf of Light Tower, or whether it was created later by another entity performing work in and around the manhole, by ECS's maintenance work, or even by a passing vehicle.

Thus, Light Tower is not entitled to summary judgment on its cross claim for contractual indemnification against Westmoreland at this juncture

E. Light Tower's Motion for Summary Judgment on its Claim for Breach of Contract for Failure to Procure Insurance Against Westmoreland (motion sequence number 008)

Light Tower also moves for summary judgment on its cross claim for breach of contract for failure to procure insurance against Westmoreland. Light Tower established that its contract with Westmoreland included an insurance procurement provision, which recites, in pertinent part, as follows:

“[Westmoreland] shall procure and maintain and shall cause all of its subcontractors to procure and maintain insurance of the following types with the coverage amounts as set forth herein.

“(a) Prior to providing any Services, [Westmoreland] shall procure and maintain and shall cause all of its subcontractors to procure and maintain insurance of the following types with the coverage amounts as set forth herein.

“(1) Comprehensive General Liability including products and completed operations and a ‘broad form’ coverage endorsement that must include contractual liability and personal injury. The minimum required coverage is \$5,000,000 per occurrence for bodily injury and property damage on a combined single limit basis, of which \$3,000,000 may be excess coverage.”

* * *

“(c) Certificates of insurance acceptable to [Light Tower] shall be filed with

[Light Tower] The certificate of insurance and the insurance policies required hereunder shall name [Light Tower] and its successors and assigns, [Light Tower's] customer[s] under the Scope of Work . . . as additional insureds with respect to all project sites and all work on behalf of [Light Tower].”

In support of its motion, Light Tower fails to adduce any evidence or propound any argument whatsoever to demonstrate that Westmoreland, in fact, failed to procure the required insurance. Moreover, the insurance procurement provision does not state that Light Tower would be an additional insured, only that certificates of insurance naming it as an additional insured be provided.

Thus, Light Tower is not entitled to summary judgment on its cross claim for breach of contract for failure to procure insurance as against Westmoreland.

F. The City's Motion for Summary Judgment Dismissing the Complaint and All Cross Claims Against It (motion sequence number 009)

The City moves for summary judgment dismissing the complaint and all cross claims against it. The City established its prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims against it by showing that, pursuant to 34 RCNY § 2-07 (b) (1) and (2), ECS, rather than the City, “had exclusive maintenance responsibility over [the Manhole cover] and the area extending 12 inches outward from [it].” Lewis, supra, at 411; Storper, supra, at 427. Since no party opposed the City's motion, the City is thus entitled to summary judgment dismissing the complaint and all cross claims against it.

IV. CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of the third third-party defendant, Nico Asphalt Paving, Inc. (motion sequence number 005), for summary judgment dismissing the third third-party complaint and all cross claims against it is granted, and the third third-party complaint and all cross claims are dismissed as to Nico Asphalt Paving, Inc.; and it is further,

ORDERED that the motion of the defendant third-party defendant/second third-party plaintiff Mobilitie, LLC, and the defendant/second third-party defendant Lextent Metro Connect, LLC (motion sequence number 006), for summary judgment dismissing the complaint and all cross claims against them is granted, and the complaint and all cross claims are dismissed as to Mobilitie, LLC, and Lextent Metro Connect, LLC; and it is further,

ORDERED that the motion of the defendant Consolidated Edison Company of New York, Inc. (motion sequence number 007), for summary judgment dismissing the complaint and all cross claims and counterclaims against it is granted, and the complaint and all cross claims and counterclaims are dismissed as to Consolidated Edison Company of New York, Inc.; and it is further,

ORDERED that the motion of the defendant third-party defendant Light Tower Fiber Long Island, LLC (motion sequence number 008), for summary judgment dismissing the complaint and all cross claims against it and on its cross claims for contractual indemnification and breach of contract against Westmoreland Construction, Inc., is granted to the extent that the complaint and all cross claims are dismissed as against Light Tower Fiber Long Island, LLC, and the motion is otherwise denied; and it is further,

ORDERED that motion of the defendant City of New York (motion sequence number 009) for summary judgment dismissing the complaint and all cross claims against it is granted,

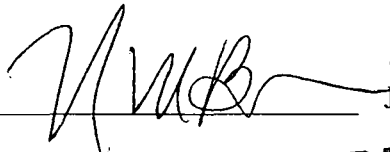
and the complaint and all cross claims are dismissed as to the City of New York; and it is further

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: September 28, 2017

ENTER:


_____)s.c.
HON. NANCY M. BANNON