

**Connaughton v Consolidated Edison Co. of N.Y.,  
Inc.**

2018 NY Slip Op 31276(U)

June 21, 2018

Supreme Court, New York County

Docket Number: 150050/2013

Judge: Kelly A. O'Neill Levy

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**KELLY O'NEILL LEVY  
JSC**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

-----X

DONAL CONNAUGHTON,

Plaintiff,

- v -

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

Defendants.

**INDEX NO.** 150050/2013

**MOTION DATE** 05/23/2018

**MOTION SEQ. NO.** 003

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

were read on this motion to/for STRIKE PLEADINGS

HON. KELLY O'NEILL LEVY:

This is an action for personal injuries allegedly sustained by the plaintiff, a firefighter, who fell from a ladder while fighting a residential fire.

Plaintiff Donal Connaughton moves for an order, pursuant to CPLR § 3126, (1) striking the answer of defendants Consolidated Edison Company of New York, Inc., Consolidated Edison, Inc. (collectively, hereinafter, Con Ed), and Island Technology, Inc. (hereinafter, Island Technology), or, in the alternative, precluding them from presenting any testimony on the issue of liability at trial, or (2) striking the answer of Con Ed and Island Technology or precluding them from presenting any testimony on the issue of liability at trial if they do not provide discovery responses by a date certain. Defendant Island Technology opposes and cross-moves for an order granting a protective order against plaintiff's Notice for Discovery and Inspection dated May 5, 2017, demand number 7. Defendant Con Ed also opposes plaintiff's motion and

cross-moves for an order granting a protective order against plaintiff's Notice for Discovery dated November 27, 2017, demand numbers 1, 3, 8, and 9. Plaintiff opposes both cross-motions.

### BACKGROUND

On March 23, 2012, plaintiff, a New York City firefighter, fell from a ladder and sustained injuries while responding to a fire in a private home located at 531 West 217<sup>th</sup> Street in Manhattan (hereinafter, the home). The fire marshal determined that the fire originated from a nearby underground utility service box (no. 24282) owned by Con Ed located on the street in front of the home (hereinafter, the service box) [FDNY Fire Marshal Report (ex. 5 to the Penson aff.)]. The fire marshal concluded that the fire was caused by leaking natural gas which reached an electrical conduit that was connected to the basement of the home (*id.*).

Island Technology, a company in the business of designing and manufacturing products for the utility and defense industries, entered into a multi-year service contract with Con Ed under which Island Technology was to inspect service boxes and manholes. Island Technology personnel were the last to inspect the subject service box within the 5-year inspection cycle mandated by Public Service Order 04-M-0159. Robert Guy Ward, the President of Island Technology, estimated that each of his crews could inspect five structures per day [Deposition of Robert Guy Ward (ex. 6 to the Penson aff.) at 58]. Lavonia Scaggs, a former Island Technology project manager for the service box inspections, testified that Island Technology crews were required to conduct a minimum of ten inspections per day [Deposition of Lavonia Scaggs (ex. 8 to the Penson aff.) at 58]. Ms. Scaggs also testified that she felt that the number of inspections was compromising the quality of inspections (*id.* at 89-90). Mr. Ward testified that Con Ed provided Island Technology with insulated poles with hooks at the end for moving wires in the

service boxes, yet instructed Island Technology's crews that moving wires during inspections was dangerous and that they should not move wires (Ward tr. at 76-78).

Plaintiff has sought discovery on these issues. On March 6, 2015, plaintiff sent Con Ed a notice for discovery and inspection, demanding the following items: (1) schematics depicting Con Ed's underground facilities on West 217<sup>th</sup> Street between Park Terrace East and Park Terrace West, (2) street opening permits for West 217<sup>th</sup> Street between Park Terrace East and Park Terrace West for a period of two years prior to the fire, (3) gas service complaints, electrical service complaints, odor of gas complaints, smoking manhole, or flickering lights complaints on West 217<sup>th</sup> Street between Park Terrace East and Park Terrace West, for one year prior to the fire, and (4) identification of any investigative reports of the incident that Con Ed claims are privileged, indicating who made the report, when the report was made, the title of the person who made the report, a general description of the report sufficient to demonstrate that it is privileged, the identities of any persons to whom the document has been provided, and a statement that the privilege has not been waived [March 6, 2015 Notice for Discovery and Inspection (ex. 10 to the Penson aff.)]. By orders dated February 17, 2016, March 30, 2016, June 15, 2016, August 3, 2016, October 5, 2016, January 11, 2017, March 15, 2017, June 28, 2017, November 1, 2017, and January 17, 2018, the court directed Con Ed to produce a response to the March 6, 2015 demands [Court Orders (ex. 11 to the Penson aff.)].

On May 5, 2017, plaintiff served Island Technology with a notice for discovery and inspection, demanding the following items: (1) the last known address of former employees John Driscoll, Chickie, and Warren Anderson (Island Technology quality control inspectors), (2) documents indicating whether quality control inspectors were present during the inspection of the service box, (3) the quote folder maintained by Island Technology for the project, and (4) a

full printout of all instructions performed under the inspection contract [May 5, 2017 Notice for Discovery and Inspection (ex. 12 to the Penson aff.)]. By orders dated June 28, 2017, November 1, 2017, and January 17, 2018, the court directed Island Technology to respond to the demands [Court Orders (ex. 11 to the Penson aff.)]. Island Technology responded to the demands on March 8, 2018, stating that it is not in possession of several of the requested documents and objecting to demand number 7, which was a request for a full printout of all inspections performed under the service box inspection contract, stating that Island Technology performed approximately 80,000 inspections between 2008 and 2009, and as such this request is burdensome, costly, overbearing, and irrelevant [Island Technology March 8, 2018 Response (ex. B to the Gerard aff.)].

On June 20, 2017, plaintiff sent Con Ed a notice for discovery and inspection, demanding the following items: (1) records regarding the installation of the electrical service running from the service box to the home, (2) records regarding the installation of the main feeders leading to the service box, and (3) records regarding the installation of the gas service that the fire marshal found contributed to the fire [June 20, 2017 Notice for Discovery and Inspection (ex. 13 to the Penson aff.)]. By orders dated June 28, 2017, November 1, 2017, and January 17, 2018, the court directed Con Ed to respond to the demands [Court Orders (ex. 11 to the Penson aff.)].

On November 27, 2017, plaintiff sent defendants a notice for discovery and inspection, demanding the following items: (1) Island Technology's daily and/or weekly reports, (2) written or videographic training materials used to train Island Technology employees to conduct inspections and repairs of service boxes, including how to perform a set up, inspect a box, make repairs, and complete the required paperwork, (3) records regarding the number of service boxes each crew completed per day, (4) records regarding a flashover inside a service box during an

Island Technology inspection, and any corrective action taken, (5) records regarding the use of a hot stick during inspections, (6) training manuals for tier 1 repairs inside service boxes, (7) any documents, records, memoranda, meeting minutes, or correspondence regarding concerns that Island Technology crews were performing a higher than expected number of inspections, and (8) documents regarding the quality of service box inspections by Island Technology [November 27, 2017 Notice for Discovery and Inspection (ex. 14 to the Penson aff.)]. By status conference order dated January 17, 2018, the court directed defendants to respond to this demand within 30 days [Court Orders (ex. 11 to the Penson aff.)]. Island Technology responded to the demands on March 9, 2018, stating that it is not in possession of any of the requested documents [Island Technology March 9, 2018 Response (ex. D to the Gerard aff.)].

Island Technology asserts that it does not have the documents responsive to most of the demands made by plaintiff, and that many if not all of the records demanded are or were in the possession of Con Ed. It asserts that service box inspection reports were sent to Con Ed during the pendency of the contract and are no longer in its possession. Con Ed asserts that the records related to Island Technology's inspection of the service boxes and the training materials used in 2008 can no longer be located. Con Ed further asserts that the records related to the installation of electrical and gas services leading to or in the area of the service box also can no longer be located, as electrical services were installed in 1961 and gas services were installed in 1983. Only database printouts confirming the year of the respective service installations could be produced.

## DISCUSSION

### *Motion to Strike*

CPLR § 3126 (Penalties for refusal to comply with order or to disclose) states, in pertinent part:

“If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wil[l]fully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

...

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

“[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order or request is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith.” *McGilvery v. New York City Transit Authority*, 213 A.D.2d 322, 324 (1st Dep't 1995).

While the court recognizes that there is certain discovery outstanding, since defendants have responded to the various notices for discovery and inspection and there is no evidence demonstrating that the non-disclosure was willful, contumacious or due to bad faith, the court denies plaintiff's motion for an order striking defendants' answer or precluding them from presenting any testimony on the issue of liability at trial, or, striking defendants' answer or precluding them from presenting any testimony on the issue of liability at trial if they do not provide discovery responses by a date certain.

*Cross-Motions for Protective Orders*

Island Technology cross-moves for an order granting a protective order against plaintiff's Notice for Discovery and Inspection dated May 5, 2017, demand number 7. Con Ed also cross-moves for an order granting a protective order against plaintiff's Notice for Discovery dated November 27, 2017, demand numbers 1, 3, 8, and 9.

While the court acknowledges that plaintiff's original request for defendants' inspection and billing records as they relate to the approximately 80,000 service box inspections performed under Island Technology's contract with Con Ed is overbroad, some of this information is relevant to plaintiff's claim, given that Lavonia Scaggs, the project manager for the Con Ed service box inspection contract, testified that Island Technology required its crews to perform an unreasonably high number of inspections, which compromised the quality of inspections. Thus, Island Technology and Con Ed's respective cross-motions for protective orders against plaintiff's various demands are denied.

*Outstanding Discovery*

There is certain discovery that remains outstanding.

In response to a demand by plaintiff for investigative reports of the accident, Con Ed replied that there were "none prepared in the ordinary course of business," suggesting that certain investigative reports may have been deemed privileged. Plaintiff then demanded a privilege log relating to any investigative reports it claimed were privileged. Therefore, if Con Ed deems any investigative reports relating to the accident to be privileged, it shall provide a privilege log related to those reports. If Con Ed does not deem the investigative reports relating to the accident to be privileged, it shall furnish those reports.

Given that Ms. Scaggs testified that Island Technology required its crews to perform an unreasonably high number of inspections, which compromised the quality of inspections, Con Ed and Island Technology shall furnish the daily and/or weekly reports regarding service box inspections for the period from August 1, 2008 through November 19, 2008, as well as any records indicating how many service boxes its crews inspected each day for the period from August 1, 2008 through November 19, 2008, to the extent not already provided. If either Con Ed or Island Technology is unable to produce the above inspection reports, each shall provide an affidavit by a person with knowledge of the search to state that a good-faith search was made for the records, describe what kind of search was made, what records still exist, and what records do not exist. “An affidavit regarding the unavailability of documents that are the subject of a discovery order must document a thorough search conducted in good faith. It should include details such as ‘where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found.’” *Henderson-Jones v. City of New York*, 87 A.D.3d 498, 505 (1st Dep’t 2011), quoting *Jackson v. City of New York*, 185 A.D.2d 768, 770 (1st Dep’t 1992); *see also Vazquez v. Lambert Houses Redevelopment Co.*, 110 A.D.3d 450, 451-452 (1st Dep’t 2013).

Defendants shall provide all aforementioned outstanding discovery and/or affidavits on or before July 19, 2018.

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

**ORDERED**, that plaintiff Donal Connaughton’s motion for an order, pursuant to CPLR § 3126, striking the answer of defendants Consolidated Edison Company of New York, Inc.,

Consolidated Edison, Inc., and Island Technology, Inc., or, in the alternative, precluding them from presenting any testimony on the issue of liability at trial is denied; and it is further

**ORDERED**, that plaintiff's motion for an order, pursuant to CPLR § 3126, striking the answer of defendants or precluding them from presenting any testimony on the issue of liability at trial if they do not provide discovery responses by a date certain is denied; and it is further

**ORDERED**, that defendant Island Technology, Inc.'s cross-motion for an order granting a protective order against plaintiff's Notice for Discovery and Inspection dated May 5, 2017, demand number 7 is denied; and it is further

**ORDERED**, that defendant Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc.'s cross-motion for an order granting a protective order against plaintiff's Notice for Discovery dated November 27, 2017, demand numbers 1, 3, 8, and 9 is denied; and it is further

**ORDERED**, that if defendant Consolidated Edison Company of New York, Inc. and Consolidated Edison, Inc. deems any investigative reports relating to the accident to be privileged, it shall provide a privilege log related to those reports; if Con Ed does not deem the investigative reports relating to the accident to be privileged, it shall furnish those reports; and it is further

**ORDERED**, that defendants shall furnish the daily and/or weekly reports regarding service box inspections for the period from August 1, 2008 through November 19, 2008, as well as any records indicating how many service boxes its crews were inspecting each day for the period from August 1, 2008 through November 19, 2008, as set forth above; if either Con Ed or Island Technology is unable to produce the above inspection reports, each shall provide an affidavit by a person with knowledge of the search to state that a good-faith search was made for

the records, describe what kind of search was made, what records still exist, and what records do not exist; and it is further

**ORDERED**, that defendants shall provide all aforementioned discovery and/or affidavits on or before July 19, 2018.

This constitutes and decision and order of the court.

June 21, 2018  
DATE

Kelly O'Neill Levy  
KELLY O'NEILL LEVY, J.S.C.

**KELLY O'NEILL LEVY  
JSC**

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: