SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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INDEX NO. 161867/2014

VERIZON NEW YORK, INC.,

MOTION DATE 10/31/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

NATIONAL GRID USA SERVICE COMPANY, NATIONAL GRID NY, NATIONAL GRID NEW YORK

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for JUDGMENT - SUMMARY.

The plaintiff, Verizon New York, Inc., which owns, operates, and maintains telecommunications facilities and cables, alleges, *inter alia*, that, in the course of installing a new gas pipe on Old South Oyster Bay Road in Nassau County, on January 9, 2012, the defendants National Grid USA Service Company, National Grid NY, and National Grid New York (collectively, National Grid), negligently drilled through the plaintiff's duct bank, cables, and conduit, thus causing $559,389.15 in property damage. The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the issue of liability as against National Grid. National Grid opposes the motion. The motion is granted in part.

It is undisputed that on December 14, 2011, National Grid submitted a locate request at Old South Oyster Bay Road through what is commonly referred to as the one-call notification system. In response to that request, the plaintiff avers that it marked out its facilities using orange paint, and that its mark-out was completed by December 23, 2011. This is reflected in the information included on the One Call ticket. However, the defendants' witness, Steven Politoski, who was regularly at the job site, testified that there were no orange markings at the site indicating the plaintiff's facilities, and that there were no mark-outs in the area identified by the locate requests prior to the defendants' drilling. Politoski further testified that employees of National Grid walked the path of the bore drill responsible for the damage in this case and tested for underground facilities. A test hole revealed the presence of the plaintiff's underground facilities, but National Grid avers that this test hole was not at the location of the incident. National Grid states that it began work on December 29, 2011, and that it drilled through the plaintiff's telecommunications equipment on January 8, 2012. It submits test hole

data work records dated December 29, 2011, in support of its assertion as to the commencement of excavation.

"'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). If the movant makes that showing, 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). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ. Med.Ctr., supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970); see Rotuba Extruders v Ceppos, 46 NY2d 223 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224 (1st Dept. 2002).

The relevant statutes and regulations, collectively known as the "Dig-Safely" Law (see article 36 of the General Business Law ["Underground Facilities"] and 16 NYCRR part 753 ["Protection of Underground Facilites"]), establish and set the guidelines for the "one-call" notification system, and define the duties of both the operator (plaintiff) and the excavator (defendants).

As to duties of the excavator, GBL § 764(1) provides in part that "[n]o excavator shall commence or engage in any excavation or demolition unless and until timely notice is served of the location and date of the proposed excavation or demolition as provided in this article to operators who maintain underground facilities in the area in which the excavation or demolition is to take place." It further provides that "[t]he provision of such notice to a one-call notification system is deemed to be compliance with this section; and notice to the one-call notification center is notice to each member." Subsection (2) of GBL 764 provides that "[p]rior to any excavation or demolition, the excavator shall verify the precise location of the underground facilities..." and subsection (3) provides that [a]n excavator may proceed with such work if he has received notice from each operator notified by the one-call system that it has no underground facility in or within fifteen feet of the proposed work area or that the operator marked any underground facility located in or within fifteen feet of the proposed work area."

As to duties of the operator, GBL § 763(2) requires an operator, upon receipt of the notification, "either directly from the excavator or from the one-call notification system" to "advise

the excavator in a timely manner of those of its underground facilities that will be affected by the proposed excavation or demolition." Subsection (3) of that statute further provides that "[t]he operator shall accurately and with due care designate within a reasonable period of time the location of its underground facilities in the manner and during the time period set forth in the rules and regulations adopted by the public service commission..."

As an excavator, National Grid had a duty to avoid damage to the plaintiff's underground cable. See Level 3 Commc'ns, LLC v Petrillo Contracting, Inc., 73 A.D.3d 865 (2nd Dept. 2010); Watral & Sons, Inc. v OC Riverhead 58, LLC, 34 AD3d 560 (2nd Dept. 2006), revd on other grounds 10 NY3d 180 (2008); Suffolk County Water Auth. v J.D. Posillico, Inc., 191 AD2d 422 [2nd Dept. 1993]. The plaintiff's evidence, consisting of the One Call ticket, a witness statement, a property damage report, and the affidavit of Politoski, purports to establish that National Grid breached this duty when it failed to comply with the obligations imposed upon excavators pursuant to General Business Law, Article 36, and 16 NYCRR Ch. 7, Subch. F., Part 753, including the duty to verify the precise location, type, size, direction of run, and depth of any underground facilities in the area (see General Business Law § 764 [2]; 16 NYCRR 753-3.6).

The plaintiff fails to eliminate triable issues of fact as to whether the plaintiff properly marked out where its equipment was located, or whether National Grid commenced excavation within the two-to-ten work day period prescribed by the statute (16 NYCRR 753-3.1[a][2]). As to whether National Grid failed to comply with its duty to verify the precise location of underground facilities in the area and avoid damaging those facilities, Politoski testified that National Grid proceeded with its excavation work in spite of his assertion that none of the plaintiff's facilities were marked as described in the One Call ticket, and even after discovering through its own testing that unmarked underground facilities in the proximity of the incident location existed. National Grid asserts that these facts do not indicate that it breached its obligations as an excavator because the incident location was "in a different area" from test holes locating unmarked facilities. This argument is belied by a map submitted by National Grid revealing that the area where National Grid was performing work is a spur road that appears to be of very limited length. Moreover, Politoski testified that after National Grid was put on notice that the plaintiff's unmarked facilities "running in every direction" were located in the proximity of the incident location, it proceeded to drill without requesting any further mark-outs.

Since plaintiffs are not required to establish the absence of their own comparative negligence in order to obtain partial summary judgment in a comparative negligence case (Rodriguez v City of New York, 31 NY3d 312 [2018]), it is irrelevant for the purposes of this motion that the plaintiff has not shown that it is free from comparative fault in connection with its disputed mark-outs responsive to the defendants' locate request.

On this evidence, the plaintiff established its prima facie entitlement to judgment as a matter of law on the issue of liability with respect to the negligence cause of action against the defendants by demonstrating that the damage to its personal property was proximately caused by the negligence of the defendants. The plaintiff presents no argument as to its cause of

action sounding in trespass. Accordingly, the court declines to address the issue of the plaintiff's entitlement to summary judgment on that claim.

Accordingly, it is

ORDERED that, the plaintiff's motion for partial summary judgment on the issue of liability as against all defendants is granted as to the plaintiff's first cause of action sounding in negligence, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/8/2019
DATE

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE