

<b>Lukens v Consolidated Edison Co. of N.Y.</b>
2020 NY Slip Op 33907(U)
November 27, 2020
Supreme Court, New York County
Docket Number: 155397/2014
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART IAS MOTION 55EFM

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DANIEL LUKENS,	<b>INDEX NO.</b>	<u>155397/2014</u>
Plaintiff,		02/18/2020, 06/17/2020,
- v -	<b>MOTION DATE</b>	<u>08/11/2020</u>
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TRIUMPH CONSTRUCTION CORP., ALL PHASE PLBC AND HTC, INC., TRIBORO WATER MAIN AND SEWER CORP.	<b>MOTION SEQ. NO.</b>	<u>004 005 006</u>
Defendants	<b>DECISION + ORDER ON MOTION</b>	

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**Hon. James E. D'Auguste**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 96, 97, 98, 99, 100, 101, 102, 103, 137, 138

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154

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

Upon the foregoing documents, the motions and cross-motion are decided as follows:

**BACKGROUND**

Plaintiff commenced this action, pursuant to a summons and complaint filed on June 2, 2014, seeking damages for personal injury as a result of a trip and fall that took place on West 125<sup>th</sup> Street on June 19, 2011.

Issue has been joined as to the three of the named defendants, and discovery has taken place, but plaintiff has not yet filed a Note of Issue and Certificate of Readiness.

### **PENDING MOTIONS**

On March 20, 2020, Triboro Water Main and Sewer Corp (TWM) moved for summary judgment and dismissal of plaintiff's claims and defendants' cross-claims (Mot. Seq. No. 004).

On July 14, 2020, Triumph Construction Corp. s/h/a Triumph Construction Corp. (Triumph) moved for summary judgment and dismissal of the complaint and cross-claims (Mot. Seq. No. 005).

On August 17, 2020, plaintiff cross-moved for an order compelling discovery.

On August 28, 2020, Consolidated Edison Company of New York (Con Ed) moved for summary judgment and dismissal of the complaint (Mot. Seq. No. 006).

The motions and cross-motion are consolidated herein for determination.

### **ALLEGED FACTS**

Plaintiff was employed as a police officer with the New York City Police Department (NYPD) on the alleged date of loss. Plaintiff had been employed with NYPD since July 2009. June 19, 2011 was Father's Day and plaintiff worked a twelve hour shift. Plaintiff was in a police van, when a call came in over the radio that there was a man with a gun at the corner of West 125<sup>th</sup> Street and St. Nicholas Avenue. The van was driven to the location, heading north on St. Nicholas Avenue, and then making a right turn on West 125<sup>th</sup> Street. The van came to a stop on 125<sup>th</sup> Street, in front of a Popeye's Chicken Restaurant, located at 321 West 125<sup>th</sup> Street, approximately two or three car lengths from the northeast corner of West 125<sup>th</sup> Street and St. Nicholas Avenue.

Plaintiff exited the van, moved quickly around the rear of the van, and the stepped into a hole in the roadway and fell. Plaintiff did not observe any construction in the area at the time of the accident. The hole was between one and two feet wide, and four or five inches deep.

## 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 demonstrate the absence of any material issues of fact.” *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985).

“Once this showing has been made... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Zuckerman v. City of New York* 49 N.Y.2d 557, 562 (1980).

In order to be liability for a dangerous condition on property a party must have occupancy, ownership, control or special use of the premises. *Gilbert Props. v City of New York*, 33 AD2d 175, 178 (1st Dept. 1969). If one or more of said elements are established, the party has a duty of care. In the absence of any of said elements a party will not be legally liable for injury caused by any defective or dangerous condition on the property. *Balsam v. Delma Eng'g Corp.*, 139 A.D.2d 292, 297 (1st Dept. 1988).

### ***TWM's Motion for Summary Judgment***

In its motion, TWM relies upon the deposition testimony of its President Michael Passalacqua (MP). MP has been President of TWM since 2008. TWM is a plumbing company that does residential and commercial work in the City of New York. MP testified that TWM's business records showed that TWM had not done work on St. Nicholas Avenue, but had done a job on the corner of 8<sup>th</sup> Avenue and West 125<sup>th</sup> Street. The project entailed disconnecting water and sewer service, and then excavating the roadway in front of 301 to 303 West 125<sup>th</sup> Street. The opening was limited to 50 or 60 feet.

Based on the foregoing, TWM asserts it did not maintain ownership or control over the area where plaintiff fell, and it owed plaintiff no duty of care.

In opposition, plaintiff alleges the motion must be denied as premature as discovery is still outstanding. Plaintiff also submits the affidavit of its investigator Christina Fama-Keane, along with permits. The permits are for work in front of 301 to 303 West 125<sup>th</sup> Street, but in describing the location, the permits define the area of work to be from 8<sup>th</sup> avenue to St. Nicholas Avenue. Plaintiff argues this is sufficient to create a question of fact.

The Court does not find the motion is premature or that there is outstanding discovery from TWM. Plaintiff relies on a January 22, 2020 Court order which provided that defendants were to respond to plaintiff's notice for discovery and inspection within 30 days "...to the extent not provided or send a courtesy copy of responses previously served." TWM had served its responses prior to said date and copies are annexed to the motion papers.

Furthermore, the work permits provided do not create a question of fact as whether the work done by TWM in front of 301 to 303 West 125<sup>th</sup> Street was in "close proximity" to the location of the accident. It is undisputed that the work done by TWM was nearly one block away from the site of the accident, such a distance has not been found to be in close proximity for the purpose of establishing liability. *See e.g., Quigley v. Nederlander Org., Inc.*, 165 A.D.3d 607, 608 (1st Dept. 2018) (holding defendant was entitled summary judgment dismissal in personal injury action in which "plaintiff tripped and fell on the street, nearly a block away from defendant [property]").

Based on the foregoing, the Court finds TWM established its *prima facie* entitlement to judgment as a matter of law by submitting evidence that it did not perform work in close proximity to the accident site and plaintiff failed to raise a triable issue of fact in opposition. *Burton v City of*

*New York*, 153 AD3d 487 (2nd Dept. 2017). As such, the complaint as against TWM, and all cross-claims as against TWM, are dismissed.

***Triumph's Motion for Summary Judgment and Plaintiff's Cross-Motion to Compel***

Triumph is a subcontractor for Con Ed, but also does contracting for other companies. Triumph moves for summary judgment based the testimony of Chris Colon and Con Ed's witness. Chris Colon has been employed by Triumph since 2012, first as an Administrative Assistant and then as a Project Manager. Mr. Colon performed a search of Triumph's records from January 2011 forward, and stated that there were no records found to indicate Triumph performed any work at the location of the accident.


The Court does not find the moving papers of Triumph to be sufficient to establish a *prima facie* case for summary judgment. Mr. Colon only did a limited scope search of Triumph's records for a period of less than one year, and only on matters related to Con Ed, not of the relevant address in general. Mr. Colon acknowledged he had no access to any of Triumph's files that did not relate to Con Ed. Mr. Colon was not employed by Triumph at the time of the accident and had no knowledge about what work might have been performed at the site of the accident, other than his limited search. Accordingly, Triumph's motion for summary judgment is denied.

Plaintiff's cross-motion is granted to the extent of directing Triumph to produce, within 60 days, any contracts, records, including handwritten or computerized permits, sub-contracts, progress notes, and photographs, for work performed for the two years prior to June 19, 2011 on the city block where the accident took place. Triumph is further directed to produce its field super John McCann for a deposition within ninety days.

**Con Ed's Motion for Summary Judgment**

It is conceded that Con Edison did work in January 2011 in close proximity of the location where plaintiff fell. It is possible that a jury could reasonably infer the defect in the roadway was caused by this work. In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party. *Valentin v Paras*, 119 AD3d 854 (2nd Dept. 2014). Where a defendant performed excavation work in close proximity to the area of the accident, there are questions of fact as to whether it created the defect in the course of its work *Rodgers v City of New York*, 79 Ad3d 1003, 1003-1004 (2nd Dept. 2010). Based on the foregoing, Con Ed's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

<u>11/27/2020</u> DATE	 _____ JAMES EDWARD D'AUGUSTE, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE