

Barilla v Verizon N.Y., Inc.

2020 NY Slip Op 34970(U)

April 30, 2020

Supreme Court, Westchester County

Docket Number: Index No. 66900/2016

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

MARIE BARILLA,

Plaintiff,

Index No. 66900/2016

-against-

Seq. Nos. 3, 4 & 5

VERIZON NEW YORK, INC., CABLEVISION SYSTEMS CORPORATION, CONSOLIDATED EDISON, INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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Hubert, J.S.C.

The following papers were read on motion sequence number 3 by Defendant Verizon New York, Inc. (“Verizon”) for an order pursuant to CPLR § 3212 granting summary judgment (a) dismissing Plaintiff’s claims against Verizon because it did not own, maintain or control any of the utility poles involved in Plaintiff’s accident; (b) dismissing Defendants Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc.’s (collectively, “Con Edison”) cross-claims against Verizon because Con Edison, not Verizon, owned the utility poles involved in Plaintiff’s accident and was responsible for inspecting and maintaining the utility poles; (c) striking Con Edison’s pleadings and/or dismissing Con Edison’s cross-claims as against Verizon on the basis of Con Edison’s evidentiary spoliation for failing to retain any and

all of the utility poles involved in Plaintiff's accident; and (d) dismissing all claims against Verizon that are based upon spoliated evidence:

Notice of Motion - Affirmation in Support (Luccarelli) - Affidavit (Simmons) - Affidavit (Schubbe)- Exhibits A-O
Affirmation in Opposition (Eagen-Sampat)- Supplemental Affidavit (Bingel) with Exhibits 1-5 - Affidavit (Oehlmann) with Exhibits 1-4 - Exhibit A
Affirmation in Opposition (Menna)-Affirmation of Service
Affirmation in Reply (Luccarelli)- Affidavit (Simmons)- Affidavit (Schubbe); Affidavit of Service
NYSCEF file

The following papers were read on motion sequence number 4 by Plaintiff for an order pursuant to CPLR § 3212 (1) granting summary judgment in favor of Plaintiff on the issue of liability against Defendant Verizon; (2) granting summary judgment on the issue of liability against Con Edison; (3) pursuant to CPLR § 3211 (b) striking Defendant Verizon's First, Second, Seventh, Eighth and Ninth Affirmative Defenses alleging culpable conduct, contributory negligence, assumption of the risk, doctrine of Laches/Estoppel/Release, serious injury threshold under Section 5102 of the Insurance Law, and failure to utilize a seatbelt; (4) pursuant to CPLR § 3211(b) striking Con Edison's First Affirmative Defense alleging culpable conduct/contributory negligence; and (5) setting this matter down for a unified trial wherein Defendants would try liability for apportionment purposes as the technical evidence introduced at a liability trial would be intertwined with the forces of impact to Plaintiff's vehicle and her injuries:

Notice of Motion- Affirmation in Support (Menna)-Exhibits A-R - Affirmation of Service
Affirmation in Opposition (Eagen-Sampat)- Supplemental Affidavit (Bingel) with Exhibits 1-5 - Affidavit (Oehlmann) with Exhibits 1-4
Affirmation in Opposition (Luccarelli)-Affidavit (Simmons) -Affidavit (Schubbe)- Exhibits A-B- Corrected Affidavit (Simmons)
Affirmations in Reply (Menna)- Exhibit A-Affirmations of Service

NYSCEF File

The following papers were read on motion sequence number 5 by Defendants Con Edison for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint against it; and dismissing the cross-claims asserted by Defendant Verizon against Con Edison:

Notice of Motion- Affirmation in Support (Eagan-Sampat)- Affidavit (Bingel) with Exhibits 1-5 - Affidavit (Oehlmann) with Exhibits 1-4 - Affidavit (Roberts) with Exhibits A-K
Affidavit/Corrected Affidavits (Simmons)- Affidavit (Schubbe) with Exhibits A-E
Affirmation in Opposition (Menna) - Affirmation of Service
Affirmation in Opposition (Luccarelli); Affidavit (Simmons) -Affidavit (Schubbe)
Exhibit A - Corrected Affidavit (Simmons)
Affirmation in Reply (Eagan-Sampat)
NYSCEF File

Upon the foregoing papers, these motions are decided as follows:

Relevant Facts and Procedural History

Plaintiff commenced this action on November 10, 2016. Plaintiff alleges serious personal injuries arising out of a motor vehicle accident that occurred on April 2, 2015, in the vicinity of Route 9A between Lindsey Avenue and Craft Lane in Buchanan, New York. Plaintiff alleges that she was driving her vehicle to work on a clear and dry day when two wooden utility poles with overhead electrical equipment suddenly collapsed and crashed onto the roadway. Plaintiff claims that one pole struck the front of her vehicle, and she was forced to drive over a section of that pole and the electrical equipment that landed on the roadway. A second pole crashed behind her vehicle. Plaintiff claims she was thrown about inside her vehicle until she came to a stop on a grassy area on the side of the road.

Defendants Con Edison filed an Answer with cross-claims on December 15, 2016.

Defendant Verizon filed its Answer with cross-claims on January 19, 2017. A partial Stipulation of Discontinuance was executed by all parties on or about March 7, 2019, releasing Cablevision Systems Corporation from this case.

Contentions of the Parties

With respect to Plaintiff's motion for summary judgment, Plaintiff states, *inter alia*, that the utility poles were owned by Con Edison and housed overhead electrical facilities that belonged to Con Edison, Verizon and Cablevision. Additionally, Plaintiff submits that Verizon installed and attached in-ground anchors and guy-wires to pole #15 to support the weight of the overhead facilities. Plaintiff submits that these anchors ultimately failed and contributed to the snapping and collapse of the poles. Plaintiff also submits that the weather was clear and dry on the date of the accident, and there were no significant storms or inclement weather events in the thirty days preceding the accident. As such, Plaintiff asserts that Defendants have no basis to argue that any extreme weather forces caused this accident.

Plaintiff proffers documentation from Con Edison which indicates that pole #13 was installed in 1953, and pole #15 was installed in 1967. Based upon Kevin Oelmann, Con Edison's witness, Plaintiff submits that the subject poles had a life span of approximately forty-four years. Additionally, Plaintiff submits that Con Edison tried to extend the lifespan of pole #13 by installing a C-Truss in or about 2005. Plaintiff further submits that the records of Con Edison demonstrate that pole #15 was a 45-foot high Class 2 Southern Pine with 42 inches of original circumference, and pole #13 was a 40-foot Class 3 Southern Pine pole with 38 inches of original circumference. Plaintiff additionally submits that the circumference of each of the poles

was determined to have been significantly reduced at the time a 2005 inspection was last completed by Con Edison. Specifically, an October 21, 2005 inspection report stated that pole #15 measured 38 inches in circumference and the circumference of pole #13 measured 32 inches. Plaintiff submits that a 45-foot high Class 2 pole, like pole #15, should maintain a minimum circumference of 40.5 inches pursuant to the American National Standard Institute (“ANSI”). Similarly, a 40-foot Class 3 pole, such as pole #13, should maintain a minimum circumference of 36 inches. As such, Plaintiff avers that the poles did not meet national industry standards dating back to October 21, 2005.

Plaintiff further argues that Con Edison did not replace pole #13, which did not meet Con Edison’s own standards, as set forth in specification No.EO-10345. That specification states that a pole is considered to be unfit for service if its remaining sound wood line circumference is about 88 percent or less of its original value. Pole #13 did not meet Con Edison’s standard on pole circumference, and instead of replacing the pole, Con Edison installed a C-Truss, which Plaintiff claims was a cost-saving approach.

Plaintiff states that at the time of her accident, Con Edison’s protocol was to inspect its overhead electrical equipment once every five years, and its wooden utility poles for rot and decay once every twelve years. Plaintiff further submits that Verizon had no protocol in place to conduct periodic inspections of its electrical facilities, guy-wires and anchors. Furthermore, the poles had last been inspected by Con Edison for rot and decay on October 21, 2005, approximately ten years prior to the subject accident. At the time of this inspection, no mention is made that the guy-wires or anchors were inspected.

Plaintiff contends that the poles, anchors and guy-wires should have been inspected in 2009-2010 and again in 2014-2015, according to standards set forth by the New York State Public Service Commission (“PSC”) which were adopted statewide in December 2004. Plaintiff further argues that the circumference of each pole is unknown as of the date of the accident, since measurements were not taken after the accident, but submits that photographs taken at the scene show that the poles were in an extreme state of decay, deterioration and rot. Plaintiff argues that both poles snapped and fell onto the roadway due to upon multiple hazardous conditions, including pole decay and rot, overhead equipment deterioration, overloading of the poles, deterioration and rot of the anchors and guy-wires, lack of proper inspections, lack of maintenance and several violations of national and statewide regulations.

Plaintiff notes that the poles did not tip over and collapse, but instead snapped in different sections due to the aforementioned hazardous conditions. Plaintiff contends that Defendants are liable in that they had, or should have had, advance notice of the multiple hazardous conditions, and failed to act to remedy those conditions. Plaintiff argues that Defendants are also liable under the doctrine of *res ipsa loquitur* inasmuch as the poles and overhead equipment fell on her car on a sunny day--an event that would not have happened absent negligence. Additionally, the utility poles and overhead equipment were in the exclusive control of Defendants, and Plaintiff took no actions that could have contributed to the collapse of the utility poles and overhead equipment. Plaintiff avers that since she is free from any negligence, her summary judgment must be granted under *Rodriguez v. City of New York*, 31 NY3d 312 [2018].

Plaintiff also moves pursuant to 3211(b) to dismiss Verizon’s First, Second, Seventh, Eighth and Ninth Affirmative Defenses alleging culpable conduct, contributory negligence,

assumption of the risk, the doctrines of Laches/Estoppel/Release, serious injury threshold under Section 5102 of the Insurance Law, and failure to utilize a seatbelt, and seeks dismissal of Con Edison's affirmative defense alleging culpable conduct/contributory negligence.

Finally, Plaintiff contends that there should be a unified trial wherein Defendants would be required to try the issue of apportionment first. Plaintiff asserts that her injuries bear directly on the issue of the apportionment of liability, and a jury should consider the force of impact between the utility pole and Plaintiff's vehicle when determining damages. Plaintiff submits that Defendants can present information concerning the weight and load of the subject utility poles and overhead equipment, which Plaintiff could use to demonstrate to a jury the amount of force that struck Plaintiff's vehicle and the location of impact.

Defendants Con Edison oppose Plaintiff's motion for summary judgment on the issue of liability and for a unified trial on the grounds that Plaintiff has failed to meet her burden of proof. Con Edison argues that the anchor systems that led to the failure of pole #15 were owned by Verizon. Verizon installed the anchor systems, which were attached to three guy-wires used to reinforce pole #15, to support all the various telecom attachments that Verizon had placed on the pole's midsection. Con Edison argues that the anchor systems, each comprised of an anchor rod and an anchor blade, became corroded underground, which caused the anchor blades to detach from the anchor rods. This resulted in the anchor rods pulling out of the ground and becoming embedded in the base of pole #15. As a result, the guy-wires no longer reinforced the pole's mid-section, and the pole fractured in two places where Verizon's attachments were located.

Con Edison states that as a result, significant force was placed on poles #12 and #13, which led to their failure. Con Edison also argues that Plaintiff has failed to show that it had

notice or should have had notice of Verizon's defective anchor systems. Con Edison argues that it inspected the poles in a timely manner and that no defects were noted to pole #15 or its guy-wires. Con Edison therefore argues that Plaintiff cannot, and has not, met the threshold requirement of notice. Additionally, Con Edison avers that inspecting Verizon's guy-wires would not have revealed that the underground anchor systems were corroded. Therefore, there was no visible and apparent defect of which Con Edison had or should have had notice, and Plaintiff has not shown that Con Edison created the defective anchor condition.

Additionally, Con Edison argues that the doctrine of *res ipsa loquitur* does not apply because Plaintiff cannot meet the first or second criteria of that doctrine. Con Edison argues that it was Verizon's underground anchor systems that failed, which does not speak to negligence on the part of Con Edison. Con Edison also submits that Plaintiff cannot prove exclusive control, as pole #15 and its guy-wires were located in an area accessible to the public, and the anchor systems which, according to Con Edison, were installed and maintained solely by Verizon, were located underground. Con Edison objects to the branch of Plaintiff's motion which seeks a unified trial, arguing that there is nothing distinct about the manner in which Plaintiff was injured that would assist a jury in determining liability. To the contrary, Con Edison states that a unified trial would prejudice Defendants because the manner in which Plaintiff was injured could evoke sympathy from a jury. Con Edison also argues that Plaintiff's motion must be denied because she has not established that Con Edison had notice of Verizon's corroded anchor systems that caused pole #15 to fail.

Verizon does not oppose those portions of Plaintiff's motion which seek summary judgment against Con Edison. With respect to Plaintiff's motion as it relates to Verizon, Verizon

asserts that there is no evidence in the record that Verizon installed the anchor rods or was responsible for their maintenance. Con Edison's personnel discarded the anchor rods and damaged utility poles and replaced them with new utility poles and anchor rods after the accident. Without that physical evidence, Verizon argues that neither Plaintiff nor Con Edison can prove this theory of liability, which is wholly speculative. Additionally, Verizon's experts opine that pole #13, not pole #15, was the first pole to fail, and caused poles #12 and #15 to fail.

Verizon denies that it installed the anchor rods in question, but argues that even assuming it was responsible for their installation, an inspection would not have revealed the condition of the parts that were buried underground. To perform such an inspection, the underground portions would have had to be dug up and physically removed. Verizon also submits that since Plaintiff testified she drove over the utility pole before swerving off the road, determining which utility pole Plaintiff struck, and the order in which the poles fell, are critical issues in determining liability.

Verizon also argues that Plaintiff has failed to establish that it had prior notice of any defect, or a *res ipsa loquitur* cause of action, in that Verizon did not have exclusive control over the area in question. Verizon also argues that Plaintiff's motion to dismiss its Affirmative Defenses should be denied because there is a question of fact as to Plaintiff's culpable conduct. Specifically, it states that post-accident photos of the debris taken by Con Edison contradict Plaintiff's testimony as to how the accident happened. Verizon states that the fact-finder could reasonably determine that Plaintiff had a longer amount of time to react to the falling poles and thereby determine that she was comparatively at fault.

Defendant Verizon moves for summary judgment to dismiss Plaintiff's claims against it on the grounds that Verizon did not own, maintain or control any of the utility poles involved in Plaintiff's accident. Verizon argues that Con Edison's cross-claims against Verizon should also be dismissed because Con Edison owned the utility poles at issue and was responsible for inspecting and maintaining them. Verizon also moves to strike Con Edison's pleadings and/or moves to dismiss Con Edison's cross-claims against Verizon based upon Con Edison's spoliation of evidence, because it did not keep the utility poles involved in Plaintiff's accident. Verizon further moves to dismiss all claims against it which are based upon spoliated evidence.

Verizon states that Con Edison has conceded ownership of both utility poles that fell onto the roadway. Verizon also submits that Con Edison inspected the poles on a periodic basis. Although Verizon was allowed to attach its cables to Con Edison's poles pursuant to a Joint Use Agreement, Verizon contends that Con Edison has conceded that it had sole responsibility for maintaining the utility poles pursuant to that Agreement. In addition, Verizon proffers photographs taken subsequent to the accident that depict visible interior deterioration and rot at the failure point where each pole broke. Verizon further submits that Con Edison's inspection ten years prior to the accident revealed a level decay to one of the poles which would warrant repair. Verizon contends that Con Edison's cross-claims against it are based upon pure speculation as they are based on a theory that the poles collapsed because two anchor rods were defective and failed to stabilize the poles. Verizon avers that Con Edison has not submitted any evidence to support this theory or that Verizon actually installed the anchors or was responsible for maintaining them. Additionally, Verizon submits that since the anchor rods and poles were

disposed of by Con Edison shortly after the accident, before the parties had an opportunity to physically inspect them, there is no way to disprove Con Edison's theory of liability.

Furthermore, Verizon argues that based upon Con Edison's spoliation of the physical evidence herein, its pleadings should be stricken, its cross-claims should be dismissed against Verizon, or at the very least, all parties should be precluded from referencing any spoliated evidence at trial. Verizon states that Con Edison's witness conceded at his deposition that Con Edison disposed of both utility poles and the two anchor rods that were supporting pole #15 after the accident. Verizon states that Con Edison had an opportunity to inspect the physical evidence, as reflected in its own internal correspondence and investigation, but Verizon has been severely prejudiced, and Con Edison's failure to maintain the physical evidence was willful.

Additionally, Verizon submits that Con Edison concedes that it cannot determine who the anchor rods belonged to from the photographs. Verizon argues that it is therefore entitled to relief based upon the common law standard of spoliation and CPLR § 3126.

Con Edison opposes Verizon's motion and affirmatively moves for summary judgment dismissing the complaint, as well as all cross-claims against it. Con Edison contends that three poles actually fell that morning. Con Edison owned all three poles, but all three poles were structurally compliant with the National Electrical Safety Code, and did not contribute to the fall. Instead, the three poles failed as a result of two of Verizon's anchor systems that support one of the poles. According to Con Edison, the anchor rods corroded and separated from the anchor blades that were used to secure the rods to the ground. Without the anchor systems in place, the pole could not withstand the wire tension from Verizon's telecom attachments. This caused the mid-section of the pole, which contained all of Verizon's telecom attachments, to break and pull

away from the top and bottom portions of the pole. Because of this extreme loading on the pole line, the other two poles were caused to fail.

Con Edison further argues that it did not have notice of any defect in the poles, and that there is no proof that any physical condition of the pole was a contributing factor. Instead, the failure of Verizon's corroded anchor systems caused the initial pole to fail, and therefore Verizon is not entitled to summary judgment. Because there was no pole defect and Con Edison had no actual or constructive notice of any defect, Plaintiff's complaint and all cross-claims by Verizon should be dismissed. Verizon opposes Con Edison's motion, arguing that its expert contradicts the theory of liability set forth by Con Edison's retained expert. Verizon states that it is undisputed that it is not possible to ascertain who owned or installed the anchor rods based on the photographs taken by Con Edison after the accident. Verizon's witness testified that there are no discernible markings or differences between anchor rods used by Verizon, as opposed to Con Edison. Additionally, Verizon argues that Defendants' experts dispute what caused Plaintiff's accident, and what role the anchor rods played in the accident, if any.

Plaintiff opposes the summary judgment motions of all Defendants, contending that she is the only party entitled to summary judgment. Plaintiff argues that she is an innocent driver and Defendants had exclusive control over the subject utility poles and equipment. Plaintiff further submits that her claims against Verizon should not be dismissed based upon any spoliation by Con Edison, as this would cause undue prejudice. Instead, an adverse inference charge at trial against Con Edison would be more appropriate.

Plaintiff also argues that Verizon should remain in the case as there is sufficient evidence that the failure of Verizon's anchor system contributed to the accident. As to Con Edison,

Plaintiff submits that any claim that its poles were structurally sound has been rebutted by photographs, documents, and Con Edison's own witness' testimony. Based upon Defendants' failure to adequately and properly inspect the poles, guy-wires and to timely remedy decay in the poles, Plaintiff avers that none of the Defendants are entitled to summary judgment.

Discussion

It is well-settled that summary judgment is an extreme and extraordinary form of relief that is only warranted when the admissible evidence adduced leaves no unresolved question of fact in the movant's favor. *See Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]. Nevertheless, "the court should not hesitate to give this remedy the full purpose for which it is intended." *See Wanger v. Zeh*, 45 Misc.2d 93, *aff'd* 26 AD2d 729 [3d Dept 1966]. "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." *See Alvarez v. Prospect Hospital, supra*. 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. *Id., citing Zuckerman v. City of New York*, 49 NY2d 557 [1980].

Here, the Court finds that none of the parties have made a *prima facie* showing that summary judgment in their favor is warranted, due to the many contested issues of fact. Even assuming, *arguendo*, that any of the parties have made such a showing, the Court finds that in opposition, the parties have all come forward to raise multiple issues of fact which would preclude the granting of summary judgment.

As to those branches of Plaintiff's motion seeking to dismiss Verizon's First, Second, Seventh, Eighth and Ninth Affirmative Defenses pursuant to 3211(b) which allege culpable conduct, contributory negligence, assumption of the risk, doctrine of Laches/Estoppel/Release, Section 5102 of the Insurance Law, and failure to utilize a seatbelt, Plaintiff submits that she was wearing a seatbelt, a fact that is not disputed herein. Additionally, she seeks to dismiss the Affirmative Defense based on the serious injury threshold under Section 5102 of the Insurance Law as inapplicable since the incident involved the utility poles, which are not a "covered person" under Insurance Law § 5104 (a). Plaintiff also seeks dismissal of Con Edison's Affirmative Defense alleging culpable conduct/contributory negligence.

On a motion to dismiss pursuant to CPLR § 3211 (b), a party can move for judgment to dismiss one or more affirmative defenses on the ground that a defense has no merit or is not stated. *See Family-Friendly Media Inc. v. Record Tel Network*, 74 AD3d 738 [2d Dept 2010]. On such a motion, the defendant is entitled to every reasonable benefit of its pleading. If there is a doubt as to whether a defense is available, based upon a liberal view of the pleading, it should not be dismissed. *See Family-Friendly Media Inc. v. Record Tel Network, supra*. Here, Defendants do not oppose Plaintiff's motion to dismiss these Affirmative Defenses. The remaining Affirmative Defenses will not be dismissed as Defendants are entitled to every possible favorable inference with respect thereto.

With respect to spoliation, the Court notes that under the common-law doctrine of spoliation, a party may be sanctioned by the striking of its pleading for the intentional destruction of evidence that deprives the other party from proving its claim or defense. While originally limited to a party's intentional destruction of evidence, or bad faith, spoliation has been enlarged

by the Courts to include a party's negligent destruction of evidence. *See Kirkland v. New York Housing Authority*, 236 AD2d 170 [1st Dept 1997]. Sanctions may be an appropriate remedy even where evidence has been destroyed before discovery orders have been issued, and where there has been no showing of bad faith. *See Squitieri v. City of New York*, 248 AD2d 201 [1st Dept 1998].

CPLR § 3101(a)(1) provides for full disclosure of all matter material and necessary in the prosecution or defense of an action. The term material and necessary in the statute is interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. *Matter of Kapon*, 23 NY3d 32, 38 [2014] quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]. Similarly, CPLR § 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may issue an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR § 3126 is a matter generally left to the discretion of the Supreme Court." *Carbajal v. Bobo Robo*, 38 AD3d 820 [2d Dept 2007].

Here, the Court finds that there was spoliation of crucial evidence through Con Edison's negligent destruction of the subject poles and anchor rods immediately after Plaintiff's accident. The destruction of the poles and anchor rods has deprived Plaintiff and Defendant Verizon of an opportunity to inspect, measure and photograph the poles, anchor rods and other related equipment, and has therefore prejudiced both parties. *See Kirkland v. NYC Housing Auth., supra*. Although photographs were taken by representatives of Con Edison, they alone determined what

photographs to take. *See Kirschen v. Marino*, 16 AD3d 555 [2d Dept 2005]. No report was generated with details of any measurements taken or findings; the primary evidence of the condition of the poles and the anchor rods is the photographs by Con Edison. Con Edison should have preserved the poles and anchor rods so that the parties would have been provided with the opportunity to have an expert photograph, inspect, measure and otherwise test them.

Additionally, Con Edison should reasonably have known that the evidence might be needed for litigation, [*See DiDomenico v. C & S Aeromatik Supplies, Inc.*, 252 A.D.2d 41 [2d Dept 1998], since Plaintiff was injured at the scene. Although there is no evidence in the record that the destruction of the poles and anchor rods was done in bad faith or intentionally, the Court finds that the negligent destruction and disposal of the poles and anchor rods has prejudiced Plaintiff and deprived Verizon of thoroughly defending the action. *See Iamiceli v. General Motors Corp*, 51 AD3d 635 [2d Dept 2008]. An adverse inference charge is therefore warranted.

Finally, the Court finds that the facts and circumstances warrant a unified trial. Plaintiff's injuries bear directly on the issue of liability in that a jury should be apprised of the force of impact between the utility pole and Plaintiff's vehicle when determining damages. The Court agrees with Plaintiff that she should be able to demonstrate to a jury the amount of force from the pole that struck her vehicle and the location of impact in assessing damages. *See Patino v. County of Nassau*, 124 AD3d 738 [2d Dept 2015]. Accordingly, it is hereby:

ORDERED that Motion Sequence Number 3 is granted solely to the extent that an adverse inference instruction against the Con Edison Defendants shall be given to the jury at the time of trial; and it further

ORDERED that the remaining branches of Motion Sequence Number 3 are denied in their entirety; and it is further

ORDERED that Motion Sequence Number 4 is granted to the extent that Defendant Verizon's Affirmative Defenses alleging Laches/Estoppel/Release (Seventh Affirmative Defense), Serious Injury Threshold under Insurance Law § 5102 (Eighth Affirmative Defense) and failure to utilize a seatbelt (Ninth Affirmative Defense) are dismissed; and it further

ORDERED that the branch of Motion Sequence Number 4 which seeks a unified trial is granted; and it further

ORDERED that the remaining branches of Motion Sequence Number 4 are denied; and it is further

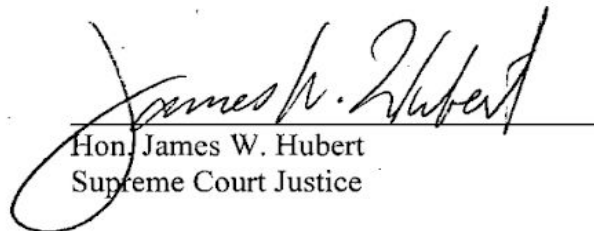
ORDERED that Motion Sequence Number 5 is denied in its entirety; and it is further

ORDERED that due to the COVID-19 public health emergency, the parties are directed to proceed with this action in accordance with the Administrative Order of the Chief Administrative Judge issued on March 19, 2020; and it is further

ORDERED that Plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon all other parties within five (5) days of entry.

The foregoing constitutes the Decision & Order of this Court.

Dated: White Plains, New York
April 30, 2020


Hon. James W. Hubert
Supreme Court Justice