

Langsam v Consolidated Edison of N.Y., Inc.

2021 NY Slip Op 33558(U)

March 9, 2021

Supreme Court, Westchester County

Docket Number: Index No. 58990/2019

Judge: Joan B. Lefkowitz

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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 - COMPLIANCE PART

-----X

JONATHAN LANGSAM,

Plaintiff,

DECISION & ORDER

-against-

Index No. 58990/2019
Motion Seq. No. 8, 9

CONSOLIDATED EDISON OF NEW YORK, INC.,
VILLAGE OF PLEASANTVILLE, 42 WHEELER
AVENUE LLC, VERIZON NEW YORK INC.,
LORDAE REALTY CORPORATION, LORDAE I LLC,
LORDAE II LLC, LORDAE III LLC, LORDAE LLC,
PLEASANTVILLE PIZZERIA, METRO NORTH
COMMUTER RAILROAD, and METROPOLITAN
TRANSIT AUTHORITY,

Defendants.

-----X

LEFKOWITZ, J.

The following papers were read on the motion by plaintiff for an order pursuant to CPLR 3124 and 3126, (1) striking defendant Consolidated Edison Company of New York, Inc.'s answer, or in the alternative, (2) precluding defendant Consolidated Edison Company of New York, Inc. (hereinafter referred to as Con Edison) from offering any evidence in this action, or in the alternative, (3) compelling defendant Con Edison to produce all installation records, permits, work orders, protocols, guidelines, diagrams, and specifications pertaining to installation of the subject utility pole and guy wire, or in the alternative, provide an affidavit of search, (4) compelling defendant Con Edison to produce all rules, guidelines, protocols, regulations, codes, safety rules, guidelines for inspections, and procedures applicable to the subject utility pole and guy wire for the fifteen year period preceding plaintiff's accident, or in the alternative, provide an affidavit of search, (5) compelling defendant Con Edison to produce all documents relating to inspections of the subject pole and guy wire for the fifteen year period preceding plaintiff's accident, or in the alternative, provide an affidavit of search, (6) compelling defendant Con Edison to produce all repair records for the subject pole and guy wire for the fifteen year period preceding plaintiff's accident, or in the alternative, provide an affidavit of search, (7) compelling

defendant Con Edison to produce all accident reports relating to accidents in Westchester County involving trip and fall accidents on guy wires, where guy markers were not used, for the three year period preceding plaintiff's accident, or in the alternative, provide an affidavit of search, and (8) compelling defendant Con Edison to provide a legible copy of the August 28, 2015 inspection report previously produced, and for such other and further relief as the Court deems just and proper.¹

Defendants 42 Wheeler Avenue LLC, Lordae Realty Corporation, Lordae I LLC, Lordae II LLC, Lordae III LLC, and Lordae LLC move pursuant to CPLR 3124 for an order compelling plaintiff to provide the discovery sought in the moving defendants' notice to produce dated June 17, 2020 by a date certain, awarding costs and disbursements to the moving defendants, and for such other and further relief as the Court deems just and proper.

Notice of Motion - Plaintiff's Affirmation in Support - Affirmation of Good Faith - Exhibits
Affidavit of Service
Affirmation in Opposition - Exhibits
Affirmation in Reply²
Notice of Motion - Defendants' Affirmation in Support - Exhibits
Memorandum of Law in Support
Affirmation of Good Faith
Affirmation in Support by Carlos Calderon, Esq.
Affirmation in Opposition - Exhibits
Affirmation in Reply - Exhibit

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

Plaintiff seeks to recover damages for injuries allegedly sustained on November 3, 2018 when he tripped and fell on a cable extending from a utility pole to the ground adjacent to the premises at 34 Wheeler Avenue, Pleasantville, New York. Plaintiff asserts that the cable was a "guy wire," which is a tensioned cable designed to stabilize the utility pole (Affirmation of Brett Kuller, Esq., FN2). Plaintiff alleges Con Edison owned and installed the subject pole and cable, and was responsible for maintaining, operating and repairing them. Plaintiff alleges the anchor to the cable violated the National Electrical Safety Code, as no substantial and conspicuous

¹ In plaintiff's affirmation in reply, plaintiff withdrew items three and eight in his notice of motion.

² In response to plaintiff's affirmation in reply, counsel for the moving defendants submitted an affirmation to correct a false statement of fact in plaintiff's reply (NYSEF doc #400-402). Plaintiff then submitted an affirmation in response (NYSEF doc #404). Both affirmations are a sur-reply, which are not permitted under the DCM protocol. The Court reviewed the affirmations, but they were not considered on the motion. In any event, the statements contained therein were not relevant to the discovery issues raised in motion Seq. #8.

marker was used to protect pedestrians from tripping on the cable.³ Stipulations of discontinuance were filed discontinuing the action as to Verizon New York Inc., Metro North Commuter Railroad, and Metropolitan Transit Authority (NYSCEF doc #394 and 433).

Plaintiff's Motion

Plaintiff moves for an order striking Con Edison's answer, precluding Con Edison from offering any evidence in this action, or compelling Con Edison to produce certain discovery. Plaintiff served a "Notice for Discovery and Inspection (1)" and a "Notice for Discovery and Inspection (2)" both dated December 26, 2019 (Plaintiff's Exhibit F). Plaintiff argues Con Edison's responses to these demands were deficient (Plaintiff's Exhibits G and H).

Con Edison served a July 17, 2020 Supplemental Response to Plaintiff's Notices for Discovery and Inspection, including inspection documents dated June 7, 2012 and August 28, 2015. Con Edison provided a document titled "Periodic Overhead Distribution Inspections and Repair Priority Procedure," which is effective November 2017 (Plaintiff's Exhibit L). Plaintiff contends that this document pertains to procedures for inspections and repairs, but the effective date is after the date of the inspection reports provided. Plaintiff seeks the Con Edison rules, guidelines, protocols, procedures, regulations, and codes related to inspections of the subject pole and cable for the ten year period preceding the alleged incident, including rules and procedures applicable to the 2012 and 2015 inspections. Plaintiff seeks inspection reports that have not been provided for the subject pole and cable for the ten year period preceding plaintiff's accident.⁴ Alternatively, plaintiff seeks an affidavit from a witness with knowledge certifying that all inspection records for the subject pole and cable have been provided for the ten year period preceding the alleged incident.

Plaintiff asserts that an August 7, 2020 letter was sent in a good faith attempt to resolve the discovery dispute (Plaintiff's Exhibit I). Con Edison's August 10, 2020 letter in response states it produced all relevant documents in its possession. Con Edison admits ownership and installation of the subject cable and as such, objects to any demands seeking to establish ownership and control. Con Edison states that no records have been found involving any repairs to the cable in question. It objects to providing records specific to the utility pole, as it is not claimed that the pole was defective and the alleged injury does not involve the pole (Plaintiff's Exhibit J, p. 2, Affirmation in Opposition, p. 2).

³ The Court notes that the section of the National Electrical Safety Code plaintiff submits states "[t]his rule does not require protection or marking of anchor guys located outside of the traveled ways of roadways or established parking areas" (Plaintiff's Exhibit B, National Electrical Safety Code §271(C)(3)).

⁴ Plaintiff's reply papers state that plaintiff is agreeable to receiving records for the ten year period preceding plaintiff's accident.

In opposition, Con Edison submits an affidavit from Kurt Allison, a Manager with the Electric Operations Regional Engineering Department at Con Edison, who states he conducted a search in the Con Edison system for records related to the installation, purchase, materials, and design of the subject pole and cable, and no such records were found. The database stores information and records dating back to 1962 and it appears the pole and cable were installed prior to that year. Mr. Allison also conducted a search for prior incidents, complaints, accidents, and repairs involving the subject cable, and no such records were found (Defendant's Exhibit 2). In plaintiff's reply, plaintiff requests records related to prior incidents, complaints, accidents, and repairs involving the pole for the ten year period preceding the alleged incident. Plaintiff argues the cable stabilizes the pole and the two cannot be parsed. Plaintiff contends that such records are relevant to the issue of Con Edison's notice of the alleged dangerous condition.

"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][internal quotations omitted]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (*see Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders... coupled with either no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431 [2d Dept 2006]; *see Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]). While the parties dispute the scope and relevance of certain paper discovery in this matter, there is no showing on this motion that Con Edison has failed to provide court ordered discovery. In fact, plaintiff does not even submit a court order in support of his motion. Under these circumstances, imposing a remedy pursuant to CPLR 3126 is not warranted.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD2d 1106 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Plaintiff's bill of particulars as to Con Edison alleges that plaintiff tripped and fell on a cable extending from a power pole and inserted into the ground. The bill of particulars alleges that Con Edison allowed and permitted a tripping hazard to exist on a walkway/pathway for an extended period of time. It is alleged that Con Edison caused and allowed a dangerous trap-like and tripping hazard to exist, failed to warn of the dangerous condition, negligently designed, engineered, constructed and repaired the dangerous condition, failed to comply with permit requirements, failed to properly place the cable in an untraveled or remote area, negligently installed and maintained the cable, failed to make necessary and adequate inspections of the condition, failed to provide adequate lighting at the subject location, and violated applicable statutes, rules, and regulations (Plaintiff's Exhibit K).

Here, plaintiff has demonstrated that the demands for Con Edison's records pertaining to the subject pole and cable, including inspection reports, protocols and procedures for inspections, prior incidents and complaints, and repair records, are relevant in this matter. Mr. Allison states he searched for records regarding the "specific utility pole with a supporting guy wire" (Defendant's Exhibit 2). As the cable at issue extended from the utility pole to the ground, and the cable supported the pole, documents pertaining to the pole and the cable are relevant to the allegations in this matter. Plaintiff's demand for inspection reports, inspection protocols and procedures, and records of prior incidents, complaints and repairs related to the utility pole may contain information pertaining to the cable. Furthermore, such records are relevant to the issue of notice and potential witnesses, as they may establish when Con Edison employees were at the site of the accident and what, if anything, they observed related to the cable.

Insofar as plaintiff seeks documents for a ten year period, this request is overbroad. Although Con Edison exchanged an inspection document dated June 7, 2012, the alleged incident occurred on November 3, 2018 and it is unclear how records from 2012 or earlier would sharpen the liability issues in this matter. Additionally, plaintiff's demand for discovery relating to similar trip and fall accidents in Westchester County involving guy wires, where guy wire markers were not used, is overbroad, burdensome, and not relevant to the allegations in this matter.

Defendants' Motion

Defendants 42 Wheeler Avenue LLC, Lordae Realty Corporation, Lordae I LLC, Lordae II LLC, Lordae III LLC, and Lordae LLC (hereinafter referred to as the moving defendants) move for an order compelling plaintiff to provide the discovery sought in the moving defendants' notice to produce dated June 17, 2020 by a date certain, and awarding costs and disbursements to the moving defendants. Defendant 42 Wheeler Avenue LLC owns the building located adjacent to the cable at issue. The building as a whole is known as 42 Wheeler Avenue, but each tenant's space has a separate street address. The portion of the building leased by defendant Pleasantville Pizzeria has an address of 34 Wheeler Avenue. In October 2017, plaintiff and his wife, as members of an LLC, assumed the lease for a portion of the building that has an address of 30 Wheeler Avenue, and opened a restaurant named Falafel Taco in the building. The moving

defendants assert that the area where plaintiff tripped and fell is park property owned by defendant Village of Pleasantville. Plaintiff's restaurant allegedly uses the Village's property for outdoor seating for plaintiff's customers (Affirmation of Debora Dillon, Esq., p. 3-4). In their answer, the moving defendants assert numerous affirmative defenses, including culpable conduct by plaintiff, and that the alleged dangerous condition was open and obvious. The answer asserts cross claims against the codefendants, alleging negligence and seeking indemnification and contribution (NYSCEF doc #25).

In the June 17, 2020 notice to produce, the moving defendants demand all applications submitted by plaintiff, plaintiff's LLC, and Falafel Taco to the Village of Pleasantville for a license to use the Village's property adjacent to plaintiff's business at 30 Wheeler Avenue for any purpose, including but not limited to, a sidewalk café (Defendants' Exhibit B, notice to produce, demands #1-3). Demand #4 seeks all licenses granted by the Village permitting use of the Village's property adjacent to 30 Wheeler Avenue for any purpose, including but not limited to, a sidewalk café. Demands #5-7 seek copies of documents, including invoices, receipts, cancelled checks, credit card statements, evidencing tables and chairs purchased, borrowed, rented or obtained by plaintiff for use on the Village's property adjacent to 30 Wheeler Avenue by customers, patrons, clientele, and/or employees and visitors to Falafel Taco. Demand #8 seeks all documents evidencing any statement, advertisement, promotion, notice, or representation that outdoor seating was available to customers, patrons, clientele, and/or employees and visitors to Falafel Taco. Demand #9 seeks all documents, including electronic data/records/communications, evidencing all lights and illuminated signs on the storefront and/or exterior of Falafel Taco.

The moving defendants argue that documents related to the use of the Village's property by plaintiff's restaurant for outdoor customer seating, the application to the Village for a license to use the area for outdoor seating, and the licenses granted by the Village for such purpose are relevant to the issues of plaintiff's comparative negligence and plaintiff's credibility. Defendant Con Edison submits an affirmation in support, arguing that information regarding plaintiff's applications and permits to use the outside seating area are material to the defense of this matter. Con Edison contends that the permit and related applications will show the actual expanse of the seating area for plaintiff's restaurant and the amount of time plaintiff has been operating the seating area. Con Edison argues that plaintiff's knowledge of the area and familiarity with the existence of the cable are material to the litigation, including the open and obvious nature of the defect and the extent of plaintiff's comparative negligence.

In opposition, plaintiff argues the subject cable is located in the outdoor seating area operated by Pleasantville Pizza, not Falafel Taco. Plaintiff argues the Falafel Taco outdoor seating is in a completely different area than where plaintiff fell. Plaintiff's counsel states he has obtained the application and license documents and the documents do not depict the cable at issue (Affirmation in Opposition, p.3-5).

Upon review of the photographs depicting outdoor tables and seating outside the building owned by defendant 42 Wheeler Avenue LLC (Defendants' Exhibits H and I), the Court finds plaintiff's applications for a license to use the Village's property for outdoor seating are relevant to plaintiff's familiarity with and knowledge of the area, plaintiff's awareness of the cable, the perimeter of the outdoor seating area operated by plaintiff, and the issue of comparative fault. Plaintiff shall provide complete copies of all applications for outdoor seating and all licenses permitting use of the Village's property for outdoor seating. Insofar as the moving defendants seek copies of applications and licenses to use the Village's property for any purpose the demands are vague and overbroad (Defendant's Exhibit B, Notice to Produce, demands #1-4).

The bill of particulars as to Con Edison alleges failure to provide adequate lighting at the subject location (Plaintiff's Exhibit K). Given the general proximity of plaintiff's business to the subject cable, plaintiff shall provide all documents evidencing all lights and illuminated signs on the storefront and/or exterior of Falafel Taco. Insofar as the moving defendants seek electronic data and communications related to this demand, the demand is vague and overbroad (Defendant's Exhibit B, Notice to Produce, demand #9).

Insofar as the moving defendants seek copies of all documents evidencing tables and chairs purchased, borrowed, or rented by plaintiff or his business for use on the Village's property, the demands are overbroad and are not relevant to the allegations in this matter (Defendants' Exhibit B, Notice to Produce, demands #5-7). The moving defendants' demand for all documents evidencing any statement, advertisement, promotion or notice that outdoor seating was available to customers, employees, or visitors to Falafel Taco is overbroad and not relevant to the claims in this matter (Defendant's Exhibit B, Notice to Produce, demand #8).

In view of the foregoing, it is

ORDERED that plaintiff's motion is granted to the extent that on or before March 26, 2021 Con Edison shall provide all rules, guidelines, protocols and procedures related to inspections of the subject pole and/or cable for a five year period preceding the alleged incident; and it is further

ORDERED that on or before March 26, 2021 Con Edison shall provide all inspection records that have not been provided for the subject pole and/or cable for the five year period preceding the alleged incident. Con Edison shall provide on or before March 26, 2021 an affidavit from a witness with knowledge certifying that all inspection records for the subject pole and cable for this time period have been provided; and it is further

ORDERED that on or before March 26, 2021 Con Edison shall provide all records related to prior incidents, complaints, accidents, and repairs involving the subject pole and/or cable at issue for the five year period preceding the alleged incident. Con Edison shall provide on or before March 26, 2021 an affidavit from a witness with knowledge certifying that all such records for this time period have been provided; and it is further

ORDERED that the branches of plaintiff's motion seeking to strike Con Edison's answer, or alternatively, preclude Con Edison from offering evidence in this matter are denied; and it is further

ORDERED that defendants' motion to compel is granted to the extent that on or before March 26, 2021 plaintiff shall provide a response to plaintiff's June 17, 2020 Notice to Produce, providing complete copies of all applications for outdoor seating and all licenses permitting use of the Village's property for outdoor seating; and it is further

ORDERED that on or before March 26, 2021 plaintiff shall provide all documents evidencing all lights and illuminated signs on the storefront and/or exterior of Falafel Taco; and it is further

ORDERED that the branch of defendants' motion seeking costs and disbursements is denied; and it is further

ORDERED that in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District, counsel for the parties are directed to appear for a virtual compliance conference via Microsoft Teams on April 22, 2021 at 4 p.m., or as the Court may otherwise direct; and it is further

ORDERED that plaintiff shall serve a copy of this Order with notice of entry upon all parties within seven (7) days of entry. Plaintiff shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
March 9, 2021

**Joan B.
Lefkowitz**

Digitally signed by Joan B. Lefkowitz
DN: CN=Joan B. Lefkowitz,
E=jlefkowi@nycourts.gov
Reason: I am the author of this document
Date: 2021.03.09 15:24:01-05'00'
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HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All Counsel via NYSCEF

cc: Compliance Part Clerk