SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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PATRICIA CHU,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON OF NEW YORK,

Defendants.

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INDEX NO. 159490/2015

MOTION DATE 04/27/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

CONSOLIDATED EDISON OF NEW YORK

Plaintiff,

-against-

NICO ASPHALT PAVING, INC.

Defendant.

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Third-Party
Index No. 595642/2017

The following e-filed documents, listed by NYSCEF document number (Motion 003) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152

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

In the underlying action plaintiff, Patricia Chu, alleges that she sustained personal injuries on February 17, 2015 while walking at or near the intersection of Baxter Street and Walker Street in front of 220 Walker Street in New York, New York. Plaintiff testified that she was caused to fall due to a depressed section in the roadway as she was crossing from the North Side of the street to the South Side of the street. Plaintiff commenced an action against The City of New York (the "City") and Consolidated Edison Company of New York i/s/h/a Consolidated Edison Company of

New York ("Con Edison"), alleging that defendants were negligent in their ownership, operation, maintenance and control of the roadway.

Subsequently, Con Edison filed a third-party complaint against Nico Asphalt Paving, Inc. (“Nico”), asserting claims against Nico for: (1) contractual indemnification; (2) common law indemnification; (3) breach of contract for failure to procure insurance; and (4) negligence.

Now pending before the court is a motion, (Motion Sequence #003), and two cross-motions:

Nico filed a motion, (Motion Sequence #003), seeking an order: (1) pursuant to CPLR 3212, granting summary judgment in favor of third-party defendant Nico and (2) dismissing the third-party complaint and any and all cross-claims against Nico.

Con Edison filed a cross-motion seeking an order granting it summary judgment under CPLR 3212 by (1) dismissing the complaint and all cross-claims asserted against it; and (2) determining that Con Edison is entitled to indemnification from Nico under the parties’ contract insofar as Nico is obligated to reimburse Con Edison for defense costs incurred in defending against this action.

The City filed a cross-motion seeking an order, pursuant to CPLR 3212, granting the City summary judgment and dismissing the complaint on the issue of liability.

Upon the foregoing documents, the motion and cross-motions are each GRANTED.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, 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 (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Nico's Motion With Respect to Plaintiff's Complaint

In one branch of its motion, Nico argues that the alleged condition that caused plaintiff's accident was not caused by Nico's work, and that the work performed by Nico, was done at the direction of Con Edison. Nico argues that Con Edison had inspected and approved Nico's work, which was guaranteed for a period of one year after completion and that Nico was never notified by Con Edison that there was any issue with Nico's work.

In support of its motion, Nico attached the EBT transcripts of Con Edison's witness Jennifer Grimm (NYSCEF Document #91), and Nico's witness John Denegall (NYSCEF Document #92). Nico contends that the testimony of both witnesses supports Nico's claim that the alleged defect could not have been caused by Nico, as the area where Nico performed its work was farther down the street from where plaintiff indicated that she fell. Nico further argues that the testimony of Mr. Denegall, supports Nico's claim that the trench identified by plaintiff in the accompanying exhibits was smaller than the trench that Nico restored. Next, Nico argues that the trench identified by plaintiff was *perpendicular* to the curb in the roadway, whereas the trench Nico restored was *parallel* to the roadway. Lastly, Nico argues that Mr. Denegall's testimony is corroborated by Con Edison's opening ticket (NYSCEF Document #146), for which it is shown that the trench on the

side of the roadway where Nico performed work was both larger in scale than the area plaintiff alleges she fell, and is parallel (not perpendicular) to the curb on the roadway.

Given the above, this court finds that Nico has made a *prima facie* case for summary judgment, and the burden now shifts to any party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action.

Tellingly, Con Edison, who had filed a third-party complaint against Nico, did not dispute Nico's claim that Nico did not perform work in the subject area.[1] The only opposition to this motion was filed by plaintiff, who argues that Nico did sealing work in two specific areas on the streets at or near the intersection of Baxter and Canal, and that one of the areas where Nico performed work "happens to be right next to where the depression/defect in the street which caused plaintiff to fall." This court finds that plaintiff's claim is speculative at best, and belied by the record in this case, that includes the testimony of Jennifer Grimm a Senior Specialist at Con Edison and John Denegall, a Superintendent at Nico who testified that Nico did not perform any work in the location where plaintiff fell and plaintiff failed to produce sufficient evidence in admissible form to controvert their testimony or to establish material issues of fact that the work performed by Nico caused the depression where plaintiff fell.

[1] Con Edison opposed only that branch of Nico's summary judgment motion that seeks indemnification from Con Edison for the costs to defend this action.

Con Edison's Cross-Motion With Respect to the Accident Location

In its cross-motion, Con Edison argues that it did not perform any work at the accident location in the two years before plaintiff's accident, and Con Edison does not have any facilities there.

In support of its motion, Con Edison attached the deposition transcript of Jennifer Grimm (aka "Jennifer Kim") (NYSCEF Document #113) who was employed by Con Edison as a Specialist. Con Edison argues that Ms. Grimm's testimony established the following: That Ms. Grimm conducted two record searches in this case. The first search was for the roadway in front of 200 Walker Street, at or near its intersection with Baxter Street in Manhattan, from February 17, 2013 through February 17, 2015. The second search was for the same type of documents and for the same search period, but was for the roadway in front of 220 Canal Street, at or near its intersection with Baxter Street in Manhattan. According to Con Edison, Ms. Grimm's testimony was that she did not find a single record showing Con Edison performed any work at plaintiff's accident location.

Con Edison also attached the Affidavit of its Engineer Jing Mo (NYSCEF Document #119), and the Affidavit of Con Edison's Construction Representative Gerardo Natale (NYSCEF Document #120). The Affidavit of Engineer Mo states that he conducted a site investigation on May 13, 2021, and took measurements of the area at the time of his visit. He affirms that the Con Edison service box is not at the area where plaintiff fell, but instead is located 16.5 feet east of the paved area where plaintiff fell. The Affidavit of Construction Representative Natale states that he conducted a site investigation on May 26, 2021. In his affidavit, Natale avers that the Con Edison service box is not at the location of the paved area where plaintiff alleges she fell; that Con Edison did not perform work at the paved area where plaintiff alleges she fell; and that there are no Con

Edison structures at the location of plaintiff's accident. According to Mr. Natale, the closest work done by Con Edison was at least 12 feet and 5 inches away from the alleged accident location.

Given the above, this court finds that Con Edison has made a *prima facie* case for summary judgment, and the burden now shifts to any party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action.

In opposition, plaintiff makes several arguments:

First, plaintiff argues that she sent Con Edison a post-deposition demand dated December 20, 2020, wherein plaintiff demanded the name of all individuals who inspected the roadway. According to plaintiff, Con Edison failed to respond to this demand and did not indicate that Construction Representative Natale was a vital and important witness. Therefore, plaintiff argues, the affidavit of Mr. Natale should be disregarded completely.

Second, plaintiff appears to argue that even if Nico performed work on a trench that ran parallel to the curb and plaintiff fell on a trench that ran perpendicular to the curb, it is still possible that the two trenches are close enough to intersect each other

Third, plaintiff argues that the general area where plaintiff fell was "an unsafe, hazardous condition, clearly" and "the entire roadway had multiple areas of defects, depressions in the road." Plaintiff argues that even if Nico/Con Edison did not technically work on the trench where plaintiff fell, Nico and Con Edison both had "constructive and actual notice of the issues relating to the condition of the street pavement at or near their own service box." Plaintiff argues that Nico and Con Edison could be liable because "they chose to ignore said unsafe, hazardous road condition."

Finally, plaintiff argues that "no evidence is presented of the possibility the work done in the area did not directly cause the defect".

This court finds plaintiff's arguments to be unavailing. First, with respect to the Affidavit of Mr. Natale, it is clear from the record that Con Edison did name Mr. Natale in prior discovery. Specifically, Con Edison did so at NYSCEF Document #98, which was uploaded by Con Edison on May 26, 2021 (two months before Con Edison filed the instant motion on July 27, 2021). In fact, Mr. Natale's name was listed three different times in the discovery response.

With respect to plaintiff's other claims, the court finds that they can be characterized as "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" which the Court of Appeals has ruled are insufficient to defeat a *prima facie* case for summary judgment. The testimony and exhibits submitted by Con Edison sufficiently show that Con Edison did not perform any work or have any facilities in the actual location where plaintiff fell. There is no evidence that Con Edison caused or created the defective condition; that Con Edison had either actual or constructive notice of an alleged defect; or that the two different trenches were physically connected.

Nico's Motion and Con Edison's Cross-Motion on Indemnification

In another branch of its motion, Nico argues that Con Edison's third-party complaint, asserting claims for contractual indemnification, common law indemnification and breach of contract, must be denied because: (1) Con Edison cannot establish entitlement to contractual indemnification because plaintiff's injury is not the result of the performance of Nico's work; (2) Con Edison cannot establish entitlement common law indemnification because the record is devoid of any evidence that Nico was negligent, and because Con Edison participated in the performance

of Nico's work; and (3) Con Edison cannot establish that Nico did not have the requisite insurance and therefore breached its agreement with Con Edison by failing to procure insurance. Nico argues, therefore, that Con Edison's third-party complaint must be dismissed.

In another branch of its motion, Con Edison argues that it is entitled to summary judgment on its contractual indemnification claim against Nico for defense costs incurred in defending this action because the undisputed evidence shows that plaintiff's claim against Con Edison results, in whole or in part, from or connected with, the work Nico performed under its contract with Con Edison. Con Edison also argues that the branch of Nico's motion seeking dismissal of Con Edison's third-party complaint must be denied.

Although both Con Edison and Nico agree that agree that Nico's obligation to indemnify Con Edison for its defense costs is contractual in nature and exists even if Nico's work did not cause or contribute to plaintiff's accident, they disagree on whether the indemnification clause has actually been triggered.

Specifically, Con Edison argues that even if the court were to grant summary judgment in favor of Nico on the issue of liability, Nico is nevertheless obligated under the contract's indemnification provision to indemnify Con Edison for its defense costs incurred in this lawsuit. Con Edison further argues that the language of the contract provides that Nico must indemnify Con Edison for any expenses "connected with" Nico's work and here, plaintiff claims that work Nico performed for Con Edison on Walker Street caused the defect that she tripped over. Con Edison contends that plaintiff's allegations obligates Nico to pay for Con Edison's defense costs in this action even if a court or jury ultimately determines that Nico was not negligent.

In opposition, Nico argues that plaintiff has asserted no claims against Nico; that plaintiff has not amended her complaint to add Nico to the action; and that the four corners of plaintiff's complaint do not allege any negligence or wrongdoing against Nico. Nico argues that "Nico's sole presence in this lawsuit is based upon Con Edison's baseless third-party claims against Nico." Nico further argues that by Con Edison's own admission, and as confirmed by Con Edison's own witness, Nico's work did not cause plaintiff's accident, and Nico's work was in an entirely different portion of the roadway from where plaintiff alleges she fell. Nico argues, therefore, that the work was not "connected to" plaintiff's accident and the indemnification provision in the contract is by no means triggered.

Finally, Con Edison alleges in its third-party complaint against Nico that Nico breached the contract by failing to procure insurance.

Here, the contract between Con Edison and Nico provides, with respect to indemnification:

> 36. Indemnification. To the fullest extent allowed by law, Contractor agrees to defend, indemnify and save Con Edison, its trustees, officers, employees and agents harmless from all claims, damage, loss and liability, including costs and expenses, legal and otherwise, for injury to or the death of persons, or damage to property, including the property of Con Edison, and statutory or administrative fines, penalties or forfeitures *resulting in whole or in part from, or connected with, the performance of the Work by Contractor*, any subcontractor, their agents, servants and employees, and including claims, loss, damage and liability arising from the partial or sole negligence of Con Edison or non-parties to this Contract […] [emphasis added]

First, with respect to whether Nico procured insurance as required, the court credits Nico's argument that it procured the requisite insurance under Policy No. MPA00000028752R and CMB00000028753R, issued by Harleysville Worcester Insurance Company, effective September 14, 2014 to September 14, 2015 (NYSCEF Document #96).

Second, because this is a situation involving contractual indemnification, as opposed to common-law indemnification, the parties are correct that Con Edison does not need to allege or prove that Nico was negligent, as the indemnification clause could still be triggered if Nico's work was "connected with" plaintiff's injury, even if Nico's work did not actually cause or contribute to such injury. *See, e.g.*, Espinal v. City of New York, 107 A.D.3d 411 (Sup. Ct. App. Div. 1st Dep't 2013)(concluding that although the work did not cause or contribute to plaintiff's accident, the work was connected to plaintiff's claim against Time Warner. Thus, the basis for naming Time Warner as a defendant was the permit that the Department of Transportation issued to Time Warner to perform work at the subject intersection, and it was undisputed that Hylan performed that work).

While Nico contends that the indemnification clause is not triggered here because plaintiff did not file directly against Nico, the Appellate Division First Department has made clear, that the first-party plaintiff need not commence or allege direct claims against the indemnitor, to trigger the indemnitor's obligation. *See, e.g.* Naughton v City of New York, 94 AD3d 1 (Sup. Ct. App. Div. 1st Dept 2012); Amante v Pavarini McGovern, Inc., 127 AD3d 516 (Sup. Ct. App. Div. 1st Dept 2015).

The City's Cross-Motion

The City argues that the only work orders and permits issued, on the roadway segment where plaintiff fell, were issued to Con Edison and, as found above, the work done by Con Edison/Nico was for a different location than the location where plaintiff fell. Therefore, the City argues, the City did not have prior written notice of the alleged defect, nor did the City cause and create such alleged defect.

The City also argues that to the extent that plaintiff argues that the proximate cause of the accident was snow/slush, and not a structural defect, such argument should fail on the basis of the "snow in progress" doctrine. The City argues that on the day of plaintiff's accident, it was snowing heavily, such that a total of 3.2 inches of snow accumulated from 10 am to 12 pm. The City attached to its papers, a certified copy of "Local Climatological data for New York, NY for February 2015," as prepared by the National Oceanic and Atmospheric Administration (NYSCEF Document #141). The City argues that no liability can attach, whereas here, plaintiff's alleged accident was at 3m, which was only a few hours after the precipitation ended.

In opposition, plaintiff argues that "as evidenced by the photographs submitted as exhibits, this area is in a constant state of disrepair, presenting a hazardous and unsafe condition," and that the City knew this was the case because the City sent Con Edison out to the subject roadway at least twice to repair it. Plaintiff also argues that there is an exception to the prior written notice requirement when snow/ice accumulation is involved, and that the City was on notice, both actual and constructive, of the impending snow storm on February 17, 2015, and of the foreseeability of the dangers of snow/ice on the streets.

Finally, plaintiff argues that according to the weather report, as of 10 am, there was only trace precipitation, and by noon all precipitation had stopped. Therefore, the City was on notice as of 10 am to remedy the snow/ice defective condition, and the City is liable because it failed to do so by approximately 3 pm, when plaintiff fell.

With respect to prior written notice, Section 7-201 [c][2] of the Administrative Code of the City of New York (also known as the "Pothole Law") provides, in relevant part:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Further, pursuant to the New York Court of Appeals in Katz v City of New York, 87 NY2d 241 (N.Y. Ct. of Appeals 1995:

> As recognized by plaintiff, prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City [emphasis added] […]. The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, **it is strictly construed** [emphasis added].

See also Kales v City of New York, 169 AD3d 585 (1st Dept 2019) ("No action may be maintained against the City of New York as a result of injury arising from a dangerous, defective, unsafe, or obstructed condition on its, *inter alia*, streets or sidewalks unless the City received prior written notice of such condition and failed to repair it within 15 days of such notice (Administrative Code of City of NY §7-201[c][2]).

Here, there is no indication that the City received prior written notice of the defect, as required under § 7-201 [c] [2]. With respect to plaintiff's argument that the work permits issued by the City to Con Edison satisfies this requirement, the First Department has held that "the issuance of a work permit is insufficient to satisfy the prior written notice requirement of the statute" (DeSilva v City of New York, 15 AD3d 252 [Sup. Ct. App. Div. 1st Dept 2005]).

Further, with respect to plaintiff's argument that the City should have known that the entire general area surrounding the accident location is in a "constant state of disrepair," the law is clear that prior written notice must be of the *specific defect involved*, and not merely notice of a similar condition. The New York Court of Appeals held in D'Onofrio v. City of New York, 11 N.Y.3d 581 (N.Y. Ct. of Appeals 2008):

> The issue is whether a map submitted to New York City by Big Apple Pothole and Sidewalk Protection Corporation gave the City the notice of a sidewalk defect that is required by the Pothole Law […]
>
> Big Apple is a corporation established by the New York State Trial Lawyers Association for the purpose of giving notices in compliance with the Pothole Law. It does so through maps on which coded symbols are entered to represent defects. For example, a straight line is used for a raised or uneven portion of a sidewalk, a circle for a hole or hazardous depression, a line with a triangle at each end for an extended section of cracks and holes in a sidewalk, and so forth. In each of these cases, Big Apple submitted a map to the City before the accident; the map had a symbol at the place where the accident happened; and the issue is whether the symbol was sufficient notice of the defect complained of.
>
> The symbol used in D'Onofrio was a straight line, indicating "[r]aised or uneven portion of sidewalk." There is no evidence, however, from which the jury could have found that such a defect caused Mr. D'Onofrio's injury. He testified that, as he was walking over a grating, both his feet became caught almost simultaneously, causing him to fall forward. He said that he felt the grating move, and that he observed broken cement in the area; he attributed his fall to "the movement of the grating, plus the broken cement, the combination of the two." It is not completely clear how the accident happened, but there is no evidence that Mr. D'Onofrio walked across a raised or uneven portion of a sidewalk, even on the assumption that the grating is part of the sidewalk. A photograph of the area where he fell does not show any surface irregularity or elevation. Since the defect shown on the Big Apple map was not the one on which the claim in D'Onofrio was based, the lower courts in that case correctly set aside the verdict and entered judgment in the City's favor.

See also Cross v. City of New York, 32 Misc. 3d 1219(A) (N. Y. Cnty. Sup. Ct. 2011) ("Here, the symbol for a pothole does not appear at the accident location on the Map, whereas a solid circle does. As a solid circle does not appear on the legend and thus has no significance, it does not represent the pothole at issue and does not provide defendant with prior written notice of this defect."); *and* O'Donoghue v. City of New York, 100 A.D.3d 402 (Sup. Ct. App. Div. 1st Dept. 2012) ("Here, in opposition to the City's showing of entitlement to judgment as a matter of law, plaintiff submitted, *inter alia*, a Big Apple Map to prove that the City had notice of the allegedly defective condition. However, the map only provided notice that every tree well on the block lacked a fence or barrier, which was not sufficient to bring the particular condition to the City's attention").

With respect to the "storm in progress" arguments, this court notes that such arguments are inapplicable here, as they relate to snow and ice removal on sidewalks by property owners - not in the roadway, where plaintiff's accident allegedly occurred. As the City properly argues, the legal standard for snow and ice removal on the sidewalk by a property owner is wholly different than the legal standard for snow and ice removal in the roadway.[2]

[2] As it relates to sidewalks, "the rule is well established that a municipality is not liable for injuries sustained by a pedestrian who slips and falls on an icy sidewalk unless a reasonable time has elapsed between the end of the storm giving rise to the icy condition and the occurrence of the accident. Here, the record is void of any evidence that a snow storm even occurred, as the Local Climatological data states that on February 17, 2015, there were only "trace amounts" of snow that fell between the hours of 10 am to 12 pm and plaintiff alleges that she fell at 3 p.m.

For the reasons set forth above, it is hereby:

ORDERED that the motion filed by Nico is GRANTED IN PART to the extent that plaintiff's complaint, and any cross-claims alleging Nico's negligence, are dismissed against Nico; and DENIED IN PART to the extent that Nico must fulfill its contractual obligations to indemnify Con Edison; and it is further

ORDERED that the cross-motion filed by Con Edison is GRANTED; and it is further

ORDERED that plaintiff's complaint, and any cross-claims alleging Con Edison's negligence, are dismissed against Con Edison; and it is further

ORDERED that Con Edison is entitled to indemnification from Nico under the parties' contract insofar as Nico is obligated to reimburse Con Edison for defense costs incurred in defending against this action; and it is further

ORDERED that the cross-motion filed by the City is GRANTED and plaintiff's complaint, and any cross-claims alleging the City's negligence, are dismissed against the City; and it is further

ORDERED that this action is dismissed with prejudice, EXCEPT as to Con Edison's Third-Party Complaint seeking contractual indemnification from Nico; and it is further

ORDERED that the caption is amended to be consistent with this order; and it is further

ORDERED that because the only claim remaining is Con Edison's Third-Party complaint seeking contractual indemnification from Nico, this action is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the City shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

1/28/2022
DATE

J. MACHELLE SWEETING, J.S.C.

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