SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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GOKHAN HOS,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,RESTANI CONSTRUCTION CORP.

Defendant.

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INDEX NO. 159034/2020

MOTION DATE 08/27/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

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

In this action, Plaintiff Gokhan Hos, a police officer, alleges that he was caused to fall at a construction site located at 420 West 25th Street due to the negligence of Defendants Consolidated Edison Company of New York and Restani Construction Corporation. In motion sequence 001, Restani moves for summary judgment dismissal of the complaint and of Con Ed's crossclaims against it. The motion is fully submitted.

Background

Plaintiff alleges that on the morning of August 30, 2019, while in the performance of his duties as a police officer, he stepped into a hole on or near the roadway located at 420 West 25th Street, New York, NY (the "premises"), causing him injury. (NYSCEF Doc No. 1, Complaint, at ¶ 20.) Plaintiff filed the complaint on October 26, 2020, setting forth causes of action for negligence under the common law and certain statutory provisions, including Labor Law § 27-a. (*Id.* at ¶¶ 32.) Restani is a contractor who performs "milling and related work … which involves

grinding off the top layer of asphalt surface of a roadway in preparation for the roadway to be resurfaced (paved)." (NYSCEF Doc No. 7, Affidavit of Giuseppe Vaccaro, at ¶ 8.)

Con Ed appeared via answer dated January 6, 2021, setting forth cross-claims against Restani for common law indemnification, contractual indemnification, and breach of contract for failure to procure insurance. (NYSCEF Doc No. 3.)

Restani appeared via answer dated February 18, 2021, setting forth cross-claims against Con Ed for indemnification and contribution. (NYSCEF Doc No. 5.)

Restani moves for summary judgment dismissal of both the complaint and Con Ed's cross-claims, arguing that documentary evidence establishes that Restani did not owe a duty to Plaintiff, as Restani "did not perform any milling or related work in the area where the alleged accident occurred." (NYSCEF Doc No. 22, Restani's Memo, at 2.) In support, Restani submits 356 pages of documents related to agreements Restani held with the New York City Department of Transportation (NYSCEF Doc No. 9); an August 1, 2016 letter between Con Ed and Restani confirming an agreement for milling work (NYSCEF Doc No. 10); emails dated May 15, 29, 30, and June 6, 2019 with certain attachments (NYSCEF Doc Nos. 11, 13, 14, 15); a June 10, 2019 permit issued by the DOT to Restani to open the roadway at the premises (NYSCEF Doc No. 12); and a May 29, 2019 letter from the DOT terminating a certain contract. (NYSCEF Doc No. 16.)

Restani states that dismissal of the complaint is appropriate because:

> A review of the May 15, 2019, May 29, 2019, May 30, 2019 and June 6, 2019 e-mails and accompanying Task Order #M20 Notice, the Task Order #M20 Rev 1 Notice, the Task Order #M20 Rev 2 Notice, the Task Order #M20 Rev 3 Notice, the May 29 Letter, and the Vaccaro Affidavit clearly establish that Restani did not perform milling and related work in the area where plaintiff's accident occurred (the street and/or roadway in front of the premises located at 420 West 25th Street, New York, New York and the May 29 Letter reveals that the DOT terminated the Agreement for convenience as of June 15,2019. (See, the May 15, 2019, May 29, 2019, May 30, 2019 and June 6, 2019 e-mails and accompanying Task Order #M20

> Notice, the Task Order #M20 Rev 1 Notice, the Task Order #M20 Rev 2 Notice, the Task Order #M20 Rev 3 Notice, the May 29 Letter…

(Restani's Memo at 6). Restani further argues that dismissal of Con Ed's cross-claims is warranted because the documents prove that it did not perform work where Plaintiff fell. (*Id.* at 6-11.)

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1977].) The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012].)

"It is settled that negligence cases by their very nature do not lend themselves to summary dismissal since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination." (*McCummings v New York City Transit Auth.*, 81 NY2d 923, 926 [1993], quoting *Ugarrizza v Schmieder*, 46 NY2d 471, 474 [1979].) "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." (*Smith v Costco Wholesale Corp.*, 50AD3d 499, 500 [1st Dept 2008].) "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted].)

The motion is denied in its entirety as it is premature. No discovery has taken place, "thereby depriving plaintiff [and Con Ed] of the opportunity to depose the parties who would have knowledge concerning the relevant issues in this action including the negligence if any, of [Restani]." (*Guzman v City of New York*, 171 AD3d 653, 653 [1st Dept 2019].) Thus, it is hereby

ORDERED that Defendant Restani Construction Corporation's motion sequence 001 for summary judgment is denied in its entirety; and it is further

ORDERED that the parties are directed to meet and confer and electronically file a proposed Preliminary Conference Order for the court's review and signature, within thirty (30) days.

5/5/2022
DATE

WILLIAM PERRY, J.S.C.

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