

Hoppenstein v Consolidated Edison Co. of N.Y., Inc.

2022 NY Slip Op 35014(U)

October 19, 2022

Supreme Court, Queens County

Docket Number: Index No. 705712/2020

Judge: Denis J. Butler

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

10/20/2022

10:06 AM

Present: HONORABLE DENIS J. BUTLER
Justice

IAS Part 12

**COUNTY CLERK
QUEENS COUNTY**

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YONATAN HOPPENSTEIN,

Index
Number: 705712/2020

Plaintiff(s),

-against-

Motion Date:
September 20, 2022

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Motion Seq. No.: 002

Defendant(s).

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The following papers were read on this motion by plaintiff for an order, (a) pursuant to CPLR 3124 the defendant's employee Donald Rubin who was the supervisor of Christos Angelidis (the Con Ed employee identified by the plaintiff as being at the scene of the accident on August 14, 2019) appear at a deposition; (b) pursuant to CPLR 3124 the defendant's employee Mr. Ferrier who was the partner of Christos Angelidis on August 14, 2019, appear a deposition; (c) pursuant to CPLR 3124 the defendant's employee Christos Angelidis continue his deposition which took place the August 13, 2021, but was not concluded; (d) pursuant to CPLR 3124 the defendant be ordered to provide the documents requested in numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, and 19 of the Plaintiff's Demand For D & I dated October 4, 2021; (e) pursuant to CPLR 3124 the defendant be ordered to provide the documents requested in numbers 5, 6, 8, 9, 10 and 11 of the Plaintiff's Demand For D & I And Combined Demands dated July 30, 2020; (f) pursuant to CPLR 3124 the defendant be ordered to provide the documents requested in numbers 7 and 8 of the Plaintiff's Demand for D & I dated April 29, 2021; (g) pursuant to CPLR 3124 the defendant be ordered to provide the documents requested in number 4 of the Plaintiff's Demand For D & I dated June 30, 2021; (h) pursuant to CPLR 3124 the defendant be ordered to produce any non-privileged documentation for post-accident work or investigation done on service box 607 located in front of 45-50 48th Street, Woodside, New York with regard to the explosion

alleged in the complaint that took place on the night of August 14, 2019 and (i) pursuant to Uniform Rule 216.1 an order issue directing the County Clerk to seal The Conduit And Duct Occupancy Plate which is Exhibit D of the Exhibit F Response To Plaintiff's Notice For Discovery And Inspection dated November 23, 2021 attached to the Affirmation of Andrew M. La Bella, Esq. Upon the issuance of the sealing order it will be filed separately under seal along with a magnified view of the part of the plate that shows the connection between MH1020 and service box 607 in front of 45-50 48th Street, Woodside, New York. Exhibit D mentioned above is subject to a confidentiality agreement between the parties dated May 13, 2021 based on the security and integrity of the Con Edison's electric, gas and steam systems from any and all outside and possible dangerous sources.

	Papers <u>Numbered</u>
Notice of Motion, Affirmation, Affidavit, Memorandum of Law and Exhibits.....	E63-88
Affirmation In Opposition, Exhibits.....	E90-95
Reply Affirmation.....	E96-99

Upon the foregoing papers, it is ordered that this motion is determined as follows:

It is alleged that on August 14, 2019, at approximable 10:00 at night, an explosion emanated from defendant's manhole covers located in front of the premises known as 45-50 48th Street, Woodside, New York, which caused the plaintiff's injuries.

Defendant asserts plaintiff's motion must be denied on grounds the word count of the attorney affirmation supporting the motion exceeds the 7,000 words authorized as per court rules (see 22 NYCRR § 202.8-b). The defendant's argument is unavailing. A word count performed by the Court is the same as the word count attested to by the plaintiff in his certification, and is under 7,000 words.

The plaintiff's motion seeks to compel defendant's employees Donald Rubin and "Mr. Ferrier" to appear for depositions, and to compel the defendant's employee Christos Angelidis to to appear for a continued deposition.

"New York's liberal discovery policy, generally governed by CPLR 3101(a), broadly mandates full disclosure of all matte material and necessary in the prosecution or defense of an action" (Hernandez v City of New York, 207 AD3d 450, 453 [2d Dept 2022] [internal quotation marks omitted]). "For purposes of depositions,

a corporate entity has the right to designate, in the first instance, the employee who shall be examined" (Asprou v Hellenic Orthodox Community of Astoria, 185 AD3d 638, 639 [2d Dept 2020]; see Conte v County of Nassau, 87 AD3d 559, 560 [2d Dept 2011]). "A party seeking additional depositions has the burden of demonstrating (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case" (Asprou v Hellenic Orthodox Community of Astoria, 185 AD3d 638, 639 [internal quotation marks omitted]).

Plaintiff deposed Christos Angelidis who apparently was working in or around the subject manhole covers at the time of the alleged explosion. Defendant opposes the continued deposition of this witness on grounds he was already deposed for seven hours, which is the maximum length of time a witness may be deposed as per court rules (see 22 NYCRR 202.20-b). Defendant's contention lacks merit, however, since the transcript for Christos Angelidis' deposition indicates that it began at 10:40 a.m., and concluded at 5:05 p.m., and that the parties stopped for lunch from 12:35 p.m. to 1:00 p.m., and thus the deposition may continue for one more hour before reaching the seven hour limit.

Plaintiff seeks to depose Donald Rubin on grounds, inter alia, he was Christos Angelidis' supervisor, and further seeks to depose "Mr. Ferrier," who the plaintiff explains was Christos Angelidis' partner. In seeking to depose these additional employees, however, the plaintiff failed to demonstrate that Christos Angelidis had insufficient knowledge of the alleged incident, or that his deposition testimony was otherwise inadequate, and that there is a substantial likelihood that Donald Rubin or "Mr. Ferrier" possess information which is material and necessary to the prosecution of the case (see Conte v County of Nassau, 87 AD3d 559, 560).

According, these branches of plaintiff's motion are GRANTED solely to the extent that it is

ORDERED that within ten (10) days of entry of this decision and order, plaintiff shall serve upon defendant a copy of this order. Plaintiff is further directed to notice defendant for a continued deposition of Christos Angelidis, to be held within fifteen (15) days of service of this decision and order with notice of entry. Christos Angelidis is ordered to appear for the continued deposition, and to answer deposition questions relating to the alleged incident. Such continued deposition of Christos Angelidis shall continue day to day until completion, but shall not exceed one hour in total length (see 22 NYCRR 200.22-b).

Plaintiff further seeks to compel the defendant to produce outstanding discovery pursuant to several of the plaintiff's discovery demands. To the extent defendant indicated that records could not be located, or no longer existed, there is no reason in the record to doubt the response, or to compel discovery under such circumstances. While defendant is required to provide evidence of post-accident investigation reports concerning the alleged incident (see D'Alessio v Nabisco, Inc., 123 AD2d 816, 816 [2d Dept 1986]), defendant is not required to produce records after the date of the incident constituting "[e]vidence of subsequent repairs and remedial measures [which are] not discoverable or admissible in a negligence case unless there is an issue of maintenance or control" (Soto v CBS Corp., 157 AD3d 740, 741 [2d Dept 2018] [internal quotation marks omitted]). As there is no issue as to maintenance or control, the plaintiff's request for discovery is GRANTED solely to the extent that the defendant is hereby ORDERED, to the extent it has not already done so, to respond to each of the plaintiff's outstanding discovery demands; to the extent necessary to respond to plaintiff's discovery demands, defendant shall provide post-accident investigation reports; defendant, however, is not required to provide any records concerning post-accident repairs and remedial measures; defendant shall respond to the plaintiff's discovery demands as set forth herein on or before November 18, 2022; and it is further

ORDERED that upon completion of the continued deposition of Christos Angelidis, and defendant's compliance with the all outstanding document requests, to be completed within the time set forth above, discovery shall be deemed complete; and it is further

ORDERED that the County Clerk shall seal the conduit and duct occupancy plate which is Exhibit D of the Exhibit F response to the plaintiff's notice For discovery And inspection dated November 23, 2021, attached to the affirmation of Andrew M. La Bella, Esq.; and it is further ordered

ORDERED that the plaintiff, is directed to serve a copy of this order with notice of entry upon the defendants within ten (10) days of entry.

All other requested relief not expressly addressed herein is denied.

The clerk is directed to fax and mail a copy of this decision and order to all parties.

This constitutes the decision and order of the court.

Dated: October 19, 2022



Denis J. Butler, J.S.C.

FILED

10/20/2022

10:07 AM

**COUNTY CLERK
QUEENS COUNTY**