

**Elias v New York City Hous. Auth.**

2023 NY Slip Op 30896(U)

March 22, 2023

Supreme Court, New York County

Docket Number: Index No. 160487/2017

Judge: J. Machelie Sweeting

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

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JOSE ELIAS,

Plaintiff,

- v -

NEW YORK CITY HOUSING AUTHORITY, CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, JUDLAU CONTRACTING, INC., JCDECAUX STREET FURNITURE, LLC, JCDECAUX STREET FURNITURE NEW YORK, LLC, JLJ IV ENTERPRISES, INC., CONSOLIDATED EDISON, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., CONSOLIDATED EDISON DEVELOPMENT, INC., CONSOLIDATED EDISON ENERGY, INC., CONSOLIDATED EDISON ENERGY DELIVERY SERVICES, INC., JOHN DOES, JANE DOES, JOHN DOE CORPORATIONS AND OTHER JOHN DOE ENTITIES, ALL WHOSE TRUE NAMES ARE UNKNOWN,

Defendants.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Third-Party Plaintiff,

-against-

DANELLA CONSTRUCTION OF NEW YORK INC.

Third-Party Defendant.

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JCDECAUX STREET FURNITURE, LLC, JCDECAUX STREET FURNITURE NEW YORK, LLC

Second Third-Party Plaintiffs,

-against-

DYNASERV INDUSTRIES INC.,

Second Third-Party Defendant.

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X

**DECISION AND ORDER  
ON MOTIONS**

Index # 160487/2017  
Motion #002  
Motion #004

Index # 162172/2019<sup>1</sup>  
Motion #003  
Motion #005

Third-Party  
Index No. 595010/2021

Second Third-Party  
Index No. 595170/2022

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 75, 76, 82, 83, 89, 90, 91, 93, 94, 102 under the 2019 index number, and 166-171, 175, 176 under the 2017 index number

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 103, 104, 105, 106, 107, 114, 115, 116, 117, 118, 119, 121, 122, 123, 126, 127, 131 under the 2019 index number, and 146, 172, 173, 174, 175, 177 under the 2017 index number

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER) .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 103, 120, 144, 164, 165 under the 2017 index number

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 145, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 175 under the 2017 index number

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

Plaintiff Jose Elias commenced two actions before this court, both stemming from the same incident, which occurred on December 17, 2016 between approximately 9:00 A.M. and 10:00 A.M. on the eastern sidewalk of Columbia Street, New York, New York 10002, between Delancey Street and Rivington Street. In plaintiff's Bill of Particulars (NYSCEF Document #44 under Index Number 162172/2019), plaintiff summarized the incident as follows:

Around 6:00 P.M. on December 16, 2016, Plaintiff lawfully parked his vehicle, on the eastern sidewalk on Columbia Street, New York, New York 10002, between Delancey Street and Rivington Street [...]. On December 17, 2016 between approximately 9:00 A.M. and 10:00 A.M., Plaintiff JOSE ELIAS returned to his vehicle. A light snowfall, which onset sometime prior to 6:00 P.M. of December 16, 2016 and continued until after 9:00 A.M. or 10:00 A.M. on December 17, 2016, caused snow to accumulate on Plaintiff JOSE ELIAS' windshield. Accordingly, Plaintiff JOSE ELIAS walked to the driver's side of the vehicle and began clearing the accumulated snow from the left side of his front windshield. Thereafter, Plaintiff JOSE ELIAS walked around the front of his vehicle onto the abovementioned sidewalk to clear off the accumulated snow on the passenger side of the front windshield. After taking two steps onto the sidewalk, Plaintiff JOSE ELIAS slipped

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<sup>1</sup> This Index Number is closed.

on a metallic orange sign that laid flat in the middle of the sidewalk, was chained to a metal post of an upright and embedded parking sign and entirely concealed by accumulated snowfall. As a result of slipping and falling on the hazardous defect, Plaintiff JOSE ELIAS was caused to suffer permanent and severe personal injuries.

Plaintiff commenced the first action on November 27, 2017 under Index Number 160487/2017 (hereinafter referred to as “the 2017 action”), and commenced the second action on December 17, 2019 under Index Number 162172/2019 (hereinafter referred to as “the 2019 action”). Third party actions were also filed.

The 2017 and 2019 actions were consolidated by orders issued by the Honorable Paul A. Goetz, dated April 26, 2021 (NYSCEF Doc. No. 120) and December 8, 2021 (NYSCEF Doc. No. 135). Both orders were issued under the 2019 action, and directed that the cases be consolidated under the 2017 action.

The parties are referred herein as follows:

Jose Elias is referred to as “plaintiff”; New York City Housing Authority is referred to as “NYCHA”; City Of New York is referred to as the “City”; New York City Department Of Transportation is referred to as the “DOT”; Judlau Contracting, Inc. is referred to as “Judlau”; Jcdecaux Street Furniture, LLC and Jcdecaux Street Furniture New York, LLC are referred to, collectively, as “JcDecaux”; Jlj Iv Enterprises, Inc. is referred to as “JLJ” Consolidated Edison, Inc. is referred to as “Con Ed”; Consolidated Edison Company Of New York, Inc. is referred to as “Con Ed NY”; Consolidated Edison Development, Inc. is referred to as “Con Ed Development”; Consolidated Edison Energy, Inc. is referred to as “Con Ed Energy”; Consolidated Edison Energy Delivery Services, Inc. is referred to as “Con Ed Delivery”; and these three parties are collectively referred to as the “Con Ed Trio”; Danella Construction Of New York Inc. is referred to as “Danella”; Dynaserv Industries Inc. is referred to as “Dynaserv.”

Now pending before the court are the following motions:

Motion #002, (filed on October 4, 2021 under the 2017 action), wherein defendants Con Ed Trio seek an order granting summary judgment in their favor and dismissing all cross-claims as against them.

Motion #003, (filed on December 21, 2020 under the 2019 action), wherein defendant Judlau seeks an order granting it summary judgment under Civil Practice Law and Rules (“CPLR”) § 3212, and an order dismissing plaintiff’s complaint and all cross-claims against Judlau.

Motion #004, (filed on June 29, 2022 under the 2017 action), wherein third-party defendant Danella seeks an order, pursuant to CPLR 3212, dismissing plaintiff’s complaint. Also pending under this motion sequence number is a cross-motion filed by Con Ed NY seeking summary judgment pursuant to CPLR 3212, and an order dismissing all claims against it.

Motion #005, (filed on April 8, 2021 under the 2019 action), wherein defendants Con Ed Trio seek an order granting summary judgment in their favor and dismissing all cross-claims against them.

In 2022, this action was transferred to the undersigned. Given the passage of time, and the consolidation of these actions, in an order dated October 17, 2022, counsel was directed to file affirmations with regard to the status of the motions, which are now fully briefed and decided herein.

Motion #002 Made by Con Ed Trio (filed under Index Number 1604871/2017)

On November 17, 2022, Con Ed Trio filed a letter (NYSCEF Doc. No. 164) and an Affirmation (NYSCEF Doc. No. 165) stating, in sum and substance, that this motion had inadvertently been filed under the incorrect index number and was being withdrawn.

Accordingly, this motion is hereby closed as moot.

Arguments made by Judlau in Motion #003 (filed under Index Number 162172/2019)

Judlau argues that it did not own, control, install or have notice of the Sign; did not work at the alleged accident location; and last worked down the street one year and four months before the alleged accident. In support of this argument, Judlau submitted the sworn Affidavit of Carl Balzofiore, (NYSCEF Doc. No. 66), who is employed by Judlau, and who corroborates the arguments made by Judlau.

Opposition papers were filed by Con Ed, JcDecaux, Con Ed Trio, and plaintiff. All opposing parties argue, *inter alia*, that Judlau's motion is premature. Con Ed argues that there remains outstanding discovery, most important of which is the depositions of all parties. JcDecaux argues that it was not a party to this action when plaintiff, City and NYCHA were deposed, and that no other depositions have been held in this matter. Con Ed Trio argues that defendants have not been able to question co-defendants under oath regarding how the accident occurred, and that this information is exclusively within co-defendants control and could clearly demonstrate negligence. Plaintiff argues that the parties must be afforded the opportunity to depose Mr. Balzofiore and cross-examine him on the statements made in his affidavit and to further obtain the context of his assertions.

Arguments made by Danella in Motion #004

The Notice of Motion, which was filed by Danella, (NYSCEF Document No. 84), seeks “an Order pursuant to CPLR § 3212 dismissing the Plaintiff’s Complaint against CONSOLIDATED EDISON COMPANY OF NEW YORK, INC, CONSOLIDATED EDISON DEVELOPMENT, INC, CONSOLIDATED EDISON ENERGY, INC., CONSOLIDATED EDISON ENERGY DELIVERY SERVICES, INC.” Although the requested relief seeks dismissal on behalf of the Con Ed entities, in Danella’s Affirmation in Support (NYSCEF Doc. No. 85) and the attached exhibits (NYSCEF Doc. Nos. 86-95) there are no arguments made on behalf of the Con Ed entities, only with respect to Danella.

As plaintiff correctly argues, Danella has no standing to seek dismissal on behalf of the Con Ed Trio, as the Con Ed Trio did not make any claims against Danella. Further, Danella argues that it was only employed by “CONSOLIDATED EDISON COMPANY OF NEW YORK, INC” (“Con Ed NY”). It is unclear on this record how Danella is connected to CONSOLIDATED EDISON DEVELOPMENT, INC., CONSOLIDATED EDISON ENERGY, INC., or CONSOLIDATED EDISON ENERGY DELIVERY SERVICES, INC. (“the Con Ed Trio”).

To the extent that Danella intended to seek summary judgment on its own behalf, Danella argues that it Danella argues that it did not own, borrow, lease, use, install, or control the construction sign. Instead, Danella argues, it was hired by Con Ed NY to render certain services near the intersection of Columbia Street and Delancey, New York, New York, underneath the Williamsburg Bridge. This work started on July 19, 2016, was completed by July 21, 2016, and Danella did not return to the worksite thereafter. Danella also argues it never used, installed, or controlled the type of sign on which plaintiff claimed to have slipped, and in fact, the sign that plaintiff complains about was at the accident location in May 2016, two months prior to Danella

commencing its work in the area. In support of these arguments, Danella submits the sworn Affidavit of Charles Argo (NYSCEF Doc. No. 91) and Roger Kent (NYSCEF Doc. No. 92), who are both employed by Danella, and whom corroborate Danella's arguments.

In its cross-motion, Con Ed NY<sup>2</sup> argues that it did not own, borrow, lease, use, install, or control the sign, and in fact did not conduct any work at the location of the accident in or around the time of plaintiff's accident. Con Ed NY also incorporated into its motion the arguments and exhibits relied upon by Danella in its motion papers. Specifically, Con Ed NY argues that Google Maps establishes that the sign on which plaintiff slipped upon was placed in May of 2016, and that all work done by Con Ed NY in the two years prior to the accident took place either "many months" before the Google Maps appearance of the sign in question, or "multiple months after." Con Ed NY also argues that it requires its employees and subcontractors to use the most recent version of the Manual on Uniform Traffic Control Device for Streets and Highways published by the Federal Highway Administration, which means that any signs utilized by Con Ed NY would have "differs [differed] greatly" from the sign in question. In support of these arguments, Con Ed NY submits the sworn Affidavits of Vicky Cheung (NYSCEF Doc. No. 132), Mathieu Maynard (NYSCEF Doc. No. 133), and Kerry Watts (NYSCEF Doc. No. 143), who are each employed by Con Edison,<sup>3</sup> and who corroborate Con Ed NY's arguments.

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<sup>2</sup> The cross-motion was filed only on behalf of Con Ed NY and not on behalf of any of the other Con Ed entities.

<sup>3</sup> Each of the affiants states that he or she is employed by "Con Edison." It is unclear if this refers to the movant Con Ed NY, or to one of the other Con Edison entities.

JcDecaux argues that the motion and cross-motion are premature, because JcDecaux has not had an opportunity to examine any witnesses. Specifically, JcDecaux argues that it has not had the opportunity to examine any witnesses in this matter, as it was not a party to this action when plaintiff appeared for his deposition on June 14, 2019 or when NYCHA was deposed on June 2019 or when the City witnesses were deposed on November 14, 2019.

Plaintiff also argues that all of the pending motions are premature, because they were filed prior to any discovery and are based almost entirely on self-serving affidavits that raise additional questions of fact and show the need for the taking of depositions.”

Arguments made in motion #005 filed by Con Ed Trio

Con Ed Trio argues that they did not build, own, operate, or maintain the sign, and that they did not have any contacts or contracts with any party or entity involved with the alleged accident site. In support of this argument, Con Ed Trio submits the sworn Affidavit of Paul Mapelli, (NYSCEF Doc. No. 107), who is employed by Con Ed Development and Con Ed Energy, and which generally corroborates the arguments made by movants with respect to these two defendants.<sup>4</sup>

Opposition papers were filed by plaintiff, JcDecaux and Danella.<sup>5</sup> All opposing parties argue, *inter alia*, that this motion is premature. Plaintiff argues that little to no meaningful discovery has been exchanged and that party depositions have not been completed. JcDecaux argues that only limited discovery has been provided, and Danella argues that virtually no depositions have been conducted.

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<sup>4</sup> The Affidavit is silent with respect to the entity Con Ed Delivery.

<sup>5</sup> Danella inadvertently filed its opposition under Motion Sequence #002, which was withdrawn. The opposition by Danella (NYSCEF Doc. No. 146) and the reply by the Con Ed Trio (NYSCEF Doc. No. 173) were considered under Motion Sequence #005.

Conclusions of Law on Motion Sequence Numbers 003, 004 and 005

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. 1<sup>st</sup> 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]).

Here, the motions and cross-motion (Motion Sequence Numbers 003, 004 and 005) are all denied as premature. Any movant seeking summary judgment must tender sufficient evidence to demonstrate the absence of any material issues of fact. Here, there is an open question of fact as to what entity placed the roadwork sign in the subject location. This is a critical factual issue which greatly impacts the liability of all defendants, and as of now, no defendant has admitted ownership or control of the sign. Further discovery and completion of party depositions in this matter is necessary to determine which defendant, if any, installed the sign, or whether any defendant in this action had notice of the same.

Accordingly, it is hereby:


**ORDERED** that Motion #002, filed on October 4, 2021 under the 2017 action by the Con Ed Trio, is closed as withdrawn; and it is further

**ORDERED** that Motion #003, filed on December 21, 2020 under the 2019 action by Judlau, is DENIED as premature; and it is further

**ORDERED** that Motion #004, filed on June 29, 2022 under the 2017 action by Danella and the cross-motion filed by Con Ed NY, are both DENIED as premature; and it is further

**ORDERED** that Motion #005, filed on April 8, 2021 under the 2019 action by the Con Ed Trio, is DENIED as premature; and it is further

**ORDERED** that Judlau, Danella, Con Ed NY and each member of the Con Ed Trio are each given leave to re-file for summary judgment after the completion of relevant discovery.

<u>3/22/2023</u>					
DATE			J. MACHELLE SWEETING, J.S.C.		
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN				