SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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EDWARD MCHUGH,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,PEDUTO CONSTRUCTION CORP., CITYWIDE PAVING INCORPORATED,

Defendant.

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INDEX NO. 162650/2015

MOTION DATE 06/07/2022

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

PEDUTO CONSTRUCTION CORP.

Defendant.

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Third-Party
Index No. 595294/2018

The following e-filed documents, listed by NYSCEF document number (Motion 006) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252

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

Upon the foregoing documents, and after oral argument, which took place on January 17, 2023, where Carolyn M. Canzoneri, Esq. appeared for Plaintiff Edward McHugh ("Plaintiff"), Walter J. Klimczak III, Esq. appeared for Defendant/Third-Party Defendant Peduto Construction Corp. ("Peduto") and Paul Fino appeared for Defendant/Third-Party Plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed"), Peduto's motion for summary judgment is denied.

I. Factual and Procedural Background

This action arises out of Plaintiff's trip and fall on June 2, 2015 (NYSCEF Doc. 1). On the date of the incident, Plaintiff was working as a member of the New York Police Department ("NYPD") (NYSCEF Doc. 214). Plaintiff was walking to get his coffee at Dunkin Donuts somewhere between 185th and 184th streets and Broadway (*id.*, p. 10:14-25). While getting his coffee, Plaintiff saw a suspect wanted for burglaries and began to chase him (*id.*). As Plaintiff was chasing the suspect, the suspect "cut into a store" which caused Plaintiff to run across the street (*id.*, p. 12:7-14). It was while crossing the street that Plaintiff fell in a pothole (*id.*). The pothole was in the roadway immediately off a curb (*id.*, p. 12:17). Plaintiff testified that the fall occurred in front of 661 West 181st Street (*id.*, p. 59 17-21). Plaintiff then commenced this action on December 11, 2015 (NYSCEF Doc. 1).

According to Lance Del Plato ("Del Plato"), the designated representative of Con Ed, Con Ed did excavation work on both the sidewalk and roadway (NYSCEF Doc. 215, p. 24:16-24). Del Plato testified that a "trouble ticket" was generated by Con Ed on February 22, 2015 at 3:41 p.m. in response to a customer complaint (*id.*, p. 30:2-19). Del Plato testified that a shunt was laid with 150 feet of cable, which would typically run across the sidewalk into the street and along the curb until it reached a service box or manhole that would feed power (*id.*, p. 36:12-25 and p. 37:2-16).

On May 20, 2015, Con Ed generated a paving order to Peduto to perform a sidewalk repair (*id.*, p. 45:5-14). Del Plato testified that based on the paving order, a 9.5 feet by 2.3 feet portion of the sidewalk was restored by Peduto (*id.*, p. 46:5-7). Del Plato testified that based on the paving order, only sidewalk restoration was done (*id.*, p. 46:16-17). The repair appeared to be a same day repair (*id.*, p. 47:16-20).

Del Plato testified that the "cuts" which needed restoration by either Peduto or Citywide were created by Con Ed's Sub-Surface Construction ("SSC") Department (*id.*, p. 81: 4-5). Del Plato testified that Con Ed had several concrete contracts with Peduto to restore concrete sidewalks and possibly concrete roadways (*id.*, p. 51:3-7). Con Ed had a contract with Citywide to perform asphalt work (*id.*, p.51:8-11). The roadway located at the incident site was described as an asphalt roadway (*id.*, p.62:4-8). However, Del Plato testified that based on photographs, the roadway had concrete bus paths on both sides of the street in the parking lane, so the surface material involved was concrete (*id.* p. 68:5-16). Del Plato testified that although Citywide was retained to do restoration work in the parking lane, it appears they did not because the surface in the parking lane turned out not to be covered by their contract (*id.* p. 76:11-24). Del Plato knew of no evidence that Peduto ever did work in the parking lane where the incident took place prior to June 2, 2015 (*id.*, p. 77:19-24). Del Plato testified that unless there was another paving order or if it was communicated verbally, Peduto would not be expected to do any work in excess of the work reflected in the original paving order (*id.*, p. 93:2-4). However, Del Plato did not know if a verbal directive to restore the concrete bus lane took place at this location (*id.*, p. 96:15-19)

Joseph Bodden ("Bodden") the Vice President of Peduto testified that Peduto specialized specifically in repairing concrete sidewalks, curbs and roadways (NYSCEF Doc. 216, p. 16:11-17). Bodden testified that there was a contract with Con Ed to repair the sidewalk at the location of the incident (*id.* p. 22:2-9). Bodden testified that the work at that location was solely on the sidewalk, and while Peduto does conduct repairs in the street, they only perform restoration work based on documents given to them (*id.*, p. 23:3-14).

Bodden testified that the paving order directed Peduto to "remove and replace sidewalk, saw cut the sidewalk and install joint fill on the sidewalk" (*id.*, p. 31:16-20). Bodden's testimony

concurred with Del Plato's testimony that pursuant to the paving order, Peduto's work was completed on May 20, 2015 (*id.*, p. 43:15-21). Bodden's testimony also concurred with Del Plato in that he testified on some occasions Peduto would be verbally asked to do more work than what was indicated in the paving order (*id.*, p. 51:13-17). However, if Peduto was given additional work verbally, Bodden agreed with Del Plato that work would be reflected on the Paving Order, along with an indication on who gave those instructions (*id.*, p. 52:5-7). Bodden testified that the Paving Order indicated no other work was completed other than what was originally directed (*id.*, p.53:15-16).

Bodden also submitted an affidavit (NYSCEF Doc. 222). In the affidavit, Bodden testifies that Peduto utilized an air compressor, jackhammer, and a handheld cutting machine to remove sidewalk concrete (*id.* at ¶ 10). Bodden swears that none of the work on the sidewalk impacted the street. Bodden also swears he conducted an exhaustive search of all records related to work done by Peduto at the site of the incident and found no records pertaining to restoration work done on the street (*id.* at ¶ 6). However, absent these conclusory assertions, there is no substantive testimony regarding the means and methods by which Peduto used the jackhammer and handheld cutting machine to remove and to replace the sidewalk abutting the pothole.

John Denegall ("Denegall") testified as the representative of Defendant Citywide (NYSCEF Doc. 217). Denegall testified that Citywide handles asphalt restoration for Con Ed (*id.*, p. 10:4-6). Denegall testified he could find no records related to Citywide's involvement in restoration of the area where Plaintiff allegedly fell (*id.*, p. 13:3-6). According to Denegall, if he had no records, that would mean they did not work at that location (*id.*, p. 16:20-24). Denegall testified that as he had no knowledge of any work Citywide performed at the location, he likewise had no knowledge of any work Peduto performed at the location (*id.*, p. 24:2-5).

On November 20, 2020, prior to the depositions of Del Plato, Bodden, and Denegall, Peduto moved for summary judgment (NYSCEF Doc. 161). At that time, this case was assigned to Hon. Carol R. Edmead. In a decision and order dated June 29, 2021, Justice Edmead denied Peduto's motion for summary judgment as premature, with leave to renew upon completion of further discovery (NYSCEF Doc. 198). Peduto made the instant motion for summary judgment on May 20, 2022 (NYSCEF Doc. 208). Sometime thereafter, this case was assigned to Part 33. The note of issue has not yet been filed.

Peduto argues it is entitled to summary judgment because the evidence is clear that Peduto did not perform any work in the roadway where Plaintiff's fall occurred, nor did it create the pothole which caused Plaintiff's fall (NYSCEF Doc. 209 at ¶ 5). Peduto argues that since there is no evidence that it either created the pothole or performed any work in the roadway where Plaintiff fell, then Peduto owed Plaintiff no duty of care and therefore may not be found liable.

Plaintiff filed opposition to Peduto's motion for summary judgment on July 1, 2022 (NYSCEF Doc. 234). Plaintiff argues that the evidence does not eliminate the possibility that Peduto created the pothole either through the effects of its sidewalk restoration or by being verbally assigned to conduct work on the street. Plaintiff argues that the law is clear that where construction work takes place near the area of the accident, there are questions of fact as to whether a defendant created the defect in the roadway in the course of its work (*id.* at ¶ 12). Plaintiff argues that despite multiple depositions from representatives of Con Ed, Peduto, and Citywide, nobody could say definitively who created the pothole which directly abutted the area where Peduto conducted its work. Plaintiff also points out that both Peduto's representative and Con Ed agreed that Peduto might be given verbal directives to do work, and so it is possible that Peduto was requested to work on the area where the pothole existed. This is especially true given the area where the pothole was

located purportedly had a concrete layer, and Peduto specializes in concrete restoration. However, it appears there is no record of any verbal directive.

In reply, Peduto argues that proximity to work alone is not enough to impose a duty on Peduto. Peduto argues it is undisputed that Con Ed excavated the roadway where Plaintiff fell and Peduto was instructed to perform sidewalk restoration. Peduto argues that there has been no evidence presented that the work on the sidewalk somehow caused or contributed to the pothole in the roadway. Peduto also argues that there is no triable issue of fact regarding verbal instructions to conduct roadway work, as both Con Ed and Peduto's representative testified that if there were verbal instructions, it would have been noted on the paving order.

II. Discussion

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the 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. (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

Based on the deposition testimony and documentary evidence proffered by the parties, it is undisputed that just two weeks prior before Plaintiff's accident, Peduto replaced and restored a

sidewalk directly abutting the area where the pothole existed. Photographs do show the pothole which allegedly caused Plaintiff's fall is directly abutting the site where Peduto performed work. It is also undisputed that Peduto performed invasive construction work adjacent to the situs of the accident: Peduto's representative testified that it "remove[d] and replace[d] sidewalk, saw cut the sidewalk and install[ed] joint fill on the sidewalk." Peduto's representative further testified that machinery was used to accomplish this work: a jackhammer, an air compressor, and a handheld cutting machine were used "to remove sidewalk concrete from the old sidewalk flag." Based on the photographs, the pothole appears less than a step from the curb that Peduto worked on two weeks prior to the accident.

There has been no evidence presented which addresses whether Peduto's activities in removing the sidewalk with a jackhammer and a handheld cutting machine created or exacerbated the pothole. Notably, there is no expert report or testimony analyzing the means and methods by which Peduto replaced the sidewalk and testifying that it could not have possibly been the cause of the pothole abutting Peduto's worksite. The only evidence Peduto presents is that none of its work "indirectly impacts the roadway, and none of the work…causes or creates a pothole in the roadway." However, aside from this one conclusory paragraph, there is no evidence or analysis substantiating Peduto's assertion. A movant's burden on summary judgment is a heavy one, and to receive summary judgment, a movant is required to show the absence of any triable issues of fact. Given the extremely close temporal and spatial proximity of Peduto's construction to the pothole and accident, and given the lack of any substantive and non-conclusory evidence showing that Peduto's work could not have possibly created or exacerbated the pothole at issue, this Court is unable to grant summary judgment.

A contractor may be held liable for an affirmative act of negligence which results in creation of a dangerous condition upon a public street or sidewalk (*Pizzolorusso v Metro Mechanical, LLC*, 205 AD3d 748 [2d Dept 2022]. Denial of summary judgment is, therefore, supported by decades of persuasive and binding precedent, as Peduto failed to provide evidence dispelling of any notion that its negligence created or exacerbated the pothole (*Bagley v 1122 E. 180th St. Corp.*, 203 AD3d 502 [1st Dept 2022]; *Martin v City of New York*, 177 AD3d 411, 413 [1st Dept 2019]; *Corprew v City of New York*, 106 AD3d 524 [1st Dept 2013]; *Campisi v Bronx Water & Sewer Serv., Inc.*, 29 AD3d 452 [1st Dept 2006]; *DeSilva v City of New York*, 15 AD3d 252, 254 [1st Dept 2005]; *Field v City of New York*, 302 AD2d 223 [1st Dept 2003]; *Wasserman v City of New York*, 267 AD2d 151, 152 [1st Dept 1999]).

Precedent which holds to the contrary is easily distinguishable from the case at bar, as in those cases, the spatial and temporal proximity of a contractor's work to the site and date of an accident was far more attenuated when compared to the facts of this case (*McDaniel v city of New* York, 209 AD3d 409 [1st Dept 2022]; *Camacho v City of New* York, 135 AD3d 482 [1st Dept 2016]; *Amini v Arena Const. Co., Inc.*, 110 AD3d 414, 415 [1st Dept 2013]; *Amarosa v City of New* York, 51 AD3d 596 [1st Dept 2008]; *Flores v City of New York*, 29 AD3d 356 [1st Dept 2006]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005]).

Indeed, as opposed to cases where summary judgment is appropriate, in the case at bar, it is undisputed that Peduto used a jackhammer and a handheld cutting machine to remove sidewalk abutting the pothole just two weeks prior to Plaintiff's fall. The Court is mindful of the heavy burden a movant bears when seeking summary judgment. Moreover, all facts must be viewed in the light most favorable to the non-movant. Therefore, Due to Peduto's work bearing an extremely close temporal and spatial proximity to the incident, and the absence of any non-conclusory,

substantive evidence supporting Peduto's assertion that its work did not create or exacerbate the pothole, this Court is unable to grant summary judgment.

Accordingly, it is hereby,

ORDERED that Defendant/Third-Party Defendant Peduto's motion for summary judgment is denied; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff Edward McHugh shall serve a copy of this Decision and Order, with notice of entry, on all parties; and it is further

ORDERED that the parties are directed to appear for an in-person conference on May 24, 2023 at 10:00 a.m. to address outstanding discovery and why the note of issue has not yet been filed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

4/10/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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