Consolidated Edison Co. of N.Y., Inc. v City of New York
2012 NY Slip Op 33655(U)
July 20, 2012
Sup Ct, New York County
Docket Number: 104047/03
Judge: Arthur F. Engoron

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

PRESENT: Hon. Arthur F. Engoron **PART 52**
Justice

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

- v -

CITY OF NEW YORK, COLUMBUS CORNERS REALTY CORP. and KAIN REALTY & ASSOCIATES,

Defendants.

INDEX NO. 104047/03
MOTION DATE 2/14/12
MOTION SEQ. NO. 008

The following papers, numbered 1 to 14, were read on these motions for summary judgment and cross-motion to compel discovery.

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In this action to recover approximately $147,274.92 in property damage, plaintiff Consolidated Edison Company of New York, Inc. ("Con Ed") alleges that on or before August 6, 2002, sewage containing hazardous materials were released into, and damaged, electrical equipment in Con Ed's manhole number 30740, located at or near the southwest corner of West 106th Street and Columbus Avenue, New York, New York.

The City of New York ("the City") now moves for summary judgment (Mot. Seq. 006); plaintiff cross-moves to compel the City to provide outstanding discovery (Mot. Seq. 006X); plaintiff also moves for partial summary judgment against all defendants (Mot. Seq. 007); and defendants Columbus Corners Realty Corp. and Kain Realty & Associates (jointly, "C & K") move (mistakenly labeled as a cross-motion) for summary judgment (Mot. Seq. 008). Based on the foregoing, the motions for summary judgment are all denied, and the cross-motion to compel is granted solely to the extent of setting this matter down for a conference before the Court to resolve the outstanding disclosure issues.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED: J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Background

Plaintiff alleges that the City owns and operates the sewer system; has a duty to maintain, control, inspect, and repair it; and failed to do so. Plaintiff also alleges that C & K, as owners of the property located at 934 Columbus Avenue, New York, New York, had a duty to ensure that sewage from their building was properly discharged into the public sewage system. Plaintiff claims that it was forced to incur $147,274 in cleanup, disposal, repair and temporary service replacement costs as a result of the City's and C & K's failure to properly maintain and operate the sewer system. The City denies any negligence and cross-claims against C & K for indemnity. For their part, C & K claim that plaintiff has failed to demonstrate that C & K's negligence was the proximate cause of the sewage leak, and cross-claim against the City on the basis that the City was negligent in investigating the source of the leak.

Defendants' Summary Judgment Motions

The City predicates its summary judgment motion on three grounds: (1) the City did not have constructive notice of any defect; (2) the City did not cause or create any defect in the sewers or drains; and (3) plaintiff has no evidence demonstrating the City's negligence under either point (1) or (2). Likewise, C & K move for summary judgment on the basis that there is no evidence that they were negligent or that any negligence on their part was the proximate cause of plaintiff's damages. Further, C & K argue that they are entitled to summary judgment on their cross-claims against the City due to the City's negligence in conducting the dye test. Lastly, plaintiff moves for summary judgment on the basis of the doctrine of res ipsa loquitor.

The cause of the sewage leak into Con Ed manhole number 30740 cannot be determined as a matter of law on the basis of the conflicting evidence submitted by the City and by C & K. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498 (1957) (citations omitted), states, "[t]o grant summary judgment it must clearly appear that no material issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure." Here, the contradictory investigations into the source of the leak, performed by experts for the City and for C & K, raise an issue of fact.

C & K challenge every aspect of the City's inspection of Con Ed's manhole number 30740, including whether or not the correct manhole was even inspected. C & K have also provided an affidavit from Jose Ramos, a specialist in waste line problems, detailing an investigation involving a Borescope Investigation Recording[1] and concluding that there is no problem or defect in the private sewer line reaching to West 106th Street.

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[1]According to C & K's expert, Jose Ramos, the Borescope Investigation Recording involved inserting a small, lighted camera into the sewer line at 934 Columbus Avenue and snaking it fifty feet through the sewer line and out into the street until it met with the New York City sewer line. (Moving C & K, Exh. U.)

In contrast, the City has submitted a dye test that implicates C & K's property as the source of the sewage leak. The dye test contradicts the Borescope Investigation Recording and concludes that C & K's property was the source of the leak. According to Ray Jelen, Director of Research and Reconciliation for the City's Housing Preservation and Development Department, "'The dye doesn't lie where it shows up." If it shows in the leak, then we know we found the source of the leak." (See Exh. E, p. 12, within Moving City, Exh. A.) As defendants have submitted technical evidence of sewer investigations that conclude others are liable, creating a quintessential "battle of the experts," and neither of the tests is clearly a sham, there is a question of fact sufficient to deny either defendant summary judgment.

Plaintiff's Summary Judgment Motion

Plaintiff's request for summary judgment is predicated upon the doctrine of res ipsa loquitor. However, plaintiff has failed to prove, prima facie, the three elements of res ipsa loquitor: that (1) the event was of a kind which ordinarily does not occur in the absence of someone's negligence; (2) the event was be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the event was not due to any voluntary action or contribution on the part of the plaintiff. See, Dermatossian v New York City Transit Auth., 67 NY2d 219, 226 (1986) (citations omitted). Here, the plaintiff cannot demonstrate elements one or two of res ipsa loquitor and, therefore, plaintiff's motion must be denied.

Although the City controls the sewer system, and is obligated to repair defects in that system, that does not automatically make it liable for all sewage leaks. Plaintiff has failed to demonstrate that the City or C & K had exclusive control over the instrumentality that caused the sewage leak, or that a leak of this nature does not occur without the absence of someone's negligence. In sum, (1) the sewer system is, mostly, under a public right-of-way, and, (2) old pipes can leak without anyone's negligence.

Plaintiff further claims that the Department of Environmental Protection has exclusive control of the sewage system in the City of New York. Citing to The New York City Charter, §1403(3)(b)(1), which states "[t]he Commissioner shall have charge and control over the location, construction, allocation, repair, maintenance and operation of all sewers. . .and shall have charge of the management, care and maintenance of sewer and damage systems therein," plaintiff claims that the City has an absolute obligation to maintain and correct any defects in the system. However, § 1403(a)(1)(a) also states, "[t]he commissioner shall have charge and control of:...All structures and property connected with the supply and distribution of water for public use not owned by private corporations." As argued by the City, C & K are private corporations whose building lines connect to the City's sewer lines, as do those of other private corporations. Thus, de jure control does not equate with de facto control and the City's responsibility to maintain the sewer lines, as regards manhole number 30740, is not absolute. As the City, C & K, and/or other property owners whose lines feed into the subject manhole might be responsible for the sewage leak, plaintiff cannot invoke res ipsa loquitor in this matter.

Cross-Motion to Compel

Plaintiff has also cross-moved to compel disclosure from the City. In opposing the cross-motion the City argues, mistakenly, that there is no reason to strike its answer, relief that was never requested. Additionally, and more on point, the City argues that it has provided six witnesses for deposition, two sworn affidavits, and substantial disclosure and should not be forced to provide anything further. In reply, Con Ed argues that what has been provided is contradictory and unclear, and that the City has failed to provide the parameters of the searches it has conducted making the value of the searches questionable and confusing. Without more substantial documentation of what has or has not been provided, this Court is unable to rule on the question of further disclosure. Thus, the parties are hereby directed to appear before this Court in room 328, 80 Centre Street, New York, NY, on September 5, 2012, at 12 noon, for a disclosure conference in this matter. All parties shall bring whatever discovery has been exchanged as well as the basis for their requests or denials unless doing so would be unduly burdensome.

Conclusion

Based on the foregoing, the motions for summary judgment are all denied, and the cross-motion is granted solely to the extent of setting this matter down for a conference as detailed above.

Dated: July 20, 2012

Arthur F. Engoron, *J.S.C.*