

Addonisio v City of New York
2012 NY Slip Op 31056(U)
April 16, 2012
Supreme Court, New York County
Docket Number: 100870/2010
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 100870/2010
ADDONISIO, NICK
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

motion to/for _____
ts _____ No(s). _____
_____ No(s). _____
_____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 4/16/12
which disposes of motion sequence(s) no.

005, 006, 007, 008

FILED

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/17/12

Saliann Scarpulla J.S.C.
SALIANN SCARPUZZA

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
NICK ADDONISIO and LISA ADDONISIO,
Plaintiffs,

Index No.:100870/2010

-against-

DECISION AND ORDER

THE CITY OF NEW YORK, CONSOLIDATED
EDISON, INC., EMPIRE CITY SUBWAY
COMPANY (LIMITED), VERIZON
COMMUNICATIONS INC., VERIZON NEW YORK
INC., NYC & LI ONE CALL/DIG SAFELY, INC., and
ONE CALL CONCEPTS, INC.,

Defendants.

-----X
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For Defendants NYC & LI One Call/Dig Safely, Inc.
and One Call Concepts:
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Communications Inc.:
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New York, NY 10005

FILED

APR 19 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. SALIANN SCARPULLA, J.:

This personal injury and Labor Law action arises out of plaintiff Nick Addonisio's ("Addonisio") electrocution injury as a result of defendants' alleged negligence during the course of his employment as a utility worker. Plaintiffs' causes of action include claims for violations of Labor Law §§ 200, 240 (1), 241 (6). Although not separate

causes of action, several provisions of the Industrial Code, OSHA and other New York City regulations are also alleged. Motions with sequence numbers 005, 006, 007 and 008 are hereby consolidated for disposition.

In motion sequence number 005, defendant Verizon New York Inc. ("Verizon") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all claims and cross claims alleged as against it.

In motion sequence number 006, defendants One Call Concepts, Inc. and NYC & LI One Call/Dig Safely, Inc. (together "One Call") move, pursuant to CPLR 3212, for an order granting summary judgment dismissing all of plaintiffs' claims as against them.

In motion sequence number 007, defendant The City of New York moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all claims and cross claims alleged against it.

In motion sequence number 008, defendant Consolidated Edison, Inc. ("Con Ed") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiffs' claims, as well as any cross claims alleged as against it.

Addonisio alleges that, at approximately 10:30-11:00 A.M. on July 17, 2007, he sustained personal injuries when he was electrocuted while performing utility work. Addonisio was employed by Empire City Subway ("ECS") as a utility worker at the time of the accident. Addonisio was working on cutting the roadway for ECS on First Avenue and 77th Street in Manhattan, in preparation for the installation of underground conduit for

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phone lines. Addonisio claims that as he was cutting into the intersection, his power saw hit an unmarked energized electrical feeder cable owned by Con Ed. Specifically, Addonisio alleges that while he was “cutting a section of roadway 130 feet long and 2 feet wide, approximately 10" below the pavement ... he was caused to be shocked, electrocuted and/or otherwise severely injured when his saw hit an unmarked underground conduit thereat.”

The City of New York is the owner of the public roadway and issued a permit to ECS for excavation of the roadway. Verizon is the parent company of ECS. One Call operates the one-call notification system in the New York City area.

Pursuant to a decision dated July 15, 2011, the Court granted ECS’s motion for summary judgment dismissing the complaint and any cross claims as against ECS. The Court held that ECS was Addonisio’s employer on the date of the accident and that ECS’s sole liability to Addonisio and other defendants is to pay worker’s compensation benefits. In the same decision, the court also dismissed the complaint and any cross claims as against Verizon Communications, Inc.

Addonisio testified that he had been working for ECS since 1998. In 2007, Anthony Barone (“Barone”) was Addonisio’s foreman. Barone went to the job sites with Addonisio and Addonisio’s crew. Addonisio testified that ECS provided him with “training, safety tips and how to be safe with the cones and pedestrians.” Addonisio explained that he was performing saw cutting for the particular job on the date of the

accident. He stated, "I put on my rubber boots, my gloves. Most likely I put a Tyvek suit on. I have my helmet, my safety glasses." ECS provided him with his protective equipment and he was wearing it on the date of the accident.

Addonisio stated that during saw cutting, if he saw markings such as for gas or Con Ed, he would "stick the blade down maybe five inches." However, if he did not see markings, he would put the blade down nine or ten inches. He then continued that, "[m]ost likely when we saw cut on crossroads, we stick the blade down five inches to six inches." Addonisio then testified that as a general rule, his foreman would tell him, if he was working on an intersection in Manhattan, "to go five inches down to six, because sometimes, you know, there's high things."

Addonisio claimed that, on the date of the accident, he did see markings from Con Ed, but they were further up from the manhole where he was working. He testified that he put his saw blade down about five inches, his saw got stuck in an electrical cable and then he got electrocuted. The saw had a gauge to set the depth of the cut and Addonisio would look at the gauge while he was cutting. "You take out the blacktop and concrete. That particular sheet was concrete." He continued that the saw never cut deeper than what was shown in the gauge and that it was working perfectly on the day of the accident.

Barone testified that he is usually the instructor for the monthly ECS safety meetings. He stated that ECS employees are instructed only to saw cut four to six inches at an intersection. Barone explained that, even though there may not be markings around

- a manhole, the crew has to be careful because, “[i]t could be missed. It could be not marked right. Everything is done with care out there.”

Barone testified that ECS determined that Addonisio had cut through the intersection approximately ten to twelve inches when he was electrocuted. He continued that part of ECS’s investigation was to figure out why Addonisio cut that deep, instead of only four to six inches. Most importantly, Barone testified that Addonisio should have been written up with a safety warning for violating a methods and procedures policy. Barone concluded that Addonisio was the operator of the saw, the saw was working perfectly, and Addonisio should have been aware of how deep the blade was in the ground.

Prior to performing excavation, ECS notified One Call and One Call transcribed the request. One Call then read back the information to ECS, who confirmed that it was accurate. The read back apparently did not have the intersection as requiring a marking. One Call then notified Con Ed, who advised One Call that they did have underground facilities in the area. Then nonparty Eastern Locating Services, Inc. marked the location of Con Ed’s utilities.

One Call states that it is responsible “for receiving utility locate requests for excavation and demolition from potential excavators, such as [ECS] and then transmitting those requests to the member utility operators who have advised [One Call] that they have underground facilities in the area of the proposed excavation, such as [Con Ed].” After

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the utility operator receives notice of the proposed excavation, it is the utility operator's responsibility to provide accurate markings. One Call does not mark the underground facilities.

Damage reports compiled by Con Ed after the accident noted that the blade was set at a 14.5-inch depth. Con Ed noted that the electrical feeder was only 10.5 inches below the roadway and did not have any additional protection. Con Ed wrote that the ECS representative did not object to what the One Call operator had read back to it, and as a result, the intersection was not marked out as it should have been. However, Con Ed continued with the following, in pertinent part:

The ECS crew involved in the damage did not adhere to a previous assurance made by ECS that all field crews (of ECS) involved in saw cutting operations were instructed to saw cut no deeper than four inches in all intersections of Manhattan and the Bronx. This assurance by ECS management ... was a direct result of a previous incident where two other feeders were damaged during saw cutting operations

Addonisio attended a safety meeting on August 2, 2001, where he learned about the proper methods and procedures when operating a street saw. The manager signed the attendance sheet, and affirmed that he had taught all of the employees the following, in pertinent part:

[U]nder no circumstance should a saw cut be made greater than:
4 inches in depth when crossing an existing facility including but not limited to an ECS or Con Ed duct formation, subsidiary duct run and any known or marked subsurface structure.
5 inches in depth when crossing or working within the confines of a street intersection, i.e. the area bound from curb to curb [emphasis in original].

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Addonisio was also informed at the meeting that any employee who failed to follow these precautions, whether it resulted in damage or not, could be subject to discharge from the company.

Addonisio claims that defendants were negligent in the “ownership, operation, excavation, management, maintenance and/or control of the subject roadway in failing to construct, equip, guard, arrange, operate and conduct the trench/excavation work area so as to provide reasonable and adequate protection and safety to plaintiff” Addonisio submits an expert affidavit from Joseph Cannizzo (“Cannizzo”), who claims that Con Ed’s electrocution hazards departed from accepted industry standards and that these hazards caused Addonisio’s accident. For example, Cannizzo avers that Con Ed was supposed to install the conduit at least 18 inches below the roadway surface in accordance with acceptable practices, instead of at the depth of 10.5 inches. He continues that, if the conduit was not installed at the depth of 18 inches below, then Con Ed should have installed a protective steel plate.

Addonisio also submits another expert affidavit from Kathleen Hopkins (“Hopkins”). Hopkins contends that ECS departed from acceptable industry standards in that it did not provide Addonisio with the correct insulated protective gear and/or equipment to prevent and/or protect against electric shock. According to Addonisio, Con Ed, the City of New York and Verizon are also subject to vicarious liability under Labor Law § 241 (6).

The City of New York claims that it did not create the condition that allegedly caused Addonisio's accident. It also maintains that it should not be vicariously liable for any of the other defendants since it did not supervise or control the means or methods of the work. Regardless, the City of New York contends that the Addonisio is the sole proximate cause of his own accident and that the accident would not have occurred if Addonisio had followed the instructions from his supervisor.

Con Ed claims that Addonisio's saw had also cut through another protective plate nearby and that, even if the electrical cable in question had a plate, the saw would have cut through it. Con Ed does not admit that the cable was installed without a plate and claims that the cable may have originally had a plate which was moved. Con Ed contends that it had no duty to Addonisio under the Labor Law. Con Ed also blames other defendants for failing to mark out the area. It also attributes Addonisio's injury to his own actions.

Verizon contends that it is not an owner for purposes of the Labor Law and that it was not the named contractor with respect to ECS's work. It explains that there is no evidence that Verizon had responsibility for the safety of the roadway construction site. Verizon also maintains that Addonisio's cutting of the roadway to an improper depth is the sole proximate cause of his injury.

With respect to One Call, Addonisio alleges that One Call failed to properly record that ECS was performing excavation work and then failed to notify Con Ed of this

proposed work. One Call maintains that it did correctly transcribe the information that it received from ECS. Regardless, One Call, similar to the other parties, contends that Addonisio was the sole proximate cause of his own injuries. One Call states that Addonisio's injuries "could have been entirely avoided had he complied with ECS's rules for excavating pavement in intersections."

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 A.D.3d 303, 306 (1st Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dept. 2008), quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Id.* at 544, citing *Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630 (1997).

“To impose liability on [defendants] for violations of the Labor Law and common-law negligence, the violations or negligence must be a proximate cause of the accident.” *Weingarten v. Windsor Owners Corp.*, 5 A.D.3d 674, 676 (2d Dept 2004). Proximate cause requires a showing that defendants’ actions or failure to act “was a substantial cause of the events which produced the injury [internal quotation marks and citation omitted].” *Gordon v. Eastern Ry. Supply, Inc.*, 82 N.Y.2d 555, 562 (1993). As explained below, Addonisio’s independent action of cutting through the roadway at a depth of at least 11 inches instead of the requisite four to five was “not foreseeable in the normal course of events resulting from defendants’ alleged negligence.” *Egan v. A.J. Construction Corp.*, 94 N.Y.2d 839, 841 (1999). Any alleged negligence, even if found, is irrelevant here. Addonisio’s noncompliance with safety standards was the sole and superceding cause of his injuries.

Addonisio testified that his saw was operating in good condition and that he cut through the intersection only four to five inches. He claims that he was aware of the procedure for cutting into an intersection, with or without markings, and that this procedure is not to cut more than five inches into the intersection. However, Addonisio damaged a cable that was 10.5 inches underground, using a saw with a 14.5-inch blade. Photographs taken immediately after Addonisio’s accident demonstrate that Addonisio’s saw cut approximately 12 inches below the road’s surface. Despite attending a safety meeting and verifying that he was well aware of the proper protocol, Addonisio cut at

least 11 inches into the roadway. Addonisio's foreman noted that Addonisio should have been written up for his failure to comply with safety procedures.

In response to this evidence, Addonisio provides affidavits from two expert witnesses. One of the experts, Hopkins, opines that ECS should have provided Addonisio with alternative equipment and protective gear for the job. For instance, she claims that Addonisio should have been provided with a saw cutter equipped with insulated handles so as to protect from electric shock.

Based on Hopkins' affidavit, Addonisio argues that summary judgment must be denied because Addonisio's injuries "were caused by a deviation from relevant industry standards ...", citing to *Diaz v. New York Downtown Hospital* (99 N.Y.2d 542, 544 [2002]). However ECS's alleged noncompliance with industry standards was not the cause of Addonisio's accident, it was Addonisio's own noncompliance with safety procedures and protocols. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment." *Id.* at 544. Had Addonisio complied with what he confirms were known, standard procedures, he would not have been electrocuted, and providing him with an alternative tool would not have been necessary.

Addonisio's other expert, Cannizzo, contends that Addonisio would not have gotten electrocuted had Con Ed placed the electrical cable at least 18 inches below the

surface, as required by a New York City Department of Transportation Rule. Among other things, Cannizzo claims that, even if Addonisio had only cut four or five inches, electrocution would have occurred when Addonisio, or another worker, used a jackhammer to break up the roadway because the cable would not have been visible to ECS workers.

Cannizzo's report is purely speculative. Cannizzo attempts to hypothetically discuss what may have eventually happened to Addonisio or another worker after Addonisio was finished saw cutting. Any of defendants' alleged violations cannot be connected to Addonisio's injuries. Addonisio's own actions, while he was saw cutting and doing nothing else, caused him to come into contact with the wire.

In conclusion, Addonisio's actions were independent from any of the defendants' alleged negligence and they were the sole proximate cause of his injuries. Neither expert addresses the indisputable evidence that Addonisio cut further than four to five inches into the roadway, despite knowing not to do so. Addonisio knew that he was not supposed to cut more than five inches, whether or not the area had been properly marked or not. Accordingly, the lack of proximate cause requires dismissal of all of Addonisio's causes of action as against all defendants.¹

In accordance with the foregoing, it is hereby

¹ Con Ed's motion for summary judgment is untimely, as it was submitted after the court-imposed deadline of July 5, 2011, without good cause shown. However, the court has searched the record, pursuant to CPLR 3212 (b), and finds that Con Ed is entitled to summary judgment in its favor. See *Dunham v. Hilco Construction Company, Inc.*, 89 N.Y.2d 425 (1996).

ORDERED that the motion of defendant Verizon New_York Inc. for summary judgment dismissing plaintiffs' causes of action as well as any cross claims alleged as against it is granted and the complaint and cross claims insofar as asserted against it is dismissed; and it is further

ORDERED that the motion of defendants One Call Concepts, Inc. and NYC & LI One Call/Dig Safely, Inc. for summary judgment dismissing plaintiffs' complaint is granted and the complaint insofar as asserted against them is dismissed; and it is further

ORDERED that the motion of defendant The City of New York for summary judgment dismissing plaintiffs' complaint as well as any cross claims alleged as against it is granted and the complaint and cross claims insofar as asserted against it is dismissed; and it is further

ORDERED that, although Consolidated Edison, Inc.'s untimely motion is denied, the complaint is dismissed as against Consolidated Edison, Inc. based on the other timely summary judgment motions and the court's search of the record; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

FILED

Dated: April 16, 2012
New York, New York

APR 19 2012

NEW YORK
COUNTY CLERK'S OFFICE


J.S.C.