Matter of Steam Pipe Explosion at 41st St. & Lexington Ave. v Consolidated Edison
2013 NY Slip Op 33072(U)
December 5, 2013
Sup Ct, New York County
Docket Number: 768000/08
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE **PART** 12
Justice

Index Number : 768000/2008
STEAM PIPE EXPLOSION AT 41ST
vs
CONSOLIDATED EDISON
Sequence Number : 006
REARGUE / RECONSIDER

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

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 365-386
Answering Affidavits — Exhibits _____ **No(s).** 429-436
Replying Affidavits _____ **No(s).** 438

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

MOTION DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

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

Dated: 12/5/13

_____, J.S.C.

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**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12
----------x

IN RE: STEAM PIPE EXPLOSION AT 41st STREET AND LEXINGTON AVENUE

Index No. 768000/08

Mot. seq. nos.: 005, 006

This Document Relates to All Cases

DECISION AND ORDER

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By notice of motion, defendant/third-party plaintiff Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc. (Con Ed, collectively) move for leave to reargue and renew their motion to compel documents from third-party defendant Team Industrial Services, Inc. (Team) and upon re-argument and renewal, compelling Team to produce documents. Team opposes.

By notice of motion, Con Ed also moves for an order imposing sanctions against Team for the spoliation of evidence and directing Team to pay Con Ed's costs and fees incurred in preparing the motion. Team opposes.

The motions are consolidated for disposition.

By decision and order dated April 23, 2013, I granted Con Ed's motion to compel against Team, as pertinent here, to the extent of directing Team's former counsel to produce for an *in camera* inspection eight boxes of documents related to another case in which Team had been sued (*Diamond Shamrock*).

After receiving and reviewing the produced documents, I issued a supplemental decision and order, dated June 18, 2013, finding that "[a]s to the *Diamond Shamrock* records, notwithstanding allegations that Team's injection of too much sealant caused the fire at issue in that case, as the records reflect that an investigation into the fire concluded that Team's injection or application of sealant did not cause or contribute to the incident, none of the records are discoverable."

Con Ed now moves for leave to reargue or renew my decision, contending that I erred in finding that the *Diamond Shamrock* records were not discoverable as documents in its possession reflect that excessive sealant or Team's injection of sealant caused or contributed to the fire at issue in *Diamond Shamrock*.

The documents provided by Con Ed are summarized, as pertinent, here:

(1) The Final *Diamond Shamrock* Incident Investigation Report contains the following representations:

(a) As to what happened, "[t]he outlet nozzle of the Depropanizer feed temperature control 3-way valve (440-TV-209) failed. The failure released vapors into the unit; the vapors ignited"; and

(b) As to how it happened, "[t]he 3-way valve (440-TV-209) failed between the control valve body and the control valve mixed feed outlet flange. Post-incident measurements indicated internal corrosion in the valve body."

(2) The Supplemental Incident Investigation Report contains the following representations:

(a) On the incident date, a leak developed from the gasket on the bonnet flange on the valve at issue;

(b) Team evaluated various leak control techniques for the problem and eventually installed an enclosure box around the leaking flange. This box covered the entire valve and 4 of its flanges. Team injected sealant materials into the box to seal the bonnet flange; and

(c) The outlet nozzle on the valve then failed. The original leaking bonnet flange was not the failure location . . . The incident investigation indicated that the nozzle failed due to insufficient wall thickness.

(d) The report concluded that "based on the condition of the valve following the incident, and the previous corrosion rates experienced in the system . . . it is likely that the valve was not properly restored offsite."

(3) A U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) Citation and Notification of Penalty, dated January 7, 2002, which cites Team, as pertinent here, for failing to advise *Diamond Shamrock* of any unique hazards presented or found by Team's work, as follows:

> In June 2001, [*Diamond Shamrock*] contracted to have a leak stopped at control valve, TCV-209, in the HF Alkylation Unit. A full box enclosure was selected, fabricated and installed to contain the leaking chemicals. [Team] did not emphasize to the refinery of the hazard of thin valve walls or the importance of addressing pressure forces with the clamp box to contain a shift of the tie-in piping (e.g. strongbacks). On July 9, 2001, a mechanical failure at the outlet connection on the TCV-209 valve led to a chemical release and fire.

Nothing in the OSHA report references or cites sealant in any way.

(4) A Preliminary Report issued by R. Craig Jerner, an expert retained by *Diamond Shamrock* to investigate the incident, in which he opines that:

(a) "Team, Inc. failed to use good engineering practice to design the subject leak enclosure. Team should have incorporated strongbacks in the leak enclosure design. Team, Inc. technicians, during injection and reinjection, applied unknown and excessive pressure to the sealant in the enclosure. This action caused excessive stress to be applied to the subject valve outlet

flange resulting in a stress overload fracture of the outlet nozzle, which forced the outlet flange out of the leak enclosure. If strongbacks had been properly designed and . . . had been present and the enclosure had been properly filled, the subject valve failure would not have occurred";

(b) In discussing an examination of the valve, Jerner writes that it exhibited characteristics consistent with overload fracture, which "clearly indicates that the fracture occurred as a result of the pressure exerted by Team, Inc. technicians during sealant injection. Basically, the Team, Inc. technicians placed sufficient force on the valve flange by sealant injection to physically separate the outlet flange from the valve nozzle";

(c) Jerner thus concludes that the valve rupture was caused by overload, "that is, the stress being applied by Team, Inc. technicians during pressurization injection/re-injection of sealant into the Team, Inc. designed enclosure surpassed the tensile strength of the valve nozzle steel";

(d) Jerner also finds that "Team, Inc. technicians improperly disregarded the fact that the volume of injected sealant had greatly exceeded the calculated enclosure 'void' volume;" and

(5) Testimony at the *Diamond Shamrock* trial given by Francis Labry, Team's chief investigator into the incident, wherein he concedes that Team employees injected two or three times the amount of sealant into the enclosure box than it could hold.

Proof of prior accidents may be admissible, to prove the existence of a dangerous condition or notice thereof, upon a showing that the "relevant conditions of the subject accident and the previous one were substantially the same." (*Hyde v Rensselaer County*, 51 NY2d 927 [1980]). The party seeking to introduce such proof must also show that the prior accident of a similar nature was caused by the same or similar contributing factor as the instant accident. (*Brown v State*, 79 AD3d 1579 [4th Dept 2010]).

While it is Con Ed's contention that the two incidents are similar because both involved the alleged excessive application of sealant, the sealant was, at most, a contributing factor in both incidents. However, the condition or nature of the two accidents was not substantially the same.

In *Diamond Shamrock*, the conditions of the accident were a defective and leaking valve in a unit in a refinery, which defect was then unknown, Team's alleged application of too much sealant to the leak and improper erection and installation of a leak enclosure unit, which allegedly contributed to causing the nozzle of the valve to rupture, and subsequent chemical release and fire. The mechanism of the injury there, as it concerns Team, was its failure to design the leak enclosure unit properly and its excessive application of sealant into the unit which caused the nozzle to rupture, either by the pressure of the sealant application or the sealant itself.

The incident at issue here involves a steam system overloaded by a large amount of rain in a short time period and unable to release accumulated steam properly due to blocked steam traps, which caused a steam pipe to burst and explode. And, the allegations against Team are that when it made various leak repairs on the steam system over the years, it injected too much sealant which then migrated from the pipes into the system and eventually blocked the traps. The mechanism of the injury as to Team is that Team's sealant migrated rather than stayed attached to the pipes and blocked steam traps.

The conditions of the accident are dissimilar. A leaking and defective valve in one case and an overloaded steam system in the other; a chemical release and fire in one case, and a burst steam pipe and explosion in the other. The particular allegations against Team are also disparate. Consequently, Con Ed has failed to establish that the relevant conditions of the subject accident and the one in *Diamond Shamrock* are substantially the same. (*See Gjonaj v Otis Elev. Co.*, 38 AD3d 384 [1st Dept 2007] [plaintiff's proof of notice based on prior accident was speculative as he did not establish that alleged dropping malfunction in prior case was caused by same defect at issue in his case]; *Chunhye Kang-Kim v City of New York*, 29 AD3d 57 [1st Dept 2006] [expert

did not show previous accidents involved vehicle hitting pedestrian or bicyclist on sidewalk near park or near sidewalk]; *Nichols v Cummins Engine Co.*, 273 AD2d 909 [4th Dept 2000], *lv denied* 96 NY2d 703 [2001] [court properly excluded evidence of prior incident where other employee received electric shock; even though plaintiff died from electrocution at same worksite, no showing that prior incident was substantially similar to plaintiff's accident]; *Clairmont v State*, 277 AD2d 767 [3d Dept 2000], *lv denied* 96 NY2d 704 [2001] [even if witness's statement that she had seen other people get hit by door at issue was admissible, it did not constitute proof of dangerous condition absent evidence that physical conditions and circumstances of other accidents were substantially similar to one at issue]; *Malossi v State*, 255 AD2d 807 [3d Dept 1998] [court properly declined to consider evidence of two or three other falls at accident location on same day plaintiff fell without evidence that conditions were similar]; *Weidemann v Knights of Columbus, St. Margaret Mary's Council No. 6758*, 199 AD2d 838 [3d Dept 1993] [evidence of previous accidents excluded as those accidents did not involve coats draped over chairs]).

Con Ed has also failed to demonstrate how the *Diamond Shamrock* incident would have given Team notice of the allegations at issue here, or how Team's knowledge that excessive sealant application or pressure, combined with a defective valve and improper leak unit, could cause a chemical release and fire, would have given it notice that excessive application of sealant to pipes within a steam system could cause the sealant to migrate into the water and block steam traps, and, combined with a system overwhelmed by too much rain within a short period of time, could cause a burst steam pipe and an explosion. That the *Diamond Shamrock* incident may have placed Team on notice generally of dangers associated with excessive sealant is insufficient to

show that Team had notice of the specific problem at issue here.

In any event, given Con Ed's submission of various *Diamond Shamrock* documents in support of its motion, it has not identified what particular documents it seeks from Team from the *Diamond Shamrock* litigation that it does not already have. Nor has it shown that it cannot otherwise obtain or has not already obtained pertinent documents.

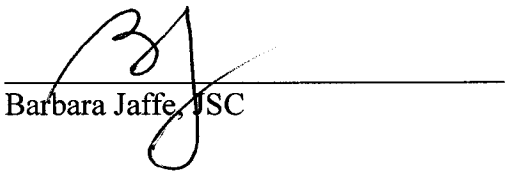
Con Ed's motion for spoliation sanctions is denied. (*See eg OrthoTec, LLC v HealthpointCapital, LLC*, 106 AD3d 472 [1st Dept 2013] [spoliation properly denied as alleged destruction did not deprive defendant of ability to defend against claim and evidence of plaintiff's preservation and collection of documents insufficient to show degree of culpability]; *Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15 [1st Dept 2013] [striking pleading as sanction for spoliation too drastic remedy where opposing party is not entirely bereft of evidence tending to establish its position]).

Accordingly, it is hereby

ORDERED, that Con Edison's motion for leave to reargue and/or renew is granted to the extent of granting leave to renew, and upon renewal, the motion to compel is denied; and it is further

ORDERED, that Con Edison's motion for an order imposing spoliation sanctions is denied.

ENTER:



Barbara Jaffe, JSC

DATED: December 5, 2013
New York, New York