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

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ANDREW BERLINER and DOUGLAS SALTSTEIN,

Plaintiffs,

-against-

CONSOLIDATED EDISON, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and VERIZON NEW YORK, INC.,

Defendants.

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Index No.: 151345/13
Motion Seq. No. 002

DECISION AND ORDER

KELLY O'NEILL LEVY, J.S.C.:

In a case involving a telephone pole that fell during Hurricane Sandy, defendants Consolidated Edison, Inc. (Con Ed's Parent) and Consolidated Edison Company of New York, Inc. (Con Ed) move, pursuant to CPLR 3212, for summary judgment dismissing all claims as against them. The plaintiffs oppose this motion.

BACKGROUND

Hurricane Sandy was the largest hurricane ever recorded in the Atlantic Ocean measuring over 1,000 miles in diameter and claiming the lives of 53 New Yorkers. It resulted in 2.2 million power outages in New York State (see *Moreland Commission Final Report*, June 22, 2013). On October 28, 2012 the Metropolitan Transit Authority suspended subway and commuter rail services, New York City Mayor Michael Bloomberg ordered the evacuation of low-lying areas and closed public schools. President Barack Obama declared a state of emergency for seven states including New York. The hurricane hit land on October 29, 2012, the date of the accident giving rise to the complaint. On that day, plaintiffs Andrew Berliner (Berliner) and Douglas Saltstein (Saltstein), along with their families and two other families, took shelter from Hurricane Sandy at the Saltsteins' home. The families gathered at the Salteins,' because their home had a

generator and the storm knocked out power in the neighborhood, in Armonk, New York, where the families lived (*see* Jory Benerofe tr at 38).

The Berliner family, along with another family that was taking shelter at the Saltsteins, the Benerofes, tried, at around 5:00 PM, to return to their own homes in separate cars (*id.* at 42-43), but found that the road, Evergreen Row, was blocked in both directions by downed trees (*id.* at 45). Separately, nonparty James Vincequerra (Vincequerra) and Saltstein set off for Vincequerra's house in a car for overnight clothes for Vincequerra (Vincequerra tr at 38). Their efforts were also blocked by the fallen trees (id. 38-39).

After the Berliners and the Benerofes returned to the Saltsteins, Berliner and nonparty Jory Benerofe went back out onto Evergreen Row, on foot, to have a look at the downed trees blocking the road (Benerofe tr at 51). Berliner and Benerofe then returned to the Saltsteins' property, only to set out again with Saltstein and Vincequerra onto Evergreen Row to see if they could move the fallen tree from the road (*id.* at 52-57). Vincequerra had "a vague recollection" of somebody having some kind of "hatchet or . . . saw" (Vincequerra tr at 44).

After quickly realizing that they could not move the downed tree, the four men turned to head back along the road to the Saltsteins' home (*id.* at 45; Benerofe tr at 60).

At his deposition, Benerofe described what happened next:

> "Ahead of us aways off to the right, a large pine tree cracked and started to fall, which I heard and saw. I yelled 'watch out,' and I dove off to the right. As the tree was coming down, it came down diagonally across the street towards us, and hit telephone wires. Now, at first we did think that the tree had caused the damage, but there was a telephone pole off to the left side of us as we were walking. When the tree hit the telephone wires, it snapped the telephone pole. The telephone pole is what hit Mr. Saltstein. And it appeared that the equipment towards the top of the telephone pole is what hit Mr. Berliner. I got up off the ground, looked around, saw that there was a serious accident that had just taken place. Mr. Berliner was laying in a pool of blood, surrounded by equipment from the utility pole. Mr. Saltstein was laying on his side, appeared to be unconscious,

> was making some groaning noises. His eyes were closed, and, if I recall there was some blood coming out of his nose"

(Benerofe tr at 27-29).

Both Berliner and Saltstein suffered serious injuries in the accident. On February 2, 2013, they filed their summons and complaint against Con Ed's parent company and Verizon New York, Inc. (Verizon), alleging that both defendants were liable to them under various negligence theories. After it became clear, through discovery, that Con Ed owned the subject pole, plaintiffs discontinued their claims against Verizon and added Con Ed to the action.

In moving for summary judgment, Con Ed notes that during Hurricane Sandy, 972 telephone poles fell within its service area (*see* Rand affirmation, exhibit N at 42), and argues that it is not the insurer of each of these poles. Moreover, Con Ed argues that there is no evidence that the pole was defective. Additionally, Con Ed contends that there was no notice of any defect. In such circumstances, Con Ed argues that it is not liable for injuries, such as the ones suffered by plaintiffs, flowing from the fall of one of its telephone poles. In opposition, plaintiffs argue that Con Ed fails to make a prima facie showing of entitlement to judgment, and that the doctrine of res ipsa loquitur is an appropriate path to liability in this action.

Con Edison's parent company argues that it is entitled to summary judgment, as it is not liable for its subsidiary, Con Ed. Plaintiffs do not respond to this argument.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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 the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court

must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Con Ed Parent

Here, Con Ed, has acknowledged ownership of the subject pole. Con Ed's parent company submits an affidavit from Robert Muccilo (Muccilo), its controller and vice president, who testified that Con Ed's parent company "did not, own or operate the overhead electric distribution system in Westchester County or anywhere else" (Muccilo aff, ¶ 6). Muccilo added that Con Ed parent company "does not, and in October 2012 did not, own or operate any utility poles in Westchester County or anywhere else" (Muccilo aff, ¶ 7). Con Ed's parent company argues that, as plaintiffs' claims against it in the amended complaint are based on allegations of ownership and operation of the subject poles, those claims must be dismissed.

Plaintiffs do not respond to Con Ed Parent's arguments. As such, all claims against Con Ed's parent company must be dismissed as abandoned (*see Perez v Folio House, Inc.*, 123 AD3d 519, 520 [1st Dept 2014] [failure to address claims indicates an intention to abandon them as a bases of liability]).

II. Con Ed

Con Ed first argues that there is no evidence that there was a defect in the subject pole. Con Ed destroyed the pole after Hurricane Sandy, but before plaintiffs put it on notice of their claims against it. However, the pole was inspected by nonparty Osmose Utilities Services, Inc. (Osmose) on June 28, 2012, four months before the accident.

Con Ed submits not only the inspection record (Rand affirmation, exhibit M), but also an affidavit from its former employee, Steven Rossi (Rossi), who worked for the company from 1970 until November 30, 2012. For more than a decade, including during Hurricane Sandy and

its aftermath, Rossi worked in Con Ed's "Overhead Department" (Rossi aff, ¶ 2). Rossi testified that, as an "operating supervisor" in that department, he oversaw Con Ed's program for inspecting and treating its wooden utility poles in Bronx and Westchester counties" (*id.*, ¶ 5). This oversight included managing Osmose's inspection work, including personally inspecting some poles Osmose had already inspected, to ensure that the work was done properly (*id.*, ¶ 9). In preparing his affidavit, Rossi consulted both the Osmose report and pictures that Benerofe took the day after the accident (*id.*, ¶ 6).

Rossi states that the subject pole was installed in January 2004, after its predecessor was broken in an automobile accident (*id.*, ¶ 7). More generally, Rossi states that "the average in-service lifespan of a wooden utility pole is anywhere from 30 to 50 years" (*id.*, ¶ 8) and that:

> "each wood utility pole is inspected once every 12 years. Depending on the age of the pole, either a visual or treated inspection is performed. The inspections are performed by a crew of 3 who prepare the poles and a foreman who inspects the work performed by his or her crew. The inspections performed during the 12 year inspection cycle are called treated inspections. They include a visual inspection, digging near the base of the pole to assess the below grade condition of the pole, sounding the pole with a hammer, and applying different types of treatment, as needed. If a crew is in the field and encounters a pole that is not yet due for a treated inspection, the crew will perform a visual inspection. This consists of retrieving information stamped on/affixed to each pole examining the pole for any signs of defect, including rot, cracking, woodpecker holes, and/or equipment problems"

(*id.*, ¶¶ 10-11).

With specific reference to the June 28, 2012 inspection performed by Osmose on the subject pole, or pole #13429, as it was known officially, Rossi states:

> "The inspection of pole #13429 was a visual inspection because of the young age of the pole. It . . . found the pole to be without any signs of defect, including rot, cracking, woodpecker holes, and/or equipment problems. At that time, Osmose's inspector of pole #13429 also documented the following information, all of which was either stamped on or affixed to the pole: the manufacturer of the pole ('CPI'); the year of manufacture ('2003'); the pole's length/class ('45/3'); and the species of wood/type of treatment. During its inspection of pole #13429, Osmose also

> measured the pole's aboveground circumference, and compared it with the pole's original circumference. In this case, both the original circumference and the circumference as measured in June 2012 were 38 inches"

(*id.*, ¶ 13).

As an indication of the rigor of the inspection, Rossi notes that several nearby poles that Osmose inspected on June 28, 2012 did not pass muster, such as pole #13432, which "was found by Osmose to have significant shell rot with carpenter ant infestation," and "was classified as a 'reject' and was therefore prioritized for replacement" (*id.*, ¶ 14). As to Benerofe's photographs, Rossi stated that he reviewed them and "found no evidence of any rot or decay either on the interior or exterior of the pole" (*id.*, ¶ 17).

Con Ed also submits an affidavit from Nelson Bingel (Bingel), a mechanical engineer, who is the vice president of product development at Osmose (Bingel aff, ¶¶ 2-3). Bingel has "been granted three patents for unique designs of wood utility pole restoration systems" (*id.*, ¶ 4) and he has held leadership positions for a variety of industry committees (*id.*, ¶ 5).

Bingel states that the pole was made from Southern Pine, "a standard type of wood used for poles due to its properties of strength and durability," (*id.* ¶ 6) and that it was treated with chromated copper arsenate, a preservative that gave the pole the "slight greenish tint visible on the exterior of the pole" in the photographs (*id.*, ¶ 13). Bingel testified that, because of the effectiveness of chromated copper arsenate in preventing decay, "industry practice is to perform no more than a visual inspection for the first 15 to 20 years of service life" (*id.*, ¶ 14). As a result, Bingel states, "there was no need to perform more than a visual inspection of the Subject Pole in 2012" (*id.*). As the subject was not due for inspection, Bingel states that it was only inspected because the crew was in the area to inspect older trees (*id.*).

In analyzing the adequacy of the inspection, Bingel refers to National Electric Safety Code (NESC) Rule 212.A2 which "provides that equipment inspections shall be conducted upon the experience of the utility" (*id.*, ¶ 15). Given that the industry standard requiring Southern Pine poles in the northeast to be inspected every 12 to 15 years, Con Ed's "12 year inspection frequency is reasonable and well within industry standards in the northern states" (*id.*).

Bingel, like Rossi, concludes that the subject pole did not exhibit any signs of being defective at the inspection or in the photographs:

> "The Subject Pole was not defective on or before October 29, 2012. The Subject Pole did not exhibit any signs of a defective condition. The Subject Pole was in the early years of its expected 'service life.' Photographs of the exterior of the pole and the interior visible areas after the incident show a pole in excellent condition. In particular, Photographs P-4 and P-7 show the exposed interior wood to be free from rot and decay. There is no evidence of any fungi or insect infestation. The photographs do not show any decomposition or any other physical manifestations that might indicate structural compromise. The photographs do not depict any physical conditions typically recognized to be indicative of rot, deterioration, or weakened structure. Plaintiffs allege that Con Edison failed to prevent fungi and insect infestation in the pole. Yet none of the photographs of the Subject Pole show any evidence of fungi or insect infestation in the pole. The wood is solid without any void spaces that would be present if there were any infestation"

(*id.*, ¶¶ 8-9).

Bingel states additionally that, as "[m]ost pole rot occurs below ground," if the subject pole were rotted or decayed, then, "the fracture site would most likely have been below ground" which is not the case here (*id.*, ¶ 11). Without any signs of decay, Bingel concludes that the pole fell because of the extraordinary circumstances of Hurricane Sandy:

> "The post-incident photographs and the deposition testimony indicate that a large tree came down during Superstorm Sandy. As it fell, the tree contacted the electric and tele-communication wires attached to the pole and pulled them to the ground forming a V-shape and snapping the Subject Pole near its base . . . It is my opinion that the size of the tree and the forces as it fell far exceeded any applicable standard regarding the Subject Pole's strength. Given the extreme forces created as the tree fell and made contact with the wires in question, and the

> absence of any defective condition in the pole, it is my opinion that the physical condition of the pole in question played no role whatsoever in the occurrence of this incident"

(*id.*, ¶¶ 18-19).

Con Ed argues that the testimony of Rossi and Bingel, as well as the inspection report, which Con Ed authenticates through the affidavit of Eric Cruz (Cruz), a field supervisor for Osmose (*see* Cruz aff, ¶¶ 3-5), show that there was no defect in the pole and that, in any event, it had no actual or constructive notice of the defect.

The law on liability for telephone poles in New York traces back to 1877, although the case in question involved a telegraph pole. That case, *Ward v Atlantic & Pac. Tel. Co.* (71 NY 81 [1877]), involved a telegraph pole that fell in a severe winter storm. In analyzing the parameters of the telegraph company's duty of care, the Court of Appeals set out principles for this area of law.

> "The defendant is not absolutely bound to make its line safe to the public, to have its posts in the street so strong and secure that they cannot be blown down or broken by any storm. It does not insure the safety of travelers in the streets from injuries by its posts lawfully placed there. It is bound to use reasonable care in the construction and maintenance of its line, so that no traveler shall be injured by it, and the amount of care must be proportioned to the amount of danger and the liability to accident. The poles must be strong enough to withstand such violent storms as may be reasonably expected, but they are not required to be so strong that no storm can break them, or to withstand such storms as reasonable foresight and prudence could not anticipate"

(*id.* at 84-85).

The Court of Appeals in *Ward* found that the trial court had erred by rejecting the telegraph company's request to charge the jury that "the defendant was not bound so to make or manage the line as to guard against storms of unusual severity, the occurrence of which could not be reasonably expected" (*id.* at 84). Thus, following *Ward*, the touchstone of an inquiry into the

liability for telephone poles is whether the responsible entity took reasonable steps to keep the poles safe (*see e.g.*, *Ray v New York Tel. Co.*, 260 App Div 405 [3d Dept 1940]).

In *Ray*, the plaintiff drove at night into telephone wires that had fallen twenty minutes before when another car struck a telephone pole. The Court cited *Ward* and noted that the defendant telephone company was "not bound to build its line so strong that it cannot be broken down" and that the company "does not insure the safety of travelers on the highway from injuries if its poles and wires are properly and lawfully placed, but it is bound to use reasonable care . . . in the maintenance of its line" (*id.* at 407). Such care requires that the defendant's "poles, wires and equipment must be strong enough to withstand any violence which reasonably may be anticipated" (*id.*). Applying these principles, the Court did not find that the defendant had to install poles that were strong enough to withstand the impact of an automobile crashing into it, nor did it find that reasonable maintenance included remedying the hazard of downed lines within 20 minutes, as "it would be an unreasonable rule to require the telephone company . . . to man its repair truck after usual working hours so as to be ready for instantaneous departure at any hour of day or night" (*id.*).

Moving from the specific jurisprudence of telegraph and telephone poles to more general principles of liability, a negligence claim, of course, requires: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). "To hold a party with a duty of care liable for a defective condition, it must have notice, actual or constructive, of the hazardous condition that caused the injury" (*Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 62 [1st Dept 2006]).

Thus, in the absence of actual notice, plaintiffs must show constructive notice. "Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

Here, just as the telephone company in *Ray* did not have a duty to install poles that could withstand the impact of an automobile accident, Con Ed does not have a duty to install telephone poles that can, in all cases, withstand the impact of falling trees in a superstorm. However, Con Ed does have a duty to take reasonable steps to protect the public from accidents involving its telephone poles. If one of the poles has a defective condition, Con Ed has to take reasonable steps to discover and remedy that defect.

Con Ed makes a prima facie showing that there was no defect in the subject pole. Even if there were a defect, Con Ed makes a prima facie showing that it had no constructive notice of any defect. The subject pole was inspected sooner than required by industry standards, and the inspection yielded no indication of a defect.

In opposition, plaintiffs submit an affidavit from Joseph Cannizzo (Cannizzo), who identifies himself as a professional engineer, but offers nothing as to his experience with telephone pole installation or maintenance, utilities, or related fields (Cannizzo aff, ¶ 1). Although he states that he is familiar with "relevant ANSI" standards, he makes no mention of the NESC rules that are specific to the installation and maintenance of telephone poles (*id.*). Nevertheless, Cannizzo concludes:

> "that the incident occurred due to the negligence and multiple failures of Con Edison. These failures include (1) installing a defective pole that was not strong enough to withstand the stresses of a foreseeable event; (2) permitting a defective pole that was incapable of withstanding the stresses of a foreseeable event to remain in service; (3) failing to properly inspect the subject pole; (4) failing to recognize or appreciate the defective condition of the pole; and (5) Con Edison's

> failure to use an adequate pole to protect against a foreseeable risk of harm, or to take adequate steps to protect against that harm such as replacing the weakened pole. Each of these failures independently, and collectively, was a substantial factor in the happening of this incident"

(*id.*, ¶ 3).

The linchpin of this opinion is that there was a defect in the subject pole. Cannizzo reasons that "[t]he fact that the newest and thickest pole broke before the adjacent poles, or before the wire connections failed, is evidence that there was a defect in the pole" (*id.*, ¶ 6). Of course, this presupposes that the falling tree exerted equal force on the subject pole, as well as nearby older poles, a fact that plaintiffs never establish, or even explicitly state.

Cannizzo also reasons that the subject pole, at 38 inches, was too narrow in circumference to be a Class 2 pole (*id.*, ¶ 8). However, Con Ed's expert, Rossi, and the Osmose inspection report, identify the subject pole as a Class 3 pole (Rossi aff, ¶ 13; Osmose inspection report at 35). Nowhere does Cannizzo suggest that it was impermissible or that it violated any applicable rules for Con Ed to install a 38-inch Class 3 pole.

Cannizzo also suggests that the pole broke because "brash failure," which, he opines, can be caused not only by decay, but also by "undetected damage to poles due to a number of factors such as damage caused during processing or compression failures as a result of poles being dropped during processing, storage, transfer, or installation" (Cannizzo aff, ¶ 12). Plaintiffs, however, offer no evidence that anything of this nature occurred to the subject pole. Finally, Cannizzo arrives, without naming the doctrine, at a res ipsa loquitur explanation of the defect: "it is my opinion," he writes "with a reasonable degree of certainty, that absent negligence, a properly maintained and

inspected utility pole should not fail when a foreseeable risk comes to fruition" (Cannizzo aff, ¶ 16).

Cannizzo's affidavit, while lengthy and exhaustive in its way, fails to raise any questions of material fact that overcome Con Ed's prima facie showing of entitlement to judgment. First, Cannizzo does not provide any indication that he has the requisite background to furnish a reliable opinion on the subject of telephone pole safety (*see Browder v New York City Health & Hosps. Corp.*, 37 AD3d 375, 375 [1st Dept 2007] ["plaintiff's purported expert was insufficient since it did not indicate either the affiant's specialty or that he or she possessed the requisite background and knowledge to furnish a reliable opinion"]). Second, Cannizzo's opinions are speculative, as well as replete with presuppositions lacking in factual support; and, thus, would not be helpful in assisting a factfinder (*see Addonisio v City of New York*, 2012 NY Slip Op 31056 [U] [Sup Ct NY County 2012] [rejecting this same expert's opinion in a Labor Law action as "purely speculative"]).

Plaintiffs attempts to invoke res ipsa loquitur are unpersuasive. "To apply res ipsa loquitur, a plaintiff must establish that: (1) the accident [is] of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality or agency causing the accident [is] in the exclusive control of the defendants; and (3) the accident must not be due to any voluntary action or contribution by plaintiff" (*Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 429 [1st Dept 2013] [internal quotation marks and citation omitted]).

This kind of accident ordinarily occurs in the absence of negligence. In *Ray*, for example, the Appellate Division did not find negligence on the part of the telephone

company where a car had knocked down one of their poles. Similarly, a telephone pole can fall in a superstorm in the absence of negligence. As to control, Con Ed did not have exclusive control over the subject pole, as it was placed in the public. Here, it is not necessary to determine whether plaintiffs contributed to the accident by venturing out into Hurricane Sandy on foot. It is already clear that res ipsa loquitur is inapplicable to this action.[1] Plaintiffs, then, fail to overcome Con Ed's prima facie showing of entitlement to judgment.

CONCLUSION

Accordingly, it is

ORDERED defendants Consolidated Edison, Inc. and Consolidated Edison Company of New York, Inc.'s motion for summary judgment dismissing all claims against them is granted.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: April 20, 2017

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY, J.S.C.

[1] Plaintiffs mischaracterize the testimony of Con Edison's witness Sandra Corona, who did not testify that that normal poles do not break in the manner in which the subject pole broke, or that only a defective pole could have done so (*see* Corona aff, at 77).