At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 29th day of January 2019

PRESENT:
HON. CAROLYN E. WADE,
Justice

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JEFFREY LIDE,

Plaintiff,

Index No. 517779/2016

-against-

DECISION and ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and MECC CONTRACTING INC.,

Defendants.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

MECC CONTRACTING INC.,

Third-Party Defendant.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff's Motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	2
Reply Affidavits/Affirmations.....	3
Memorandum of Law.....	

Upon the foregoing papers and after oral argument, plaintiff JEFFREY LIDE moves for an Order granting summary judgment in favor of plaintiff and against defendant CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. on the issue of liability.

The underlying personal injury action was commenced by plaintiff Jeffrey Lide ("Plaintiff") to recover damages. Plaintiff alleges that, on September 30, 2015, he was in the driver seat of his vehicle, parked in the parking lane at 744-746 Nostrand Avenue, Brooklyn, New York. Plaintiff claims that a manhole underneath his vehicle, identified as SD29821, suddenly exploded and lifted up his vehicle, and that he was injured when the vehicle dropped back on the ground.

Plaintiff filed the Summons and Complaint on October 8, 2016 against defendant Consolidated Edison Company of New York, Inc. ("Con Ed"), claiming, *inter alia*, that the utility company was the owner, co-owner, agent, lessor, and lessee of the manhole, and that it constructed and erected the manhole. On June 28, 2017, it instituted a third-party action against MECC Contracting Inc. ("MECC"), a contracting company that Con Ed entered into an agreement with to perform work at the location of the accident. Subsequently, Plaintiff amended

his complaint and added MECC as a direct defendant, asserting allegations similar to those against Con Ed. The instant motion ensues.

In support of his motion for summary judgment, Plaintiff submits that he was sitting in the driver seat of his vehicle, parked in front of 744-746 Nostrand Avenue, Brooklyn, New York, waiting for a store to open, when the subject manhole suddenly exploded. The explosion lifted up his vehicle and it dropped back down to the ground. Plaintiff argues that Con Ed's negligence is established under the doctrine of *res ipsa loquitur*, because (1) an exploding manhole is an accident of a kind that does not ordinary occur in the absence of someone's negligence; (2) the manhole was within Con Ed's exclusive control; and (3) Plaintiff did not cause or contribute to the manhole explosion.

Con Ed, in opposition, contends that the doctrine of *res ipsa loquitur* provides only an inference of negligence and not a presumption of any factual issue. It argues that the jury should decide whether the inference is sufficient to create a prima facie case of negligence. Moreover, it avers that summary judgment is premature at this point, as no depositions have been held, and it has not been established that Plaintiff was in a vehicle at the time of the accident. It further claims that Plaintiff has not pointed to any medical evidence showing that he received an injury while in his vehicle when the manhole exploded.

In rebuttal, Plaintiff maintains that Con Ed failed to submit any evidence of triable issues of fact. Plaintiff also avers that Con Ed does not dispute that a manhole explosion does not ordinarily occur in the absence of someone's negligence, that the subject manhole was within Con Ed's exclusive control, and that Plaintiff did not cause or contribute to the explosion.

The doctrine of *res ipsa loquitur* permits an inference of negligence to be drawn solely from the happening of an accident *(Giantomaso v T. Weiss Realty Corp.*, 142 AD3d 950, 952 [2d Dept 2016]). "Submission of a case on the theory of *res ipsa loquitur* is warranted only when the plaintiff can establish three elements: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987], *citing* Prosser, Torts § 39, at 218 [3d ed.]). Indeed, *res ipsa loquitur* is "nothing more than a brand of circumstantial evidence" (*Morejon v Rais Const. Co.*, 7 NY3d 203, 211 [2006]). "Viewed in that light, the summary judgment issue may also be properly approached by simply evaluating the circumstantial evidence." (*Id.*)

In the instant case, given the limited record as no depositions have been conducted, this Court finds that Plaintiff has not established his entitlement to summary judgment based on the doctrine of *res ipsa loquitur*. At this juncture, there remain questions of facts to be determined by the trier of fact.

Accordingly, plaintiff JEFFREY LIDE's motion for a summary judgment against defendant CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. is **DENIED**.

This constitutes the Decision/Order of the court.

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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KINGS COUNTY CLERK
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