SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART 62**

Justice

----------X

VERIZON NEW YORK INC.,

Plaintiff,

- v -

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

Defendants.

----------X

INDEX NO. 150104/2013

MOTION DATE 03/30/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

THE CITY OF NEW YORK

Defendant.

----------X

Third-Party
Index No. 590759/2013

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, on or about January 4, 2013, plaintiff Verizon New York, Inc. ("Verizon") filed a Summons and Complaint against Consolidated Edison Company of New York/Consolidated Edison, Inc. ("Con-Edison"), alleging that on or about May 16, 2011, steam facilities and equipment owned by Con Edison at the intersection of Madison Avenue and East 66th Street in New York leaked steam on Verizon's telecommunication equipment ("Verizon's facilities"), causing damage in the amount of $312,275.85.

On or about September 25, 2013, Con-Edison filed a third-party Summons and Complaint against the City of New York (the "City"), to recover for the alleged property damage sustained by Verizon.

Pending now before the court is a motion filed by the City seeking an order, pursuant to CPLR § 3212, granting summary judgment in favor of the City and dismissing the complaint. Oral arguments were held before the undersigned on October 7, 2021. Pursuant to the relevant filings, and the arguments made on the record, this motion is GRANTED.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make 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 failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

The City's *Prima Facie* Case

The City argues that it is entitled to summary judgment because it had neither actual or constructive notice of the subject condition; nor did it affirmatively create the subject condition.

In support of its motion, the City submits the sworn Affidavit of Kemal Babajanov, (NYSCEF Document #41), a Claim Specialist for the New York City Department of Environmental Protection (the "DEP"). According to Mr. Babajanov, he performed a search of records pertaining to the intersection at East 66th Street and Madison Avenue, New York, New York for two years prior to and including the date of the subject damage. The City also submitted

the records that were the result of Mr. Babajanov's search (NYSCEF Document #40), and the transcript of the deposition of Steven Cear, a Field Supervisor at the Bureau of Water and Sewer Operations (NYSCEF Document #42). The City argues that the DEP records and the testimony establish that the City did not create, or have actual or construction notice of any leak or possible steam damage that would have caused property damage to Verizon's facilities on May 16, 2011.

Given the evidence and exhibits produced by the City, as supplemented by the arguments made by the City during oral arguments, this court finds that the City has made a *prima facie* case in support of summary judgment, and the burden now shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that require a trial of the action.

Con Edison's Opposition

In opposition, Con Edison argues that the City had adequate prior notice of water issues, and therefore questions of fact remain as to whether these water issues caused or created the damage alleged to have occurred to Verizon's facilities. Specifically, Con Edison alleges that: (1) a leak from 2010, (Customer Service Request ["CRS"] #185009766), was in close proximity to Verizon's facilities and provided the City with actual and constructive notice; (2) water pooling on 66th Street in 2009, (CSR #84943115), provided the City with actual and constructive notice; and (3) a leak from a fire hydrant, (CSR #185204440), and corresponding completed Work Order #842223296, provided the City with actual and constructive notice.

As discussed on the record, this court finds as follows:

CSR# 185009766 was generated due to a leaking main line gate that Con Edison argues was "in very close proximity" to where Verizon alleges its damaged structures were located. However, the record shows that the leak reported to Verizon on April 1, 2010, was repaired and remedied eight days later, on April 9, 2010. There is no evidence on the record that the condition was re-occurring and/or that the repair was faulty. Thus, this 2010 leak, which was repaired over a year before the subject incident occurred, does not provide the City with actual or constructive notice.

CSR#184943115 was generated due to a customer at 64 E. 66th Street calling on October 31, 2009 to report water gathering in front of her home. The caller noted that "it happens all the time." Contrary to Con Edison's assertion that this condition was never addressed, the City records show that this complaint was in fact inspected and then "REFERRED TO D.O.T." on November 1, 2009 at 8:30AM (NYSCEF Document #40). The City received no subsequent complaints about water gathering in front of 64 East 66th Street. Thus, this 2009 condition, which was sent to the DOT about 1.5 years before the subject incident, does not provide the City with actual or constructive notice.

CSR #185204440 was generated in response to a leaking fire hydrant, and Work Order #842223296 was generated. The records show that the DEP received the complaint of the subject hydrant leaking on March 7, 2011, and upon receipt of the complaint, the hydrant was turned off. Eleven days later, on March 18, 2011, the hydrant was repaired. There is no suggestion that, in the eleven days between the time the City received the complaint and the time the hydrant was repaired, the DEP received any further complaints of water going into a basement, or elsewhere. In any event, the alleged damage to Verizon's facilitates was on May 16, 2011, more than a month after the hydrant was repaired.

In further support of its opposition to Con Edison's motion, the City also submitted the Affidavit of DEP District Supervisor, Michael Dibartolo, (NYSCEF Document #43), who averred that, when there is a hydrant leak due to a defective drip rod, as the one that was indicated in CSR #185204440, the leaks are limited only to when the hydrant is being operated, and only to the few feet in front of the hydrant.

The City further submitted a google maps photo, (NYSCEF Document #44), showing that the location of the fire hydrant is near the intersection of East 67th Street and Madison Avenue. In contrast, the Verizon facilities that were allegedly damaged are located near the intersection of East 66th Street and Madison Avenue. Given the above, the court finds that this condition does not provide the City with actual or constructive notice.

Pursuant to the findings made herein, and those made on the record on October 7, 2021, it is hereby:

ORDERED that this motion is GRANTED; and it is further hereby

ORDERED that the third-party Complaint and any other claims against the City are dismissed, with prejudice; and it is further hereby

ORDERED that the caption is amended accordingly; and it is further hereby

ORDERED that this action is transferred to a non-City part.

11/10/2021
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**		**GRANTED IN PART**	X **OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**