SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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JOANNE LOWMAN,

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 158715/2017

MOTION DATE 2/2/2022

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

NELSON SERVICES SYSTEMS, INC.

Defendant.

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Third-Party
Index No. 595442/2018

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 112, 113, 114, 117, 120

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 96, 100, 103, 104, 105, 106, 107, 108, 109, 110, 111, 118, 121, 123, 124, 125, 126, 127, 128

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 97, 101, 102, 115, 116, 119, 122

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injury incurred when an elevator gate fell on her on August 24, 2016. Consolidated Edison Company of New York, Inc

(Con Ed) is the owner of the premises where the accident occurred. Plaintiff was working at the premises performing cleaning services pursuant to a contract for said services between Con Ed and Nelson Service Systems, Inc. (Nelson). Nelson was plaintiff's employer on the date of the accident. Con Ed has asserted breach of contract and indemnity claims against Nelson.

PENDING MOTIONS

On November 19, 2021, plaintiff moved for summary judgment as to liability (Mo Seq 1). On January 12, 2022, Con Ed cross-moved for summary judgment and dismissal.

On January 12, 2022, Con Ed moved for summary judgment as against Nelson (Mo Seq No 2), and Nelson moved for summary judgment and dismissal of the Third-Party Complaint (Mo Seq No 3).

On February 2, 2022, the motions were fully briefed and marked submitted.

The motions are consolidated herein for determination and granted to the extent set forth below.

ALLEGED FACTS

Plaintiff was employed by Nelson for approximately six years as a maintenance worker performing service at Con Edison locations. She was involved in an accident on August 24, 2016, at approximately 1:00pm, involving the freight elevator on the premises known as 20 Worth Street (aka 30 Worth Street), Yonkers, NY (Subject Premises). She had taken the elevator from the second floor to the first floor, opened the interior gate and, while she was exiting, the elevator the gate fell and struck her in the head and neck propelling her to the floor.

Plaintiff reported the incident to a Mechanic employed by Con Ed, Naleyanda Ganapathy (NG) who went to check the elevator. In the days following the incident, plaintiff observed Con Ed workers repairing the gate and they advised her that the cable had popped. The 1/8-inch

diameter airplane cable which broke was subsequently replaced with 3/16-inch diameter airplane cable by Con Ed employees.

The elevator at was an older style freight elevator, approximately 10 feet by 10 feet. The doors to the elevator consisted of an interior gate and an exterior double door. Con Ed had its own employees perform maintenance on the elevator. Inspections of the elevators at the premises were performed on a monthly basis and would involve taking the elevator out of service so an assessment of the elevator could be made.

The gate is manually opened and closed and has a counterweight that is connected to it with a cable/rope. It moved vertically when the user would pull a strap up or down to open or close it. The gate had a pulley and counterweight suspension system to assist the user in opening in opening and closing it. Cables connected the gate to the counterweights through pulleys

As part of their inspections, Con Ed mechanics would visually inspect the cable/rope for fraying and to make sure it was properly riding on the pulleys. However, the full length of the cable/rope is not visible since the counterweight itself goes into a tube or pipe. The metal tube was located on the exterior of the elevator car. The metal tube had to be cut open to affect the post-accident repairs.

The counterweight is a long, round piece of steel with a hook at the top to which the cable was connected. The counterweight is situated within a metal post, in which it raises and lowers when the gate is lowered and raised.

Plaintiff was injured while working for Nelson. Plaintiff's work was being performed in connection with Nelson's contract with Con Ed. The contract required that Nelson procure general liability insurance that covered Con Edison, as an additional insured.

Nelson procured general liability insurance that named, Con Ed as an additional insured, but Con Ed alleges the insurance did not fulfil the requirement that Con Edison be insured for its own negligence.

Con Ed tendered a pre-suit claim to Nelson's insurance carrier on November 17, 2016, and on April 25, 2018. Nelson's insurance carrier declined Con Ed's tenders in a letter dated July 16, 2021. The carrier's declination stated the coverage for Con Ed was conditional upon the acts or omissions of Nelson and did not cover the Subject Premises.

DISCUSSION

It is well settled that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material issue of fact. *Black v. Kohl's Dept. Stores, Inc.*, 80 A.D.3d 958 (2011); *Benizii v. Bank of Hudson*, 50 A.D.3d 1372 (2008). Considering the drastic nature of the remedy, the party moving for summary judgment must establish *prima facie* entitlement to judgment as a matter of law. *Jacobsen v. New York City Health and Hospitals Corp.*, 22 N.Y.3d 824 (2014); *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728 (2014). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen* at 833.

The non-moving party must be accorded the benefit of every reasonable inference from the record proof. *Winne v. Town of Duanesburg*, 86 A.D.3d 779 (2011). It is not the Court's role to determine issues of fact or credibility, but merely to determine whether such issues exist. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499 (2012); *Green v. Quincy Amusements, Inc.*, 108 A.D.3d 591 (2013); *Pearson v. Dix McBride, LLC*, 63 A.D.3d 895 (2009). If the proponent of summary judgment fails to make a *prima facie* showing of entitlement to judgment as a matter of law, then the court must deny the motion, regardless of the sufficiency of the opposition set forth by the

opponent of the motion. *Voss, supra; Smalls v. AJI Industries, Inc.*, 10 N.Y.3d 733 (2008). The proponent of a motion for summary judgment cannot rely merely on conclusory, unsubstantiated assertions. *Longtemps v. Oliva*, 110 A.D.3d 1316 (2013). It is likewise insufficient for the proponent of summary judgment to merely point to gaps in the defendant's proof. *DiBartolomeo v. St. Peter's Hosp. of City of Albany*, 73 A.D.3d 1326 (2010); *Rachlin v. Michaels Arts & Crafts*, 118 A.D.3d 1391 (2014). A motion for summary judgment should not be granted if there is uncertainty as to the existence of triable issues of fact when viewing the evidence in the light most favorable to the party opposing the motion. *Flower v. Noonan*, 271 A.D.2d 825 (2000).

Plaintiff's Motion for Summary Judgment and Con Ed's Cross-Motion Are Denied as There Are Material Issues of Fact to Be Determined at Trial

In support of its motion for summary judgment, plaintiff offers the affidavit of her expert Patrick Carrajat. Mr. Carrajat opines that prior to the accident Con Ed improperly modified the gate in a manner inconsistent with the manufacturer's specifications, by replacing the original heavy-duty roller chain with 1/8-inch diameter airplane cable.

Mr. Carrajat further stated that Peelle had confirmed that they furnished and installed the doors and provided the channels for the gate, but did not have records of the gate installation. Mr. Carrajat opined that since gate channels were provided it is probable that the original gate was installed by Peelle. Mr. Carrajat concludes that the improper modification and replacement of the original Peelle gate chain with a cable was a proximate cause of the accident and injury to the Plaintiff. Mr. Carrajat further opined claim that the Con Ed employees charged with maintaining the elevator did not have adequate training in its proper care.

Con Ed argues that there is no allegation that it had actual or constructive notice of any defect with the elevator gate, and that plaintiff does not allege that Con Ed could have implemented any procedure that would have detected the condition that caused the failure.

Con Ed's elevator expert Ronald Schloss procured, from Peelle, the drawings from 1960 for the work done by Peelle on the subject elevator. These records show that the doors were installed by Peelle. The gate and their suspension system were not. A company named Haughton oversaw the overall elevator project. Haughton arranged for the installation of the various components and systems by the various manufacturers and suppliers.

Con Ed argues that their employees were qualified, and that plaintiff fails to connect the alleged lack of qualification to the cause of the accident. Additionally, Mr. Schloss opines that the use of 1/8" steel airplane cable in the gate suspension system was not negligent and was consistent with proper and accepted engineering and elevator design requirements. Mr. Schloss states the use of airplane cable was acceptable on a manually operated gate at the time this elevator was installed and put into use in approximately 1961, and that accepted elevator design and engineering practices did not require the use of a sprocket and chain system for a manually operated gate at that time.

Plaintiff counters that the complete lack of inspection of the cable for approximately 55 years since the presumptive date of installation by Con Ed in 1960-1961 gives rise to constructive notice of the defect, i.e. deteriorating cable that ultimately failed, as a matter of law.

The court finds that neither party has presented the court with a basis to award it summary judgment as a matter of law. The differing opinions of the experts are entitled to be put to a jury to make determinations as to weight and credibility. Whether Con Ed's inspections were reasonable under the circumstances or whether some action should have been taken to inspect the cable hidden by the tube is again a question of fact for the jury.

Based on the foregoing, plaintiff's motion for summary judgment as against Con Ed and Con Ed's cross-motion for dismissal are denied.

Con Ed's Motion for Summary Judgment as Against Nelson and Nelson's Motion for summary Judgment against Con Ed

That portion of Nelson's motion for summary judgment which seeks dismissal of the third cause of action for negligence is granted without opposition. Con Ed concedes that there is no basis to find Nelson negligent. The balance of Nelson's motion is denied.

Con Ed's Contractual Indemnification Claim Can Not be Summarily Determined

Th first cause of action in the Third-Party complaint is for contractual indemnification. The contract between the parties contains an indemnification provision which provides:

To the fullest extent allowed by law, the Contractor agrees to defend, indemnify and hold harmless Con Edison … from and against all claims, damage, loss and liability, including costs and expenses, legal and otherwise, for injury to or the death of persons …. Resulting, in whole or in part, from or connected with, the performance of the Contract by the Contractor … or any of their … employees, and including claims, losses, damages and liabilities arising from the partial or sole negligence of Con-Edison and non-parties to the contract(including 0&R). The Contractor expressly agrees that Con Edison and O&R may pursue claims for contribution and indemnification against the Contractor in connection with claims against Con Edison and O&R for injury and/or death to Contractor's employees …

'The right to contractual indemnification depends upon the specific language of the contract' (*O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2017], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]; *see Mejia v Cohn*, 188 AD3d 1035, 1038 [2020]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2009]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v Marshalls of MA, Inc.*, 61 AD3d at 930; *see Shea v Bloomberg, L.P.*, 124 AD3d 621, 622 [2015]).

Vilsaint v. SL Green Realty Corp., 195 A.D.3d 655, 656(2021).

In this case, the court agrees with Con Edison that this language is broad enough to encompass plaintiff's injury, provided there is no negligence on the part of Con Ed (*General Obligations Law* § 5-322.1). As noted above whether there was negligence on the part of Con Ed is a question of fact to be determined at trial. Based on the foregoing there is no basis to dismiss this cause of action as a matter of law at this time.

Con Ed's Motion for Summary Judgment on its Breach of Contract Claim is granted

It is undisputed that the contract required that Nelson procure general liability insurance that covered Con Edison, as an additional insured.

The contract provides in pertinent part:

> The insurance policy or policies shall name Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and Consolidated Edison, Inc. as additional insureds with respect to the services furnished hereunder ....To the fullest extent allowed by law, the Contractor agrees that this is an insured contract and that the insurance required herein is intended to cover each of Con Edison and O&R for its own liability for negligence or any other cause of action in any claim or lawsuit for bodily injury or property damage arising out of the services.

Nelson did procure insurance that covered Con Ed as an additional insured, but the parties disagree as to whether the insurance procured complied with the contract.

The court finds it did not. The contract was breached to the extent that the Subject Premises was not included in the locations covered by the insurance procured.

Additionally, the contract required Nelson to procure general liability insurance that covered Con Ed, as an additional insured for Con Ed's own negligence. The contract provides in pertinent part:

> The insurance policy or policies shall name Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and Consolidated Edison, Inc. as additional insureds with respect to the services furnished hereunder ....To the fullest extent allowed by law, the Contractor agrees that this is an insured contract and that the insurance required herein is intended to cover each of Con Edison and O&R for its own liability for negligence or any other cause of action in any claim or lawsuit for bodily injury or property damage arising out of the services.

Nelson procured general liability insurance that named Con Ed as an additional insured, but the insurance did not fulfil the requirement that Con Ed be insured for its own negligence. Instead Nelson procured a policy that required Nelson's acts or omissions to be a cause of the accident as a prerequisite to coverage for Con Ed. This violates Nelson's express obligation to cover Con Ed

for Con Ed's own liability for negligence or any other cause of action in any claim or lawsuit for bodily injury or property damage arising out of the services.

The court does not find the language in the contract ambiguous as argued by Neslon. Nor is Nelson's argument that the language, as interpreted by Con Ed, would require a separate policy to be issued persuasive. Terms such as the term in the contract between the parties have been upheld by Appellate Courts.

In *Live Nation v. Best Buy* (194 A.D.3d 487) the Appellate Division First Department held:

> The court properly granted plaintiff Live Nation's motion for summary judgment on its breach of contract cause of action, which was Live Nation's sole remaining claim. The agreement at issue stated that Best Buy would obtain liability insurance which named Live Nation as an additional insured for injuries arising from Best Buy's operations. This language required Best Buy to obtain coverage whereby Live Nation would be an additional insured for injuries originating from, incident to, or having a connection with Best Buy's operations, even if Best Buy was not at fault (see Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 38, 904 N.Y.S.2d 338, 930 N.E.2d 259 [2010]). However, the insurance Best Buy purchased only provided that Live Nation would have coverage as an additional insured if Best Buy was a proximate cause of the injuries (see Burlington Ins. Co. v. NYC Tr. Auth., 29 N.Y.3d 313, 325, 57 N.Y.S.3d 85,79 N.E.3d 477 [2017]).

The agreement between Live Nation and Best Buy had language that is similar to the language in the agreement between Con Ed and Nelson. Live Nation's contract provided that Best Buy acquire policies that list Live Nation as an additional insured "with respect to any and all claims arising from" Best Buy's operations. As is the case with Nelson here, Best Buy was free of any negligence in the occurrence of the accident in the Live Nation breach of contract case.

Based on the forgoing Con Ed's motion for summary judgment against Nelson on the breach of contract claim is granted.

CONCLUSION

WHEREFORE it is hereby

ORDERED that plaintiff's motion for summary judgment against Con Ed (Mo Seq No 1) and Con Ed's cross-motion for summary judgment against plaintiff are denied; and it is further

ORDERED that Nelson's motion for summary judgment against Con Ed (Mo Seq No 3) is granted only to the extent of dismissing the third cause of action for negligence in the third-party complaint and is otherwise denied; and it is further

ORDERED that Con Ed's motion for summary judgment as to liability on the breach of contract claim against Nelson is granted; and it is further

ORDERED that, within 20 days from entry of this order, Con Ed shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/9/2022
DATE

SABRINA KRAUS, J.S.C.

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