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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 110504/2006

SMITH, LLOYD

VS.

CONSOLIDATED EDISON

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. 110504/06

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

his motion to/for

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-X

Notice of Cross-Motion + Supporting Answering Affirmation -

Answering Affidavits — Exhibits A

Replying Affidavits

PAPERS NUMBERED

1

2

3

4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED

MAY 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: May 12, 2011

MARTIN SHULMAN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 1

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Lloyd Smith,

Plaintiff,

Index No. 110504/2006

-against-

Consolidated Edison Company of New York, Inc. and Petrocelli Electric Co., Inc.,

Defendants.

----------X

Martin Shulman, J.:

Defendant Petrocelli Electric Co., Inc. ("Petrocelli") moves for summary judgment dismissing plaintiff's complaint against it. Co-defendant Consolidated Edison Company of New York, Inc. ("Con Edison") cross-moves for summary judgment dismissing plaintiff's complaint against it. Plaintiff opposes the motion and cross-motion, which are consolidated for disposition.

Parties' Allegations

Plaintiff alleges that on April 3, 2006 at about 7:30 P.M. he crossed the street at Broadway and White Street, stepped on a metal plate in the roadway and suffered an electric shock (plaintiff EBT dated April 19, 2007 ["plaintiff April 2007 EBT"] at Exh. B, pp. 15-16). He stated he had taken "around eight steps" into the street and "wasn't looking" at what he stepped on (*id.*). He further stated that he felt a sharp pain like a needle going through him, causing him to fall and hit his back and shoulder on the ground (*id.* at 16).

Plaintiff asserts that he suffered a partial left rotator cuff tear, disc herniation, internal derangement of the right foot and right foot burns due to the shock (bill of particulars at Exh. A, item 7; supplemental bill of particulars at Exh. E, item 7). He also

contends that his injury was not due to a slip and fall (plaintiff April 2007 EBT, at 39) and that it was raining heavily that evening (*id.*). Plaintiff identified the location of the accident in a photo (*id.* at 36).

At a later deposition, plaintiff asserted that he was near the Wow Café at 381 Broadway (plaintiff EBT dated February 3, 2009 ["plaintiff February 2009 EBT"] at Exh. F, pp. 54-55) and stated that the metal plate he identified as having stepped on in his April 2007 EBT did not look like the metal plate that he stepped on (plaintiff February 2009 EBT, at 70-71, 101). He identified a different, nearby metal plate (*id.* at 101-102) as looking "like the one" he stepped on (*id.* at 109).

Plaintiff contends that there is medical evidence that he received an electric shock injury in the emergency room narrative note (Exh. W), that stray voltage was found on the southeastern corner lamp post (Morgan EBT at Exh. H, p. 27) and that this must have been "the source of the shock" that caused his fall (Tanenbaum Aff., ¶ 6). He asserts that, applying the doctrine of res ipsa loquitur, there is circumstantial evidence that the "source of the stray current [while unclear] ... had to emanate either from work by [Con Edison] or Petrocelli" (*id.*, ¶ 15) and, consequently, there is a fair inference that either one or both defendants were negligent.

Defendants note that after plaintiff was reported injured, Con Edison personnel were called to the accident site, that they arrived at 9:03 P.M., used a volt meter to test the manholes and other potential hazards at the location plaintiff identified and that they found zero voltage (Dinan EBT dated April 19, 2007 ["Dinan April 2007 EBT"] at Exh. C, pp. 6-7, 11-13). They further state that the call was for a smoking manhole, but that there was no smoking manhole at the site, that atmospheric readings were taken and

that both a handheld volt meter and a second digital volt meter both indicated zero voltage (*id.* at 11-14).

Defendants further assert that a lamp post was tested for stray voltage and it also registered as having zero voltage. They aver that a Con Edison supervisor performed additional stray voltage tests later that evening, including at the northwest corner and found no evidence of stray voltage (Thauilot EBT at Exh. J, pp. 51-52, 57-58). A Con Edison Emergency Control System ticket indicated that there was "a problem" with the southeastern corner lamp post, which had 118 volts, but that it "was not energized prior to" Petrocelli's arrival (*id.* at 71-72; Morgan EBT, 27-28). They claim that examination of the lamp posts indicated no exposed wires or cables, damaged equipment or open control boxes (*id.* at 15). Thus, the Con Edison investigators all indicated no stray voltage was found (*id.* at 29; Thauilot EBT, at 51-52, 57-58; Kapur EBT, at 34).

Petrocelli states that as a municipal contractor it was responsible for maintaining traffic signals in Manhattan and had performed a saw cut at the intersection of Broadway and White Street on March 29, 2006 as part of a modernization of the traffic control system (Ferguson EBT at Exh. I, pp. 10-11, 25). It further states that there were no electrical problems at the site prior to plaintiff's accident and its test for stray voltage after plaintiff's accident also showed zero voltage at both lamp posts (*id.* at 23, 25-26).

Defendants therefore argue that the lack of any evidence of voltage, damaged or melted wires or other damaged equipment at the site establishes that there is no evidentiary proof that an electric shock caused plaintiff's accident (Sacco Aff. at Exh. V, ¶¶ 47, 50-51). They also conclude that there is insufficient evidence of an electric shock since the plaintiff's emergency room medical record states that there were "no burn

marks to right foot" (Exh. W). Finally, they note the change in plaintiff's testimony as to the location of the metal plate that allegedly caused his electric shock. Therefore, defendants urge there is no evidence of negligence and plaintiff's complaint should be dismissed.

Analysis

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

To establish a prima facie case of negligence, plaintiff "must demonstrate that the defendants either created the condition which caused the accident, or had actual or constructive notice of the condition and a reasonable time to correct it or warn about its existence (citations omitted). *Luciani v Waldbaum, Inc.*, 304 AD2d 537 (2d Dept 2003).

Recognizing that "some accidents by their very nature would not occur without negligence", an inference may be drawn where the event is of the type that ordinarily does not occur in the absence of negligence, the event is caused by an instrumentality

in the defendant's exclusive control and plaintiff did not cause or contribute to the event (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). The doctrine of res ipsa loquitur "involves little more than application of the ordinary rules of circumstantial evidence to certain unusual events" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 495 [1997]). Moreover, "res ipsa loquitur is not a theory of recovery but an evidentiary doctrine compatible with specific evidence of fault" (*Scope v Federated Dept. Stores, Inc.*, 26 AD3d 226, 226 [1st Dept 2006]).

Defendants contend that the lack of visible burn marks to plaintiff's right foot (Exh. W) demonstrates that no electric shock occurred. The discharge note indicates that the medical resident's impression was that there was an "[e]lectric shock" to plaintiff's right foot. Defendants' argument, in essence, is that an electric shock must leave a visible mark, but they have not presented evidentiary proof in the form of an affidavit by a physician to support this. Consequently, dismissal of plaintiff's complaint on this ground is denied.

More significantly, defendants present proof through the deposition testimony of numerous Con Edison personnel that tests were conducted in the immediate aftermath of plaintiff's accident, commencing less than two hours thereafter and that such tests showed no stray voltage, damaged or exposed wires or other defective equipment at the site. They also present proof that, if voltage capable of causing an electric shock had been present, Con Edison and/or Petrocelli technicians would have detected it or observed improper wiring or damaged equipment (Sacco Aff., ¶¶ 48-52).

This court rejects plaintiff's res ipsa loquitur claim as plaintiff presents this theory for the first time in opposition to these motions for summary judgment. See *Yousefi v*

Rudeth Realty, LLC, 61 AD3d 677, 678 (2d Dept 2009). In any event, the evidence failed to show that this doctrine applies to this case. And it bears repeating: while res ipsa loquitur permits an inference of negligence to be drawn from the occurrence of an accident (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 142 [1st Dept 2000]), it is "an evidentiary doctrine compatible with specific evidence of fault" (*Scope*, 26 AD3d at 226). With their evidence, defendants have made a prima facie showing that no defective condition existed. Plaintiff fails to present any specific evidence of fault to controvert defendants' showing that there was no stray voltage at the site and therefore defendants did not cause plaintiff's accident.

Additionally, plaintiff cannot identify the metal plate he stepped on, having first identified one metal plate (plaintiff February 2009 EBT, at 70-71) then having subsequently identified a different metal plate which "looked like" (*id.* at 101-102) the plate that caused his injury. This is mere speculation and is insufficient to raise a material issue of fact. Further, plaintiff fails to present evidence that either defendant had knowledge of the purportedly defective condition or how long this purported condition existed prior to plaintiff's accident. Accordingly, Petrocelli's motion for summary judgment and Con Edison's cross motion for summary judgment must be granted. It is, therefore,

ORDERED that Petrocelli Electric Co., Inc.'s motion for summary judgment dismissing the complaint and any cross claims against it is granted and the complaint and any cross claims are dismissed with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Consolidated Edison Company of New York, Inc.'s cross motion for summary judgment dismissing the complaint and any cross claims against it is granted and the complaint and any cross claims against it are dismissed with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes this court's decision and order. Copies of this decision and order have been provided to counsel for the parties.

Dated: May 12, 2011

Martin Shulman, J.S.C.