

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

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THE CITY OF NEW YORK,

Plaintiff,

Index No. _____/2020

-against-

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

SUMMONS

Defendant.

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TO THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to appear in this action by serving a notice of appearance on Plaintiff’s attorney within twenty days after service of this summons, exclusive of the day of service, or within thirty days after service is complete if this summons is not personally delivered to you within the State of New York.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 503(a), venue is properly designated in that Plaintiff resides in New York County, having its principal offices at One Centre Street and 100 Church Street, New York, New York.

Dated: New York, New York
January 3, 2020

JAMES E. JOHNSON
Corporation Counsel of the City of New York
Attorney for Plaintiff

By: /s/ Eric Proshansky
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE CITY OF NEW YORK,

Index No. _____/2020

Plaintiff,

-against-

COMPLAINT

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Defendant.

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Plaintiff The City of New York (the “City”), by its attorney, James E. Johnson, Corporation Counsel of the City of New York, alleges upon personal knowledge as to itself and upon information and belief as to all other matters:

INTRODUCTION

1. This is an action for a declaration that defendant Consolidated Edison Company of New York, Inc. (“Con Edison”) has a duty to defend the City in fifty-nine individual lawsuits brought on behalf of 168 plaintiffs that are consolidated for discovery purposes before a single judge under the caption *In re Gas Explosion Litigation*, Master Index No. 780000/2015, Supreme Court, New York County (Kotler, J.), referred to herein as the “*Gas Explosion Actions*”). The City also seeks a declaration that Con Edison must reimburse the City for the costs incurred in defending the *Gas Explosion Actions*, from the date of the City’s wrongfully-disclaimed December 12, 2017 tender to the date Con Edison assumes the defense of the actions.

PARTIES

2. The City is a municipal corporation organized pursuant to the laws of the State of New York.

3. Defendant Con Edison is corporation formed under the laws of the State of New York, with its principal place of business at 4 Irving Place, New York, New York 10003. Con Edison is licensed to transact and engages in business in the State of New York.

FACTS

A. Con Edison's Insurance Obligation To The City

4. On or about April 1, 2011, the New York City Department of Transportation ("DOT") issued a street opening permit to Con Edison, permit number M01-2011091-013, valid to perform work from April 7, 2011 to May 5, 2011. The permitted work was to be situated on the west side of Park Avenue, between East 116th and East 117th Streets, in Manhattan. The permit stated the purpose of the work as "conduit construction and franchise 150102/360/replace obstructed ducts."

5. On or about August 4, 2011, DOT issued to Con Edison a street opening permit, permit number M01-2011216-120, valid to perform work from August 17, 2011 to September 16, 2011. The permitted work was to be situated on the west side of Park Avenue, between East 116th and East 117th Streets, in Manhattan. The permit stated the purpose of the work as "Major Installations – High Voltage 170993/360/Install AC Service."

6. On or about September 15, 2011, DOT issued to Con Edison a street opening permit, permit number M01-2011258-103, valid to perform work from September 22, 2011 to October 21, 2011. The permitted work was to be situated on the west side of Park Avenue, between East 116th and East 117th Streets, in Manhattan. The permit stated the purpose of the work as "Major Installation – Gas 177401/360/Install Gas Service."

7. On or about October 13, 2011, DOT issued to Con Edison a street opening permit, permit number M01-2011286-215, valid to perform work from October 22, 2011 to November 19, 2011. The permitted work was to be situated on the west side of Park Avenue,

between East 116th and East 117th Streets, in Manhattan. The permit stated the purpose of the work as was “Major Installation – Gas 182546/360/Install Gas Service.”

8. On or about November 15, 2011, DOT issued to Con Edison a street opening permit, permit number M01-2011319-046, valid to perform work from November 19, 2011 to January 18, 2012. The permitted work was to be situated on the west side of Park Avenue, between East 116th and East 117th Streets, in Manhattan. The permit stated the purpose of the work as “Major Installation – Gas 187420/360/SLD-(S10-84774-000M)-Hallen.”

9. On or about November 18, 2011, DOT issued to Con Edison a street opening permit, permit number M01-2011322-067, valid to perform work from November 20, 2011 to December 19, 2011. The permitted work was to be situated on the west side of Park Avenue, between East 116th and East 117th Streets, in Manhattan. The permit stated the purpose of the work as “Major Installation – Gas 188125/360/TF - Install Gas Service.” The permits referenced in paragraphs four through nine hereto are referred to collectively as the “Permits.”

10. DOT’s Bureau of Highway Operations rules and regulations (the “Highway Rules”) require all applicants for street-opening permits to maintain a commercial general liability (“CGL”) insurance policy in the minimum amount of \$1 million per occurrence which names the City as an additional insured, 34 R.C.N.Y. § 2-02(a)(3)(i) (2009), entitled to the same coverage as an insured under the policy.

11. The Highway Rules further provide that the insurance policy shall “provide coverage to protect the City and the applicant from claims for property damage and/or bodily injury . . . which may arise from any operations performed by or on behalf of the applicant for which [DOT] has issued it a permit.” The insurance must also: (i) “provide coverage at least as broad as that provided by the most recent edition of ISO Form CG 0001,” (ii)

“provide coverage for completed operations,” (iii) “provide that the City and its officials and employees are Additional Insureds with coverage at least as broad as set forth in ISO Form CG 20 26 (11/85 ed.),” and (iv) “provide that the limit of coverage applicable to the Named Insured is equally applicable to the City as Additional Insured.” 34 R.C.N.Y. § 2-02(a)(3)(i)(B), (C), (D), (F), (G).

12. As an accommodation to applicants that frequently seek permits and have financial standing satisfactory to the City, DOT, in its sole discretion, allows those applicants to “self-insure,” provided that, *inter alia*, the applicant (i) “presents proof of excess or umbrella CGL coverage applicable to its operations under such permits;” (ii) “certifies that it has a self-insurance program in place that satisfies the requirements” set forth above for a \$1 million per-occurrence CGL policy that “will continue for the life of the permit and the Guarantee Period;”¹ and (iii) “agrees to provide the same defense of any suit against the City that alleges facts that bring the suit within the scope of the coverage required . . . as an insurer would be obligated to provide under the laws of New York” 34 R.C.N.Y. § 2-02(a)(vi)(A), (B), (C).

13. Con Edison decided to “self-insure” its insurance obligation under the Permits, and pursuant to the Highway Rules to “certify that it has a self-insurance program that satisfies” 34 R.C.N.Y. § 2-02(a)(vi)(A), (B), (C), certified to the City by letter dated February 12, 1999 that:

¹ The “Guarantee Period” is the timeframe during which permittees “shall be responsible for permanent restoration and maintenance of street openings and excavations,” and which amounts to a “a period of three years on unprotected streets, and up to five years on protected streets,” with the period “commencing on the restoration completion date.” 34 R.C.N.Y. § 2-11(e)(16)(i)(A)(5)(B)(ii). The Highway Rules further state that “[p]ermittees shall be responsible for the proper repair of the street opening or excavation for a period of three years from the date of completion or for the duration of the protected street guarantee period, whichever is longer.” 34 R.C.N.Y. § 2-11(f)(iv).

“Protected street” means “a street which has been resurfaced or reconstructed within five years prior to the date of application for a permit.” Accordingly, an “unprotected street” has not been resurfaced or reconstructed within five years prior to the permit application date. 34 R.C.N.Y. § 2-01.

Con Edison like New York State and the City, also currently self insures a portion of its liability insurance. We defend and settle all claims and/or litigation filed against us by all entities and individuals for injuries and/or property damage to the public up to \$5.0 million on each loss. This self-insurance program would be applicable in the event of any claims arising from our activities and/or work related to any of our permits issued to Con Edison by NYCDOT. We also carry substantial excess liability insurance above this \$5.0 million self-insured program.

Your office can utilize this letter as certification in accordance with the NYCDOT Highway Department Regulations of our liability insurance program. I have also attached an Excess Liability Insurance Certificate in the amount of \$5 million from our insurer. This includes both the City and the Department of Transportation as additional insureds. Note, I have discussed this matter with Mr. James Harper, Director of Insurance for the City, who finds this letter and Excess Liability Certification acceptable.

Letter dated February 12, 1999 from Joseph M. Lynch, Insurance Manager, Con Edison to the City of New York Department of Transportation.

B. The Con Edison Gas Explosion

14. On March 12, 2014, a catastrophic gas explosion occurred on the west side of Park Avenue between East 116th and East 117th Street in Manhattan, causing the complete collapse and destruction of the buildings located at 1644 Park Avenue and 1646 Park Avenue, personal injuries to dozens of people and eight deaths. The explosion also caused significant property damage to adjacent buildings and vehicles, and significant financial loss from the interruption or closure of nearby businesses.

C. The Allegations of the Complaints in the Gas Explosion Action

15. Following the explosion, sixty-three lawsuits, on behalf of 197 plaintiffs, were commenced against the City and other defendants, including eight wrongful death actions, alleging that the gas explosion was caused by the negligence of Con Edison and/or the City

and/or various other defendants. After two discontinuances and two dismissals, fifty-nine lawsuits against the City remain.

16. For example, in the action captioned *Nelson v. City of New York, et al*, Index No. 151725/2015, Supreme Court, New York County (“*Nelson Action*”), the complaint alleges:

40. That at all times hereinafter mentioned, upon information and belief, Consolidated Edison Company of New York, undertook the installation, maintenance and/or repair work involving the water mains, gas pipes and other structures under the roadway and sidewalk of Park Avenue and in front of the premises known as 1646 Park Avenue and 1644 Park Avenue, in the County of New York, City and State of New York.

* * *

76. That at all times hereinafter mentioned, upon information and belief, defendant, Consolidated Edison Company of New York, its agents, servants, employees and/or contractors were negligent in the ownership of the water mains, gas pipes and other structures under the roadway and sidewalk of Park Avenue and in front of the premises known as 1646 Park Avenue and 1644 Park Avenue, in the County of New York, City and State of New York.

77. That at all times hereinafter mentioned, upon information and belief, defendant, Consolidated Edison Company of New York, its agents, servants, employees, contractors and/or assigns acted in a willful, wanton, reckless, dangerous and negligent matter, at the time and place stated herein.

Nelson Action ¶¶ 40, 76, 77. The complaint further alleges that Con Ed’s negligence injured the plaintiffs.

17. In the action captioned *La Puma v. Consolidated Edison of New York, et al*, Index No. 153014/2015, Supreme Court, New York County (“*La Puma Action*”), the complaint alleges:

7. Upon information and belief, at all times herein mentioned, the defendants Con Ed provided natural gas services to the

premises located at 1644 and 1646 Park Avenue, New York, New York (hereinafter referred to as the "Premises").

8. Upon information and belief and at all times herein mentioned, defendants Con Ed, their agents, servants and/or employees, maintained, operated, and controlled the natural gas lines and/ or fittings providing natural gas to the premises located at 1644 and 1646 Park Avenue, New York, New York.

9. Upon information and belief and at all times herein mentioned, defendants Con Ed, their agents, servants and/or employees, were responsible for inspecting and testing the natural gas lines and/ or fittings providing natural gas to the premises located at 1644 and 1646 Park Avenue, New York, New York.

10. Upon information and belief and at all times herein mentioned, defendants Con Ed, their agents, servants and/or employees, negligently repaired/replaced the natural gas lines and/ or fittings providing natural gas to the premises located at 1644 and 1646 Park Avenue, New York, New York.

11. Upon information and belief and at all times herein mentioned, defendants Con Ed, their agents, servants and/or employees, negligently tested and/or inspected the natural gas lines and/ or fittings providing natural gas to the premises located at 1644 and 1646 Park Avenue, New York, New York.

12. Upon information and belief and at all times herein mentioned, defendants Con Ed, their agents, servants and/or employees, negligently maintained and/or caused/allowed and/or permitted natural gas to flow into the natural gas lines and/or fittings providing natural gas to the buildings located at 1644 and 1646 Park Avenue, New York, New York, when the natural gas lines and/or fittings were not properly/adequately/fully inspected and/or tested and/or repaired and/or replaced.

13. Upon information and belief, at all times herein mentioned, the defendants Con Ed, their agents, servants, and/or employees, caused and created a natural gas leak to be, become, and remain in or about 1644 and 1646 Park Avenue resulting in an explosion and fire.

La Puma Action ¶¶ 7-13. The suit further alleges that Con Ed's negligence injured the plaintiffs.

18. In the action captioned *Salas v. Consolidated Edison of New York, et al*, Index No. 154614/2015, Supreme Court, New York County (“*Salas Action*”), for example, the complaint alleges:

144. The aforesaid occurrence, and the resulting injuries sustained by the plaintiffs herein, and the resultant deaths sustained by the plaintiffs' decedents herein, and the resultant property damage sustained by the plaintiffs herein were caused by the recklessness, carelessness and negligence of the defendants Consolidated Edison Company of New York, Inc., The City of New York, Kaoru Demler Murmatsu and The Spanish Christian Church, Inc.

145. The aforesaid occurrence, and the resulting injuries sustained by the plaintiffs herein, and the resultant deaths sustained by the plaintiffs' decedents herein, and the resultant property damage sustained by the plaintiffs herein were caused by the recklessness, carelessness and negligence of the defendant Consolidated Edison Company of New York, Inc., in the ownership, operation, management, maintenance and control of its natural gas service lines providing natural gas to the aforesaid premises, and in the ownership, operation, management, maintenance, control, repair, replacement, testing and inspection of its natural gas supply lines, pipes and/or fittings.

Salas Action ¶¶ 144-145.

D. The City’s Tender To Con Edison

19. On or about December 12, 2017, the City tendered the defense of sixty-two individual actions comprising the *Gas Explosion* Actions, stating that Con Edison had been issued permits by DOT — including permit numbers M01-2011258-103, M01-2011286-275, M01-2011319-046, M01-2011322-067, and M01-2011362-128 – to perform work at the site of the explosion alleged to have caused the plaintiffs’ injuries in each of the sixty-two complaints. The tender further stated that the complaints alleged negligence in connection with Con Edison’s work performed under the Permits, and Con Edison was accordingly required under the terms of

the Permits, and the terms of Con Edison's letter dated February 12, 1999, to defend the City in the Gas Explosion Actions.

20. On or about January 9, 2018, Con Edison responded to the City's tender of its defense to Con Edison pursuant to the Permits, stating that because the complaints at issue "allege negligence on the part of the City that is wholly independent from and unrelated to the work performed pursuant to the above-captioned permits" Con Edison would not accept the tender.

21. The allegations set forth in the *Gas Explosion* Actions are within the coverage of the Con Edison's self-insurance obligation because the complaints in the *Gas Explosion* Actions allege bodily injury, death and property damage caused by or arising out of acts or omissions of Con Edison and/or its agents, servants, employees and/or licensees in connection with the work Con Edison performed under the Permits.

E. Con Edison's Duty to Defend the City as to the Gas Explosion Actions

22. Con Edison's refusal to acknowledge its duty to defend the City in the *Gas Explosion* Actions is contrary to its obligation under the Permits and has no basis in the law. Con Edison's disclaimer is baseless, in that Con Edison's obligation under the Highway Rules to provide the City with "the same defense of any suit against the City that alleges facts that bring the suit within the scope of the coverage required in subparagraph (i) as an insurer would be obligated to provide under the laws of New York." 34 R.C.N.Y. § 2-02(a)(3)(vi) (C). Under New York law, an insurer must defend an additional insured if *any* allegations of a complaint suggest a *reasonable possibility* of coverage. Con Edison's assertion that the complaints make additional or other allegations that do not qualify for coverage, including an allegation that the City was negligent, is wholly irrelevant to the duty to defend. The complaints in the *Gas*

Explosion Actions allege Con Edison's negligence arising out of its work under the Permits, which is all that is needed to establish a duty to defend the City.

23. To date, Con Edison has failed and refused to assume the defense of the City in the *Gas Explosion* Actions.

24. As a result of Con Edison's wrongful failure to provide the City with a defense in the *Gas Explosion* Actions, the City has been forced to defend itself through the Law Department in each of the fifty-nine actions comprising the *Gas Explosion* Actions.

FIRST CAUSE OF ACTION — AGAINST CON EDISON
(DECLARATION OF DUTY TO DEFEND — GAS EXPLOSION ACTIONS)

25. The City repeats and realleges paragraphs 1 through 24 as if fully set forth herein.

26. Despite the City's demand for a defense in the *Gas Explosion* Actions, Con Edison has failed and refused to defend the City, in breach of its obligations under the Permits, the Highway Rules, Con Edison's February 12, 1999 self-insurance certification and New York law.

27. Con Edison's failure to defend the City in the *Gas Explosion* Actions violates the Permits, violates Con Edison's February 12, 1999 self-insurance certification and the law.

28. There is therefore an actual controversy of a justiciable nature between the City and Con Edison as to whether Con Edison is obligated to defend the City in the *Gas Explosion* Actions under the terms of the Permits. A judicial declaration that Con Edison is obligated to defend the City is necessary and appropriate at this time because, as a result of Con Edison's wrongful failure to accept the City's tender of defense, the City has been forced to incur costs and expenses in providing its own defense.

SECOND CAUSE OF ACTION — AGAINST CON EDISON
(RECOVERY OF DEFENSE COSTS — GAS EXPLOSION ACTIONS)

29. The City repeats and realleges paragraphs 1 through 28 as if fully set forth herein.

30. Beginning no later than the December 12, 2017 City's tender of the defense of the *Gas Explosion* Actions, Con Edison has been obligated to defend the City in those actions.

31. Despite the demand that Con Edison provide the City with a defense in the *Gas Explosion* Actions, Con Edison has refused to do so.

32. When a defense has been wrongfully refused to the City, the Law Department charges the party obligated to provide that defense \$300 an hour for attorney time and \$75 an hour for paralegal time.

33. Con Edison is accordingly liable for the City's defense costs in the *Gas Explosion* Actions, beginning no later than December 12, 2017, through the date that Con Edison begins to provide that defense, at the rate of \$300 an hour for attorney time and \$75 an hour for paralegal time, plus out-of-pocket costs and, pursuant to CPLR §§ 5001 and 5004, prejudgment interest accruing from the respective dates the City expended such attorney and paralegal time or incurred such out-of-pocket costs.

WHEREFORE, the City demands judgment:

- (a) On the First Cause of Action declaring that Con Edison is obligated under the Permits to defend the City in the *Gas Explosion* Actions;
- (b) On the Second Cause of Action, declaring that Con Edison must reimburse the City for attorneys' fees and expenses relating to the City's defense of the *Gas Explosion* Actions, at the rate of \$300 per hour for attorney time

and \$75 per hour for paralegal time plus out-of-pocket expenses and interest, from no later than December 12, 2017 through the time that Con Edison provides that defense to the City, in an amount to be proven at trial; and

(c) For such other relief as this Court may deem just and proper.

Dated: New York, New York
January 3, 2020

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