

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30495
O/prt

_____AD3d_____

Argued - March 3, 2011

MARK C. DILLON, J.P.
JOHN M. LEVENTHAL
CHERYL E. CHAMBERS
LEONARD B. AUSTIN, JJ.

2009-11481

DECISION & ORDER

Rodney M. Lewis, etc., et al., plaintiffs-respondents,
v City of New York, et al., defendants-respondents,
New York Paving, Inc., appellant-respondent,
Consolidated Edison Company of New York, Inc.,
respondent-appellant.

(Index No. 12953/03)

Morris Duffy Alonso & Faley, New York, N.Y. (Anna J. Ervolina and Iryna S. Krauchanka of counsel), for appellant-respondent.

Richard W. Babinecz (Mischel & Horn, P.C., New York, N.Y. [Scott T. Horn], of counsel), for respondent-appellant.

Asher & Associates, P.C., New York, N.Y. (Robert J. Poblete of counsel), for plaintiffs-respondents.

In an action to recover damages for personal injuries, etc., the defendant New York Paving, Inc., appeals from so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated July 24, 2009, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the defendant Consolidated Edison Company of New York, Inc., cross-appeals from so much of the same order as denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is reversed, on the law, with one bill of costs, and the motion of the defendant New York Paving, Inc., and the cross motion of the defendant Consolidated

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Edison Company of New York, Inc., for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them are granted.

A contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk (*see Brown v Welsbach Corp.*, 301 NY 202, 205; *Losito v City of New York*, 38 AD3d 854; *Kleeberg v City of New York*, 305 AD2d 549, 550). Here, the appellant Consolidated Edison Company of New York, Inc. (hereinafter Con Edison), and the defendant New York Paving, Inc. (hereinafter New York Paving), established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not perform any work in the roadway at 270 Bainbridge Street where the accident allegedly occurred (*see Kruszka v City of New York*, 29 AD3d 742; *Maloney v Consolidated Edison Co. of NY*, 290 AD2d 540; *Verdes v Brooklyn Union Gas Co.*, 253 AD2d 552; *Hovi v City of New York*, 226 AD2d 430). In opposition, the plaintiffs failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320). Accordingly, the Supreme Court should have granted the motion of the appellant New York Paving and the cross motion of the appellant Con Edison for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them.

DILLON, J.P., LEVENTHAL, CHAMBERS and AUSTIN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court