

**Shechter v City of New York**

2004 NY Slip Op 30177(U)

June 16, 2004

Supreme Court, New York County

Docket Number: 0114460/2001

Judge: Faviola Soto

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

PRESENT: HON. FAVIOLA SOTO  
*Justice*

PART \_\_\_\_\_

Schechter, Roberta

INDEX NO. 114460/01  
MOTION DATE 6/2/04  
MOTION SEQ. NO. 05  
MOTION CAL. NO. \_\_\_\_\_

-v-

City of NY

The following papers, numbered 1 to, \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ 'Ordert o Show Cause – Affidavits – Exhibits ...  
Notices of Cross-Making - affidavits - Exhibits  
Answering Affidavits – Exhibits  
Replying 'Affidavits

PAPERS NUMBERED	
2	3, 4, 5, 8
7, 8	9, 10, 11
12	13, 14, 15, 16

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion and cross-motions are

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**  
JUN 22 2004  
NEW YORK COUNTY CLERK'S OFFICE

Dated: June 15, 2004

HON. FAVIOLA SOTO  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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 52

ROBERTA ANN SHECHTER and  
YAAKOV SHECHTER,  
Plaintiffs,

-against-

Index No. 114460/01

THE CITY OF NEW YORK, EMPIRE CITY SUBWAY  
COMPANY, CONSOLIDATED EDISON COMPANY  
OF NEW YORK, PETROCELLI ELECTRIC CO., INC.,  
NICO ASPHALT PAVING, CO., TRI-MESSINE  
CONSTRUCTION COMPANY, INC., and

MANETTA INDUSTRIES, INC.,  
Defendants

DECISION & ORDER

EMPIRE CITY SUBWAY COMPANY, INC.,  
Third-party Plaintiff,

-against-

NICO ASPHALT PAVING INC. and TRI-MESSINE  
CONSTRUCTION COMPANY, INC.  
Third-party Defendants.

Third-Party Index No.  
590659/02

EMPIRE CITY SUBWAY COMPANY, LTD.,  
Second Third-party Plaintiff,

-against-

Second Third-Party No.  
Index No. 590248/03

MANETTA INDUSTRIES, INC.,  
Second Third-party Defendant.

MANETTA INDUSTRIES, INC.  
Fourth- Party Plaintiff,

-against-

NEW YORK PAVING, INC.,  
Fourth-Party Defendant.

**FILED**

JUN 22 2004

NEW YORK  
COUNTY CLERK'S OFFICE

FAVIOLA A. SOTO, J.:

Before the court are a motion and Pour cross-motions ~~€~~or summary judgment. These motions and the action were randomly reassigned to this City Part following Justice Stallman's recusal order of June 2,2004.

In this personal injury action, plaintiff Roberta Ann Shechter alleges that she sustained personal injuries as a result of a trip and fall that occurred in the roadway in the cross-walk

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located at Third Avenue and East 55<sup>th</sup> Street in Manhattan on December 4,2000. Plaintiff Yaakov Shechter seeks damages for loss of services.

Summary Judgment

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". Winegrad v. New York University Med, Center, 64 N.Y.2d 851.

Once the proponent has made the showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320,324. Moreover,

"[s]ummary judgment is designed to expedite all civil cases by eliminating Prom the Trial Calendar claims which can properly be resolved as a matter of law...[W] hen there is no genuine issue to be resolved at trial, the case should be summarily decided." Andre v. Pomeroy, 35 N.Y.2d 361. Mere conjecture, speculation and conclusory assertions are insufficient.

The role of the court in determining a summary judgment motion is issue finding, not issue resolution. The opponent of the motion is entitled to all reasonable inferences in its favor.

### Nico's Motion

Third party defendant and defendant Nico Asphalt Paving Inc. (Nico) argues that it is entitled to summary judgment dismissing the complaint, and on the indemnification claims of third-party plaintiff Empire City Subway Company (Empire) and the cross-claims of Tri-Messine Construction Company, Inc. (Tri-Messine). Nico argues that it is entitled to this relief because it did not perform any work at the subject location. Nico relies on deposition testimony and an affidavit of its employee who conducted the search of work records. Nico further submits the stipulation of discontinuance signed by plaintiffs, Tri-Messine, and Empire.

Defendant Petrocelli Electric Co., Inc. (Petrocelli) opposes, arguing that as Nico does not dispute that it performed work on Empire's behalf, and as Empire asserts that a substantial portion of their records were destroyed on 9/11, then issue of fact remain,. Petrocelli further argues that the motion should be denied as Empire at the time of the motion owed an affidavit so stating.

Nico replies that additional discovery is not needed here; it attaches the applicable pages of Nico's deposition testimony that describes the detailed the record search, notes that a hard copy of the discovery was provided, and again states that there is no genuine issue of fact remaining as it did not perform **work** at the subject location. Nico further advises the court that Empire also has signed the stipulation of discontinuance

Nico's motion is granted. Nico met its prima facie burden and demonstrated, by admissible evidence, that there are no issues of material fact in dispute and that it is entitled to judgment as a matter of law. Petrocelli has failed to show that discovery remains as to Nico, and has offered only speculation and surmise.

### Con-Ed's Cross-Motion

Defendant Consolidated Edison Company of New York, Inc. (Con Ed) cross-moves for summary judgment, dismissing the complaint and all cross-claims against it. Con Ed, relying on deposition testimony, including that of its records searcher, argues that there are no remaining issues of fact as to its liability, as it did not perform work at the accident site where plaintiff was injured. Con-Ed's cross-motion is not opposed.

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Con Ed has shown that it is entitled to judgment as a matter of law dismissing the complaint and all cross-claims against it, and its cross-motion is granted.

### Petrocelli's Cross-Motion

Defendant Petrocelli argues, based on deposition testimony, a two year search of its work records, and photographs, that it did not perform any work in the area where plaintiff fell.

Plaintiffs argue that contrary to Petrocelli's reading of the record evidence, Petrocelli has failed to show that it did not perform any work at the subject location. Plaintiffs first argue that the testimony relied upon was not made by a person with personal knowledge, but rather was based on general practice, and that this testimony is contradicted by a diagram drawn by Petrocelli's employee and the remainder of Petrocelli's documents regarding the excavation work. Plaintiffs next argue that Petrocelli is misreading plaintiff's deposition testimony and the photographs. Additionally, plaintiffs argue that Petrocelli relies in error on the fact that the original 2001 expert witness response did not name Petrocelli; the supplemental expert witness report, served following Petrocelli's 2003 deposition, identifies Petrocelli and its subcontractor New York Paving as potentially culpable parties.

Defendant/second third-party defendant/fourth-party plaintiff Manetta Industries, Inc.

(Manetta) opposes, arguing that as the encircled area on the photograph is proximate to the curb line of the street, and as Petrocelli concedes that it excavated the street to lay conduits just off the face of the curb, a question exists as to whether the alleged defect that gave rise to the accident resulted from Petrocelli's failure to properly back-fill its excavation. Manetta argues that Petrocelli wrongfully relies on the lack of a charge-back from defendant the City of New York (City) to support its claim that it excavated the back-fill properly.

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Empire also opposes, arguing that the excavation **work** performed was approximately 18 inches from the face of the curb into the **parking** lane of 55<sup>th</sup> Street and Third Avenue, that plaintiff's expert opines that the defect upon which plaintiff tripped was created as a result of Petrocelli's work, and that the area circled by plaintiff on the photographs may encompass Petrocelli's work.

Defendant the City of New York (the City) also opposes, and adopts Empire's papers.

Petrocelli replies that the opposition **has** failed to meet their burden, and that there are no outstanding documents that it is withholding.

A close reading of the record evidence shows that a genuine issue of disputed fact does not exist, and that as a matter of law Petrocelli does not owe a duty here. Petrocelli showed, by admissible evidence, that it did not perform the **work** where plaintiff fell. To meet their burden, those opposing the cross-motion were to lay bare their proof and show, by admissible evidence and not mere assertions, speculation and surmise, that a genuine issue of fact exists. This they have failed to do. Indeed, the very language utilized to support their arguments so demonstrates; the opposing papers are replete with "may have"'s.

Petrocelli's cross-motion is granted.

### Manetta's Cross-Motion

Manetta, by way of attorney affirmation and deposition testimony of other defendants, Cross-moves for summary judgment dismissing the complaints and cross-claims against it. It argues that the City had crews performing work following the work performed by the multiple contractors, that the contractors/subcontractors did not perform the work, **and** that the record as it now exists (as a result from discovery from the other parties) does not show that Manetta did work in or about the intersection prior to the City performing such work.

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Petrocelli opposes Manetta's cross-motion. Petrocelli notes that the motion is premature, as Manetta failed to produce their records, failed to submit evidentiary proof in support of their moving papers, and for more than a year, failed to appear for a deposition. Petrocelli further argues that the court should not reward Manetta's failure to comply with its discovery obligations. The City also opposes, and adopts Petrocelli's arguments.

Manetta replies that the court is empowered to search the record and grant summary judgment, and incorporates the papers of Empire. Only with its reply does Manetta attach an affidavit of its President who states, on his general familiarity with record keeping and Manetta's move to new offices, that it is evident that records were discarded and destroyed and that he is advised that other deposition testimony and records establish that another contractor did the work.

The court finds that Manetta's motion is premature, and denies it with leave to renew upon Manetta's compliance with outstanding discovery, or, upon consent of all remaining parties, an affidavit from a person with personal knowledge in lieu of deposition that more fully addresses the record search and the documents, and that supports Manetta's assertion that it did not

perform the work in the subject location. The court is not inclined here to relieve Manetta of its discovery obligations.

The court further notes that Manetta did not meet its prima facie burden of proof on its moving papers on this summary judgment cross-motion: it did not demonstrate and lay bare its proof, by admissible evidence, that it owed no duty here. Nor does the reply affidavit from Manetta's President or information supplied on personal knowledge by other movants based on

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their work, cure the deficiencies of the moving papers, particularly in light of Manetta's failure to meet its discovery obligations. The court further notes that the affidavit relies on non-admissible and hearsay assertions and conclusions, and does not establish, based on the affiant's personal knowledge or even his personal review of the record documents, that an issue of fact does not remain as to Manetta's duty.

#### Empire

Empire cross-moves for summary judgment. Empire argues that the record evidence does not show that it or its contractors/subcontractors performed work in the immediate vicinity of the trip and fall, and further that Empire's work was performed at another location, 22 feet west of the easterly curb line. Empire points to plaintiff's deposition testimony and the circled photographs that depict an area other than where it performed its work: plaintiff was walking north on Third Avenue and crossed 55<sup>th</sup> Street, and waited on the northeast curb for the change of the traffic light, so she could proceed westerly across Third Avenue on 55<sup>th</sup> Street; she then began walking in a northbound direction, and walked approximately four or five steps from where she was waiting on the corner when she was caused to fall. Plaintiff further testified that when she described the area to her husband, she told him that it was just a bit over the curb into the street

on the northeast corner of Third Avenue and 55<sup>th</sup> Street.

Plaintiffs oppose. They argue that the diagrams relied upon by Empire are not drawn to scale, that the diagrams could be interpreted differently, that certain of the other documents do not depict the condition of the roadway on the date of the accident in 2001, and that work “may have been done” by Empire. Plaintiffs also point out that Manetta’s deposition was still scheduled, and that Empire has not shown that any subsequent repair **work** by the City absolved Empire of liability.

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Petrocelli also opposes to the extent that the court does not grant its cross-motion, **as** Empire has failed to produce documents that it argues were destroyed in 9/11 that “could show” that an issue of fact exists, that certain additional documents could have been attached as referred to in Empire’s deposition, and that Empire’s subcontractor did not produce documents. Petrocelli also argues that conflicting and uninterpreted records exist, and that an Empire manhole, “may have been” encompassed in the work.

The court grants Empire’s cross-motion. Empire met its initial burden, and demonstrated through admissible evidence that there are no remaining issues of disputed fact **and** that it did not perform the work at the subject location. In turn, those opposing the cross-motion were to lay bare their proof and demonstrate, by admissible evidence, that a genuine issue of fact exists that precludes the granting of judgment as a matter of law. This they failed to **do** and rely, instead, on speculation and surmise.

Accordingly, it is

ORDERED that Nico Asphalt Paving, Inc.'s summary judgment motion is granted, and all claims **and** cross-claims against said defendant/third party defendant are severed and dismissed; and it is further

ORDERED that Consolidated Edison Company of New York's summary judgment cross-motion is granted, and all claims **and** cross-claims against said defendant are severed and dismissed; and it is further

ORDERED that Petrocelli Electric Co., Inc.'s summary judgment cross-motion is granted, and all claims **and** cross-claims against it are severed and dismissed; **and** it is further

ORDERED that Empire City Subway Company, Ltd.'s summary judgment cross-motion is granted, and all claims and cross-claims against it are severed and dismissed; **and** it is further

ORDERED that the third-party and second party actions are severed and dismissed; and it is further

ORDERED that the remainder of the main action and the fourth-party action continue; and it is further

ORDERED that defendant Manetta Industries, Inc.'s summary judgment cross-motion is denied; and it is further

ORDERED that the remaining parties are directed to appear for a compliance conference on July 21, 2004, at 2:00 p.m. at 80 Centre Street, Room 103, and the note of issue is extended until August 31, 2004; and it is further

ORDERED that movant shall serve a copy of this decision and order with notice of entry upon the County Clerk and the Trial Support Office within thirty days of entry.

Dated: New York, New York  
June 16, 2004

Copies mailed

**FILED**  
JUN 22 2004  
FAVIOLA A. SOTO, J.S. CLERK  
CLERK'S OFFICE