

**Brown v City of New York**

2006 NY Slip Op 30189(U)

June 26, 2006

Supreme Court, New York County

Docket Number: 0112901/2001

Judge: Shirley W. Kornreich

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

PRESENT: Kornreich  
Justice

PART 54

Debra Brown  
- v -  
Empire City Subway  
et al

INDEX NO.

112901/01

MOTION DATE

3/23/06

MOTION SEQ. NO.

2

MOTION CAL. NO.

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

and to lift stay

Summary

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1, 3</u>
<u>2</u>
<u>4, 5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUL 05 2006

NEW YORK  
COUNTY CLERK'S OFF.

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

Dated: 7/26/06

[Signature]  
**SHELLEY HANCOCK KORNREICH**  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 54

-----X  
DEBRA BROWN,

Plaintiff,

—against—

Index No.: 112901/01

THE CITY OF NEW YORK, EMPIRE CITY  
SUBWAY COMPANY (Limited) and,  
CONSOLIDATED EDISON,

DECISION & ORDER

Defendants.  
-----X

EMPIRE CITY SUBWAY COMPANY (Limited),

Third-Party Plaintiff,

—against—

FELIX EQUITIES, INC.,

Third-Party Defendant.  
-----X

**FILED**  
Index No.: 591284/03

JUL 05 2006

NEW YORK  
COUNTY CLERK'S OFFICE

**KORNREICH, J.:**

In this action, plaintiff alleges that she fell at the intersection of 36th Street and Eighth Avenue on April 6, 2000, when she was caused to trip on large metal construction plates in the crosswalk of the intersection. Defendant Empire City Subway Company (Limited) (“ECS”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that it did not perform any work that left metal plates on the street at the time and location of plaintiff’s accident. ECS also moves to lift the stay caused by the bankruptcy of third-party defendant Felix Equities, Inc. Defendant Consolidated Edison (“Con Ed”) cross-moves for summary judgment. For the reasons stated below, the stay is lifted and the action restored to the trial calendar, summary judgment is denied as to ECS and granted as to Con Ed.

### *I. Stay*

This action was marked stayed in accordance with 11 USC § 362(d), as a result of the Chapter 11 Bankruptcy filing of third-party defendant Felix Equities, Inc., on July 9, 2002. By order dated October 31, 2005, the Bankruptcy Court modified the stay to permit plaintiff and ECS to proceed against and collect solely from any available insurance coverage that may apply in this action. All parties agree that the stay should be lifted. Accordingly, the Clerk's Office directed to restore this action to the trial calendar.

### *II. Summary Judgment*

#### *A. ECS*

Plaintiff argues that both motions for summary judgment are untimely, because the note of issue was filed on November 7, 2003 and more than 120 days elapsed before this court marked the action stayed on October 8, 2004. However, the case was automatically stayed due to the July 2002 bankruptcy of Felix Equities, Inc., and no action could be taken until the stay was lifted. Accordingly, good cause has been shown to excuse defendants' delay in filing for summary judgment. CPLR 3212(a).

Plaintiff commenced this action on July 3, 2001. She then served a verified bill of particulars in January 2002, identifying the location of the accident only as "36th Street at its intersection with Eighth Avenue." Verified Bill of Particulars, ¶ 4.<sup>1</sup> Plaintiff was deposed on March 6, 2003, and testified that she was walking south on the west side of Eighth Avenue, crossing 36th Street, when she fell on uneven metal plates positioned in the crosswalk of the

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<sup>1</sup>According to ECS's moving papers, plaintiff served a Supplemental Bill of Particulars in November of 2002, but no party has furnished a copy of this document to the court and it was not filed with the County Clerk.

intersection. Brown Tr., at 10-11, 14-15, 19-20.

ECS contends that it is entitled to summary judgment, because no evidence has been produced in discovery indicating that it performed any work at the location of plaintiff's accident. However, ECS itself produces a street opening permit (No. M01-2000080-0), issued by the City of New York to ECS on March 20, 2000 and marked valid from March 25, 2000 to April 24, 2000, for work on West 36th Street between Eighth and Ninth Avenues. Bigelow Affirm., Exh. G thereto. This permit was conditioned upon a stipulation that the full width of the roadway shall be opened to traffic when the site is unattended, which may require the installation of the type of metal plates which plaintiff claims caused her fall. This document was marked as Plaintiff's Exh. 12 at her March 6, 2003 deposition. ECS argues that its project manager, Dirk Rolf, testified at his May 14, 2003 deposition that no work would have been performed in the crosswalk on the west side of 36th Street and Eighth Avenue under this permit, citing to pages 41-42 of his deposition transcript. Bigelow Affirm., ¶ 18 and Exh. F thereto. But, the referenced testimony was with respect to another street opening permit (No. M01-2000027-139), marked as Plaintiff's Exh. 11, issued on February 18, 2000 and valid until March 3, 2000. Rolff Tr., at 28, 41-42. Even assuming that the two permits were for the same work, Mr. Rolff's testimony about the work performed under the February 18th permit is less than clear regarding the exact location of the cuts made to the roadway and does not conclusively establish that ECS did not perform any work at the location of plaintiff's accident. Thus, ECS has failed to make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issue of fact from the case. *Winegrad v New York University Med. Center*, 64 N.Y.2d 851, 853 (1985).

Furthermore, in opposition to ECS's motion, plaintiff submits photographs allegedly taken "a couple" of days after the incident (Brown Tr., at 23) and showing metal plates covering a portion of the crosswalk in question. Gooding Affirm., Exh. B thereto. Plaintiff, also, submits August 22, 2001 photographs of the location showing the "ECS" stamp near the crosswalk. *Id.*, Exh. H thereto. In addition, Mr. Rolff testified that the work performed under the street opening permit issued to ECS on February 18, 2000 was subcontracted out to third-party defendant Felix Equities, Inc., and he could not confirm that metal plates were not used on this job. Rolff Tr., at 33-35. Consequently, even assuming that ECS's evidence was sufficient to shift the burden to plaintiff, she has raised a triable issue of fact sufficient to defeat summary judgment in ECS's favor.

*B. Con Ed*

Plaintiff's photographs show active roadway construction. The only record of work performed by defendant Con Edison in the intersection in question occurred two years prior to plaintiff's accident, and includes a diagram clearly showing that the work did not encompass the crosswalk on the west side of 36th Street where plaintiff testified she fell. Absent some evidence connecting Con Edison's work to the situs of plaintiff's injury, Con Ed is entitled to summary judgment. *Robinson v City of New York*, 18 A.D.3d 255 (1st Dept. 2005). Accordingly, it is

ORDERED that the stay occasioned by the bankruptcy filing of third-party defendant Felix Equities, Inc. is hereby lifted, and the action is restored to the trial calendar; and it is further

ORDERED that plaintiff's counsel is directed to serve a copy of this order with notice of entry on the Trial Support Office (Rm. 158) which is directed to restore this action to the trial calendar; and it is further

ORDERED that Empire City Subway, Co. (Limited)'s motion for summary judgment is denied; and it is further

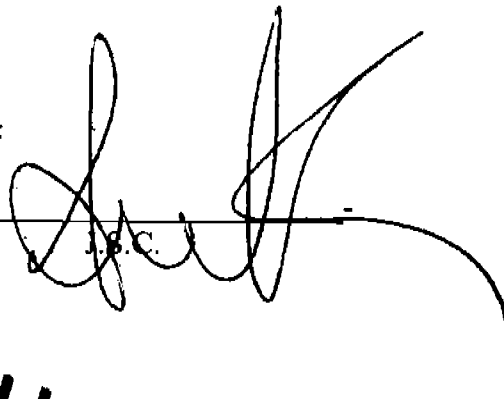
ORDERED that Consolidated Edison's cross motion for summary judgment is granted, and the complaint is hereby severed and dismissed as against Consolidated Edison, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements; and it is further

ORDERED that the remainder of the action and third-party action is severed and continued; and it is further

ORDERED that the remaining parties are to appear in Part 54, room 1227, 1211 Centre St., New York, N.Y., for a pre-trial conference on July 20, 2006.

Dated: June 26, 2006

ENTER:

  
J.S.C.

**FILED**  
JUL 05 2006  
NEW YORK  
COUNTY CLERK'S OFF.