

**Martz v City of New York**

2006 NY Slip Op 30382(U)

January 10, 2006

Supreme Court, New York County

Docket Number:

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 62

Index Number : 102689/2002

MARTZ, CLAUDE

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 12 were read on this motion <sup>of cross-motions</sup> to/for summary judgment

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

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

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

PAPERS NUMBERED

1, 2

7, 8

9, 10, 11, 12

3-4, 5-6

<sup>2</sup> Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion <sup>of cross-motions for summary judgment</sup> are granted in accordance with the attached memorandum decisions.

**FILED**

JAN 12 2006

COUNTY CLERK'S OFFICE  
NEW YORK

HON. DORIS LING-COHAN

Dated: 1/10/06

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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 62**

CLAUDE MARTZ, )

Plaintiff, )

.-against- )

) Index No. 102689/02

THE CITY OF NEW YORK, NEW YORK CITY )

DEPARTMENT OF TRANSPORTATION, )

CONSOLIDATED EDISON COMPANY OF NEW )

YORK, INC. and FELIX INDUSTRIES, INC., )

Defendants. )

) Motion Seq. No.: 002

----- )  
FELIX INDUSTRIES, INC., )

Third-Party Plaintiff, )

.-against- )

NICO ASPHALT PAVING, INC., )

Third-Party Defendant, )

-----  
**Doris Ling-Cohan, J.:**

In this action to recover for personal injuries, defendant/third-party plaintiff Felix Industries (Felix) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against it. Defendant Consolidated Edison Company of New York, Inc. (Con Ed) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against it. Third-party defendant Nico Asphalt Paving, Inc. (Nico) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

Plaintiff brought this action to recover monetary damages for personal injuries allegedly sustained on February 28, 2001, when he fell from his bicycle due to a depression in the Broadway roadway, between Wavcrly and Washington Place in Manhattan. More specifically, plaintiff alleges that he was traveling in the western traffic lane of Broadway, adjacent to the western parking lane, when he ran over the depression in the traffic lane.

At plaintiff's deposition, using photographs supplied by plaintiff, plaintiff identified the depression as being located in a square cut overlapping a trench (the eastern trench) in the traffic lane. These same photographs show a separate and distinct restored trench (the western trench) in the adjacent parking lane immediately next to the curb running parallel to the trench in the traffic lane.

In support of their respective motions, Felix and Con Ed both claim that Felix was engaged by Con Ed to perform excavation work in the area of the western trench. They allege that the specific area identified by plaintiff as where he fell was not a location that either Felix or Con Ed had worked on. They claim that the area of the eastern trench where plaintiff fell was in fact worked on by or on behalf of non-party Empire City Subway, Inc.

In support of their position, they submit the examinations before trial of Mr. Paul Deely, a foreman for Felix, and of Mr. Mario E. Smith, an employee of Con Ed, together with various business records of Felix and Con Ed, all of which confirm their position.

In opposition, plaintiff does not deny any of the claims by Felix and Con Ed. Plaintiff only argues that discovery is not complete.

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [citations omitted]. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers [citation omitted]. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986).

"A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence [citations omitted]." Ruttura & Sons Construction Co., Inc. v J. Petrocelli Construction, Inc., 257 AD2d 614 (2<sup>nd</sup> Dept 1999).

Here, Felix and Con Ed have established their right to judgment as a matter of law. In opposition, plaintiff has failed to either establish the existence of a question of fact or shown that the remaining discovery will lead to relevant evidence.

According to plaintiff, the only outstanding discovery is for the City to produce certain additional FIT reports, which designate the exact location of potholes in the roadway, and the E.B.T. of Scott Roveto, a supervisor of highway operations for the City, who will interpret the numerous street opening permits and abbreviations thereon. It is not disputed that there is no outstanding discovery from the moving and cross-moving parties.

The FITs will only show the location of the potholes of which the City had notice. They will not shed any light as to who is responsible for creating the pothole. The

permits will show who obtained them and the street address in front of which the work was to be done. The permits might also show whether the work was to be done on the sidewalk or in the street; but will not show whether the work was done in the parking lane or the traffic lane. Thus, plaintiff has failed to demonstrate that discovery may lead to relevant evidence.

Plaintiff further argues that since Felix and Con Ed acknowledge that the subject defect is in an adjacent traffic lane to which they did their work, this creates a question of fact which requires further inquiry in order to determine the exact location where Felix did the work for Con Ed.

However, since movants have submitted sufficient evidence to establish that they were not the ones who were responsible for the subject defect, it was incumbent on plaintiff to either submit evidence to establish that there is a genuine question of fact, or show that discovery may lead to such evidence. Since plaintiff has done neither, both Felix's motion and Con Ed's motion are granted.

Felix, as third-party plaintiff, only opposes Nico's motion if Felix's motion is denied. As summary judgment has been granted in favor of Felix, Nico's motion for summary judgment is also granted.

For the foregoing reasons, it is

ORDERED that Felix Industries, Inc.'s motion for summary judgment is granted and the complaint and all cross claims for indemnification are dismissed as against the aforementioned defendant; and it is further

ORDERED that Consolidated Edison Company of New York, Inc.'s cross motion for summary judgment is granted, and the complaint and all cross claims for indemnification are dismissed as against the aforementioned defendant; and it is further

ORDERED that Nico Asphalt Paving, Inc.'s cross motion for summary judgment dismissing the third-party complaint is granted and the third-party complaint is dismissed; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry, the Clerk of this Court shall enter judgment in accordance with this decision/order; and it is further

ORDERED that within 30 days of entry of this decision/order, moving and cross-moving parties shall serve copies upon all parties with notice of entry; and it is further

ORDERED that the remainder of the action shall continue.

Dated:

*1/10/06*

HON. DORIS LING-COHAN

ENTER:

**FILED**

J.S.C.

JAN 12 2006

COUNTY CLERK'S OFFICE  
NEW YORK