

**Demicco Bros., Inc. v Consolidated Edison Co. of  
New York, Inc.**

2006 NY Slip Op 30584(U)

May 16, 2006

Supreme Court, New York County

Docket Number: 105973/02

Judge: Richard B. Lowe

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

*Demiaco Brothers Inc* **RICHARD B. LOWE III**

PART St

vs

*Consolated Epsilon*

*Dismiss*

INDEX NO. 105 923/02

MOTION DATE 12/21/06

MOTION SEQ. NO. 005

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

\_\_\_\_\_ this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

**FILED**  
MAY 25 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: *S. Hefner* \_\_\_\_\_  
**RICHARD B. LOWE III**  
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: IAS PART 56

-----X  
DEMICCO BROS., INC.

Index No. 105973/02

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., EMPIRE CITY SUBWAY CO., LTD.,  
A VERIZON COMPANY and TIME WARNER  
CABLE,

Defendants.  
-----X

**RICHARD B. LOWE III, J.:**

In motion sequence number 005, defendant Empire City Subway Co., Ltd. (Empire) moves for summary judgment dismissing the claims asserted against it (CPLR 3212).

In motion sequence number 006, defendant Consolidated Edison Company of New York (Con Ed) moves for summary judgment (CPLR 3212). Plaintiff Demicco Bros., Inc. (Demicco) cross-moves for summary judgment on the issue of liability only, against all defendants.<sup>1</sup>

The above motions are consolidated for disposition in accordance with the following memorandum.

**Background**

Demicco is a construction company retained by the City of New York (City) to perform pavement milling of streets in an area of Queens.<sup>2</sup> Defendants Empire, a Verizon

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<sup>1</sup> Time Warner Cable does not join the moving defendants and neither does it oppose Demicco's cross-motion.

<sup>2</sup> Milling is a process by which the surface layer of asphalt of the street is ground off by a milling machine before a new layer of asphalt is applied. The milled surface is transferred

**FILED**  
MAY 25 2006  
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NEW YORK

company, Con Ed and Time Warner Cable own and operate electric, cable and telecommunications aerial wires and poles pursuant to franchises granted to it by the State of New York.

Prior to and during the performance of the milling work, Demicco maintained that the presence of defendants' overhead wires and polls interfered with its milling operations as the utility wires were lower than Demicco's machinery used to mill the streets. Demicco alleges that prior to encountering a low-hanging wire, its crews were forced to cease operations and move the milling machine, boom, and dump trucks in order to lower the machinery underneath the wires before resuming milling. Demicco alleges that its crews were forced to repeat this process approximately five times per interfering wire, which drastically increased the cost of performing its operations and the length of time to complete the work.

Both Demicco and the City issued several written notices to defendants advising them that their overhead utility wires and poles were interfering with Demicco's milling operations. In July of 2001, the City advised defendants that all costs incurred as a result of the interferences were their sole responsibility, and directed that arrangements be made for payment to Demicco for the costs it incurred as a result of the interferences (Exhibit E, annexed to the Affirmation of Joshua Annenberg, Esq.). Subsequently, the City ordered (Order Out) defendants to relocate their wires and poles in approximately thirty-two locations, and cited to New York City Administrative Code (Administrative Code) § 24-521 (Exhibit C, annexed to the Affidavit of David S. Torrey; Exhibit F, annexed to the Affirmation of Joshua Annenberg, Esq.).

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through a conveyor and boom machine to a dump truck that travels alongside the milling machine (Affidavit of David S. Torrey, ¶ 4).

Administrative Code § 24-521 is a penal provision that obligates utility companies to relocate certain facilities when necessary to accommodate public works projects, and grants the City authority to assess a fine against a utility in the event of a failure to comply with an Order Out from the City.

Defendants did not make their payments on invoices sent by Demicco for costs that it allegedly incurred as a result of the utility interferences. Additionally, defendants did not relocate their wires and poles subsequent to their receipt of the City's Order Out. Empire's formal response to the Order Out came in the form of a letter, wherein it challenged the applicability of Administrative Code § 24-521 to aerial interferences such as the poles and wires at issue, and stated that relocation would cause Empire to incur substantial costs (Exhibit D, annexed to the Affidavit of David S. Torrey).<sup>3</sup>

Plaintiffs then commenced this action in a different Part, asserting a claim for intentional interference with contract, which was dismissed (Exhibit F, annexed to the Affidavit of David S. Torrey, Decision of Moskowitz, J., dated September 5, 2002). Demicco subsequently sought leave to reargue and file an amended complaint to include a cause of action for prima facie tort. The motion to reargue was granted while that part of the motion which sought amendment was denied; upon reargument the court adhered to its original decision (Exhibit I, annexed to the Affidavit of David S. Torrey, Decision of Moskowitz, J., dated March 27, 2003).

The First Department subsequently reversed (8 AD3d 99 [1st Dept 2004]), granting the motion to amend the complaint to include a claim for prima facie tort "in light of defendants'

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<sup>3</sup> Subsequently, the City terminated Demicco's contract for reasons unrelated to this dispute.

affirmative legal obligation to remove or alter their wires for public works construction,” citing Administrative Code § 24-521 and *City of New York v Consolidated Edison Co.*, 274 AD2d 189 [2000], *lv dismissed* 96 NY2d 727 [2001]).

Subsequent to the First Department’s decision in this action, the Court of Appeals considered whether above-ground utility facilities fell within the scope of Administrative Code § 24-521 (*City of New York v Verizon New York, Inc.*, 4 NY3d 255 [2005]). There, the City brought an action against Verizon seeking to recover penalties under Administrative Code § 24-521 for Verizon’s alleged delay in relocating its above-ground facilities to accommodate a public works sewer project (*id.*). In reversing the First Department’s ruling which held that above-ground facilities *were* within the scope of the provision, the Court explicitly found that Administrative Code § 24-521 applies to underground facilities only (*id.*). Thus, the Court held that Administrative Code § 24-521 may not be invoked by the City as a statutory basis to assess a penalty against a utility company arising out of its failure to remove above-ground facilities to accommodate a public works project, while reaffirming the “long-standing” common law rule that utilities bear an obligation to move its facilities when it interferes with public works projects and pay the costs associated with such interferences (*City of New York*, 4 NY3d at 258).

### Discussion

The elements of a cause of action for prima facie tort are (1) the intentional infliction of harm; (2) resulting in special damages, (3) without excuse or justification; and (4) by an act or series of acts that would otherwise be lawful (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *Demicco Bros., Inc.*, 8 AD2d at 100). To establish “intentional infliction of harm,” a plaintiff must demonstrate that the defendant acted with “disinterested

malevolence,” which is defined as a malicious act “unmixed with any other and exclusively directed to injury and damage” another (*id.*). Where other demonstrable motives exist, such as profit, self-interest and business advantage, no recovery can be had under prima facie tort (*Squire Records v Vanguard Rec. Socy.*, 25 AD2d 190 [1<sup>st</sup> Dept], *appeal dismissed* 17 NY2d 870, *appeal denied* 17 NY2d 424, *not denied* 18 NY2d 895 [1966]), as justification operates as a “neutralizing factor” that overrides the intent to injure (*Appalachian Power Co. v American Inst. of Certified Pub. Accountants*, 177 F Supp 345, 350 [SD NY], *affd* 268 F 2d 844 [2d Cir], *cert denied* 361 US 887 [1959]). However, the motive or justification proffered must be one that is cognizable as a matter of law (*ATI, Inc. v Ruder & Finn, Inc.*, 42 NY2d 454, 459 [1977]; *Advance Music Corp. v American Tobacco Co.*, 296 NY 79, 85 [1946]), and otherwise a “legitimate reason” (*Demicco Bros., Inc.*, 8 AD3d at 100).

Empire and Con Ed move for summary judgment, maintaining that, because the Court of Appeals has ruled that Administrative Code § 24-521 does not apply to above-ground facilities, it is not a statutory basis upon which the City can order relocation of its above-ground facilities. Therefore, it argues, Demicco cannot prove disinterested malevolence because its failure to remove and pay for interferences was justified.

In contrast, Demicco asserts that a utility company has an absolute common law duty to remedy and pay for interferences with public works projects, irrespective of the propriety of the City’s Order Out and whether certain utility facilities constitute actual interferences. Furthermore, Demicco maintains that the Court of Appeals’ ruling on the scope of Administrative Code § 24-521 is not dispositive of this action because that decision did not alter the common law duty of utilities to remove interferences. Thus, Empire’s and Con Ed’s

justification is insufficient to defeat the inference of disinterested malevolence here.

Demicco has demonstrated that defendants acted with “disinterested malevolence,” arising out of defendants’ failure to remove aerial interferences and pay for the costs it incurred as a result of the interferences, given Empire’s and Con Ed’s affirmative legal obligation under common law to bear all costs associated with the protection of its facilities and the costs of relocating such facilities, and in the absence of a legitimate justification for the failure to remove such interferences (*see Demicco Bros., Inc.*, 8 AD3d at 100). While the Court of Appeals has since determined that Administrative Code § 24-521 does not apply to above-ground facilities, and thus, it cannot be used by the City as a basis to assess a fine against utilities for non-compliance with an Order Out, the Court reaffirmed the “longstanding” common law rule that obliges utility companies to move facilities that interfere with the performance of public works projects (*City of New York*, 4 NY3d at 258; *see also City of New York*, 274 AD2d at 191 [Administrative Code § 24-521 does not eliminate the common law rule that utilities that operate facilities pursuant to a franchise granted by the City bear an obligation to pay all costs associated with protecting the facilities during the performance of public works projects, and the exception to that rule that utility facilities operated pursuant to an easement are not responsible for such costs], cited in *Demicco Bros., Inc.*, 8 AD3d at 100; *Matter of Diamond Asphalt Corp. v Sander*, 92 NY2d 244, 249, *rearg denied* 92 NY2d 921 [1998]).

This common law duty entails bearing all costs associated with protecting utility facilities (*City of New York*, 4 NY3d at 258; *City of New York*, 274 AD2d at 191-92), and may include the actual removal or relocation of utility equipment (*Matter of Diamond Asphalt Corp.*, 92 NY2d at 249; *General Contr. Assn. of New York, Inc. v Tormenta*, 180 Misc 2d 384, 392 [Sup Ct NY

County], *appeal dismissed* 259 AD2d 177 [1<sup>st</sup> Dept 1999], *lv denied* 95 NY2d 754 [2000]; *City of New York v Consolidated Edison Co. of New York*, 114 AD2d 217, 220 [1<sup>st</sup> Dept 1986]).

Here, it is undisputed that defendants operate their utility facilities pursuant to franchises granted to them by the City (Empire's Response to Plaintiff's Rule 19-a Statement, at ¶ 2). Thus, defendants are bound by the common law duty to pay all costs associated with the protection of their utility facilities, which duty includes the actual removal or relocation of utility equipment in the event of an interference (*City of New York*, 274 AD2d at 191-92). Neither is the justification proffered by them sufficient to overcome the inference of disinterested malevolence.

In order to demonstrate the existence of motive or justification sufficient to overcome disinterested malevolence on a prima facie tort claim, that motive or justification must be one that the law recognizes (*Advance Music Corp.*, 296 NY at 85), *i.e.* "legitimate" (*Demicco Bros., Inc.*, 8 AD3d at 100). Here, however, given that Empire and Con Ed had an affirmative common law duty to remove and pay for the costs of such interferences, their failure to do so was not justified (*Demicco Bros., Inc.*, 8 AD3d at 100).

Empire and Con Ed allege that they were justified in refusing to comply with the Order Out based upon the belief that Administrative Code § 24-521, cited by the City in the Order Out, is inapplicable to above-ground facilities, rendering it legally baseless. Empire and Con Ed further maintain that as Demicco's work at numerous locations had already been completed upon the receipt of the Order Out, compliance by relocation would lead to the incurrence of unnecessary, substantial and arbitrary costs.

However, as Empire and Con Ed bear a common law duty to pay all costs associated with protecting their facilities during the performance of public works projects and to remove such

facilities if they interfere with such projects, the failure to remove the interferences was not legitimate (*Demicco Bros., Inc.*, 8 AD3d at 100). Rather, upon receiving the Order Out, Empire's and Con Ed's sole remedy was to comply, by either relocating the facilities or paying the costs that Demicco incurred as a result of the interferences, and subsequently, to seek damages from the City upon the demonstration that the Order Out was arbitrary or improperly issued (*Trocom Constr. Corp. v Consolidated Edison Co. of New York, Inc.*, 7 AD3d 434, 436-37 [1<sup>st</sup> Dept 2004]; *see also New York Tel. Co. v City of New York*, 95 AD2d 282, 286 [2d Dept 1983], *appeal dismissed* 64 NY2d 648 [1984], *order affd* 65 NY2d 681 [1985]). A utility is not at liberty to simply disregard an Order Out issued by the City, even if it believes that the order is improper (*Trocom Constr. Corp.*, 7 AD3d at 436-37).

Moreover, Empire's and Con Ed's contention that, even if such a common law duty exists, it does not flow to the benefit of independent contractors retained by the City to conduct public work projects, fails. A utility may be liable in damages to an independent contractor retained by the City to conduct public works projects for the extra costs that the contractor incurs as a result of the interferences and for untimely compliance with an Order Out resulting in delays in the performance of the public works project, irrespective of the propriety of the Order Out itself (*id.* at 436-37). Therefore, regardless of whether Empire's and Con Ed's above-ground utility facilities actually constituted interferences, both are liable to Demicco for failing to comply with the Order Out and shifting the cost of the interferences upon Demicco (*id.*).

Demicco has additionally established its entitlement to special damages, by demonstrating specific and measurable loss (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142 [1985]). Demicco submits field sheets and time and equipment charge sheets detailing the

above-ground wires that interfered with its milling operations, and the financial costs incurred as a result of the additional expenditure of labor and equipment (Affidavit of Joshua Annenberg, Esq., Exhibit B). An issue of fact is raised, however, as to the extent of damages that Demicco has incurred, as questions persist surrounding which above-ground facilities constituted actual interferences. Further, Empire disputes the extent of Demicco's alleged damages based upon its assertion that Demicco's boom machine could actually be lowered while the machine is in operation. If the machine could be lowered while in operation, it necessarily obviates the need to repeatedly turn off the machine to allow crews of workers to manually lower the machine underneath the wires, as Demicco alleged. Therefore, summary judgment on the extent of damages is premature where questions of fact remain concerning what facilities constituted actual interferences (*Cruz v Apex Investigation & Sec. Co.*, 285 AD2d 427, 428 [1<sup>st</sup> Dept 2001]).

Accordingly, it is

ORDERED that the summary judgment motion (005) by Empire City Subway Co., Ltd. is denied; and it is further

ORDERED that the summary judgment motion (006) by Consolidated Edison Company of New York is denied; and it is further


ORDERED that the cross-motion for summary judgment by Demicco Bros., Inc. is granted on the issue of liability, against Empire City Subway Co., Ltd., Consolidated Edison Company of New York, and Time Warner Cable; and it is further

ORDERED that assessment of damages against defendants Empire City Subway Co., Ltd., Consolidated Edison Company of New York, and Time Warner Cable is directed, and it is further

ORDERED that, within 60 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall thereupon place this action on the appropriate trial calendar for the assessment hereinabove directed, and it is further

ORDERED that if the plaintiff fails to comply with the immediately preceding paragraph, the action will be dismissed.

Dated: May 16, 2006

ENTER:  
  
\_\_\_\_\_  
J.S.C.  
**RICHARD B. LOWE III**

**FILED**  
MAY 25 2006  
COUNTY CLERK  
NEW YORK