

**Schindler v Consolidated Edison, Inc.**

2007 NY Slip Op 30319(U)

March 20, 2007

Supreme Court, New York County

Docket Number: 0102506

Judge: Shirley W. Kornreich

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

DECEASED **SHIRLEY WERNER KORNREICH**

PART 54

Index Number : 102506/2005

J.S.C.

SCHINDLER, SIDNEY

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

vs

CONSOLIDATED EDISON

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

Sequence Number : 001

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

DISMISS

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

The following papers, numbered 1 to 4 were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1  
2, 3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

MAR 26 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/20/2007

**SHIRLEY WERNER KORNREICH**  
J.S.C.

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

RECEIVED BY THE CLERK OF THE COURT

-----X  
SIDNEY SCHINDLER,

Plaintiff,

Index No.: 102506/05

-against-

CONSOLIDATED EDISON, INC., CONSOLIDATED  
EDISON COMPANY OF NEW YORK, TROCOM  
CONSTRUCTION CORP., R. SMITH RESTORATION, INC.,

Defendants.  
-----X

**DECISION  
and  
ORDER**

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for personal injuries. Plaintiff Sidney Schindler claims that he was hurt when he tripped and fell in the street at the intersection of Wanamaker Place and Lafayette Street, New York, N.Y. (the "intersection"). Defendant Trocom Construction Corp. ("Trocom") now moves for summary judgment dismissing the complaint. Plaintiff opposes the motion, cross-moving to compel discovery.<sup>1</sup>

I. *Statement of Facts*

At his deposition, plaintiff testified that on February 22, 2002 at approximately 11:00 P.M, he tripped and fell while crossing the intersection due to a hole in the roadway. Anthony Santoro, Trocom's vice president, testified that Trocom had a contract with New York City "to remove abandoned high pressure [fire] hydrants, systems that were put in in the '20s and '30s." The water supply to these hydrants had been shut off by the City in the early 1970s. The hydrant

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<sup>1</sup> The court reminds plaintiff that Rule 14 (a) of the Rules of the Justices of the Supreme Court, Civil Branch, New York County, governing motion papers, requires that exhibits should be tabbed.

removal process involved breaking away the sidewalk flag around the hydrant and then removing the hydrant and “plac[ing] concrete sidewalk back into the area where the sidewalk was removed.” Trocom began work on the hydrant removal in the Fall of 1998 and “substantially completed” the work in November 2000. Trocom’s work was limited to the sidewalk, rather than the street, except when Trocom would remove a hydrant valve box, located in the roadway approximately one foot from the curb.

Because the project covered every block in New York City south of 34th Street, Trocom “took out permits for every block, the intersection and the segments leading to the block in case [it] did find a hydrant, [it] needed to close lanes of traffic approaching the work.” Under the contract with the City, Trocom was required to obtain a permit in order to close a lane of traffic, which enabled it to perform the hydrant work. These permits, called “street opening permits,” allowed Trocom to do work as well as close lanes and channel traffic. Mr. Santoro testified that Trocom did not do work at the subject intersection and found no permit pertaining to that intersection. While Trocom did find a “segment” permit relating to “Wanamaker and Lafayette, Court to Third,” this is a permit for the area closest to but distinct from the intersection.

On May 13, 2000, Trocom removed a hydrant from the corner of Broadway and Wanamaker, one block west of the intersection. When shown a photograph of the intersection where plaintiff fell, Mr. Santoro testified that the photo depicted “a trench” or a “pothole.” Specifically, “it look[ed] like two patches were made, poor compaction and poor maintenance caused a pothole.” Mr. Santoro stated that there were no records that Trocom performed any work at the subject intersection.

Plaintiff’s attorney argues that water pipes for fire hydrants run under the intersection

where plaintiff fell. He contends that Trocom's "street opening permits . . . are the only permits issued in the two years prior to the date of accident for the area of the accident according to the City of New York." Plaintiff has not submitted any evidence to support his attorney's statement.

Plaintiff further moves to compel discovery and argues he is unable to meet his burden of proof due to defendant's failure to provide him with necessary discovery. However, plaintiff filed a note of issue and certificate of readiness, verifying that discovery was complete and the instant action ready for trial. There is no evidence that, prior to his instant cross-motion, plaintiff moved to compel any discovery or depositions. Plaintiff submits various discovery/compliance conference orders, which provide for general discovery scheduling but do not address defendant's alleged noncompliance with discovery. Additionally, plaintiff claims that defendant never produced an employee, Anatoly Veskler—who may have had knowledge of work done near the intersection—for a deposition, but there is no evidence to suggest that plaintiff ever requested such a deposition.

## II. *Conclusions of Law*

In order to recover, plaintiff must demonstrate that defendant created or had notice of the hazardous condition that precipitated his injury. *Frank v. Time Equities, Inc.*, 292 A.D.2d 186 (1st Dept. 2002). To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560

(1980). This proof must consist of more than “mere conclusions, expressions of hope or unsubstantiated allegations or assertions[.]” *Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 533 (1991) (citations omitted).

Here, Trocom has established its entitlement to summary judgment by showing, via deposition testimony, that it did not do work in the intersection in which plaintiff fell. Plaintiff has failed to come forward with any proof that Trocom created the roadway defect that caused his fall.

The sum and substance of plaintiffs’ argument is that a question of fact is created by Trocom’s failure to provide “discovery wholly within its control[,] which would show the work done by [Trocom] at the site of the accident herein.” The court disagrees. In light of the undisputed testimony of Mr. Santoro, that Trocom did not perform any work at the subject intersection, plaintiff’s speculative allegations are unavailing. While plaintiff’s point to the “street opening permit” as a would-be smoking gun, Mr. Santoro has explained that these permits are not exclusively obtained for roadway work and the permit at issue was for “a segment” *other than the intersection where plaintiff fell*. Equally unconvincing is the claim that Trocom was the only entity that performed work in the intersection for the two years prior to plaintiff’s accident. This statement by plaintiff’s attorney is unsupported by any evidence. *Ramnarine v. Memorial Ctr. for Cancer & Allied Diseases*, 281 A.D.2d 218, 219 (1st Dept. 2001) (attorney’s affirmation is of no probative value in opposition to summary judgment motion).

Finally, plaintiff contends that additional discovery would somehow prove defendant Trocom’s liability, but it lacks any evidence to support that argument. The “mere chance that somehow, somewhere . . . [a party] will uncover something which might add to [its] case but

obviously of which now they have no knowledge, is mere speculation and conjecture and is not sufficient[.]” *Meath v. Mishrick*, 120 A.D.2d 327, 329-30 (1st Dept. 1986), *aff’d* 68 N.Y.2d 992 (1986) (recitation of “bare allegations and speculation” as to what discovery may yield is insufficient to warrant denial of summary judgment). While plaintiff argues that the only reason it has not found documents that demonstrate defendant performed work in the intersection is that defendant has not produced those documents, this argument is speculative, conclusory and fails to identify evidence that might yield such a result. *See Bachrach v. Farbenfabriken Bayer AG*, 36 N.Y.2d 696, 697 (1975) (“Hope alone will not raise a triable issue”). Accordingly, it is

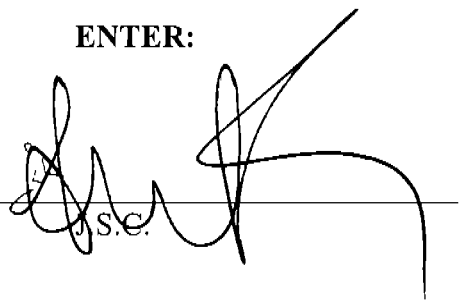
ORDERED that defendant Trocom’s motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant Trocom, with costs and disbursements to defendant Trocom as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action is shall continue.

Date: March 20, 2007  
New York, New York

**FILED**  
MAR 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



A handwritten signature in black ink, appearing to be 'J.S.C.', is written over a horizontal line. The signature is stylized and cursive.