

**Keller v City of New York**

2008 NY Slip Op 30719(U)

March 12, 2008

Supreme Court, New York County

Docket Number: 0112362/2005

Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN  
Justice

PART 52

Jeffrey Keller, as Executor of the  
Estate of Bernice Keller  
- v -  
City of New York, et al.

INDEX NO. 112362/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for ST

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED  
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

**FILED**  
MAR 14 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/12/08

SAZ

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: CIVIL TERM: PART 52

-----X

JEFFREY KELLER, as Executor of the  
Estate of BERNICE KELLER,

Plaintiff,

against

Index Number 112362/2005

Mot. Seq. No. 002

THE CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC.,  
NICO ASPHALT PAVING, INC., and MECC  
CONTRACTING, INC.,

Defendants.

**DECISION AND ORDER**

-----X

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Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross-Motion, Affidavits and Memo of Law	2, 2A
Con Edison's Affirmation in Opposition	3
MECC's Reply to Opposition of Cross-Motion	4
Plaintiff's Affirmation in Opposition	5
Additional EBT Transcripts	6, 7

**FILED**  
MAR 14 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

**PAUL G. FEINMAN, J.:**

By interim decision and order dated September 5, 2007, this court granted, without opposition, defendant Nico Asphalt Paving, Inc.'s motion for summary judgment and dismissed the complaint and any cross claims dismissed against Nico. At that time, MECC Contracting, Inc.'s cross-motion for summary judgment was held in abeyance pending completion of an

\* 3 ]  
examination before trial of two witnesses to be produced by defendant Consolidated Edison Company of New York (Con Ed). The transcripts of those depositions have now been provided to the court and considered in reaching this decision. For the reasons set forth below, defendant MECC's cross-motion for summary judgment is granted and the complaint and any cross claims dismissed as against MECC.

### *Procedural History*

On November 26, 2004, plaintiff was injured when she tripped and fell over a metal construction plate while walking along the roadway located at 400 East 57<sup>th</sup> Street (Not. of Cross-Mot. Ex. A, Ver. Compl. ¶¶13, 14). Plaintiff commenced this suit for personal injuries on or about September 2005. Plaintiff's original verified complaint named the City of New York and Con Ed as defendants in the action (Not. of Cross-Mot. Ex. A, Ver. Compl.).

In May 2006, Con Ed filed a third-party complaint, impleading MECC Contracting, Inc. (MECC) and Nico Asphalt Paving, Inc. (Nico) as third-party defendants in the action (Not. of Cross-Mot. Ex. B, Third-party Compl.). Con Ed, in its third-party complaint seeks to recover against defendants Nico and MECC for breach of contract and negligence causes of action. Con Ed seeks indemnification from both third-party defendants in accordance with the parties' construction contracts<sup>1</sup> (Not. of Cross-Mot. Ex. B, Third-party Compl., ¶¶28-36).

In June 2006, plaintiff amended the complaint to add both Nico and MECC as direct

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<sup>1</sup> Con Ed entered into construction contracts with Nico on April 20, 2001 and with MECC on January 7, 2003. The contracts contained required standard terms and conditions, including an indemnification clause, whereby both subcontractors agreed to indemnify Con Ed from incidents resulting in death or injury to persons and property (Not. of Cross-Mot. Ex. B, Third-party Compl., ¶¶8, 24).

defendants in the action (Not. of Cross-Mot. Ex. D). Defendant Nico then moved for dismissal from the direct action on the ground that the complaint failed to state a cause of action as there was nothing to show it had done any work at the location of plaintiff's accident (CPLR 3211[a] [7]). As already explained, that motion was previously granted without opposition.

MECC cross-moved for summary judgment on the ground that it is not a proper defendant in this action because it did not own the metal plate that caused plaintiff's injury; specifically MECC contends that any metal plates that it used in connection with the work performed at the site of plaintiff's trip and fall were removed more than a month prior to the date of accident (Aff. in Supp of Not. of Cross-Mot. ¶18). Con Ed initially opposed the cross-motion for summary judgment on the ground that discovery concerning material questions of fact, which may involve MECC, remain outstanding (Aff. in Opp. to Not. of Cross-Mot. ¶3). However, the issues of outstanding discovery have been addressed at the September 5, 2007, October 17 and 24, 2007 appearances on this motion. Two more depositions of Con Ed witnesses have been completed and the transcripts submitted to the court.

#### ***Factual Background***

According to the decedent's testimony at her Gen. Mun. Law 50-h hearing, she tripped on a raised metal plate located in the middle of the block on East 57<sup>th</sup> Street between First and York Avenues. Con Ed requested permits from the City to perform work in this vicinity and the City issued permits to Con Ed on October 8, 2004, and also on November 8, 2004 for the purpose of opening the street on East 57<sup>th</sup> Street (Not. of Cross Mot. Ex. G, EBT of Abraham Lopez 16, 17). MECC performs contracting work for Con Ed, including installation of underground facilities,

sidewalk restoration, and street plating.<sup>2</sup> (Not. of Cross Mot. Ex. J, EBT of Luigi Moccia [hereinafter Moccia EBT] 8, 9).

Some records show that the street was cut open by MECC at the intersection of First Avenue and East 57<sup>th</sup> Street on October 10, 2004 and backfilled on October 16, 2004 (Not. of Cross Mot. Ex. I, EBT of Genevive Martinez [hereinafter Martinez EBT] 20; Moccia EBT 12). Other records show a cut was made in the traffic lane on East 57<sup>th</sup> Street between First Avenue and York Avenue on May 10, 2004, with the backfill being completed on November 20, 2004 (Martinez EBT 21). This cut was not made by MECC, and no paving was required for completion of the job (Martinez EBT 21, 22).

According to Con Ed's records searcher, a complaint was called in to Con Ed on October 11, 2004 at 400 East 57<sup>th</sup> Street and First Avenue to report shifted plates with exposed excavation at the intersection of East 57<sup>th</sup> Street and First Avenue (Martinez EBT 37). The call requested urgent assistance with regard to the matter. Con Ed contends that on October 10, 2004,<sup>3</sup> its steam crew employees responded to a complaint of a shifted road plate at East 57<sup>th</sup> and 1<sup>st</sup> Avenue, and those employees reported that, the plates at this location were marked with the initials "MECC" (Brown EBT 19, 28, 29; Aff. in Opp to Not. of Cross-Mot. ¶¶8, 9). Con Ed's records do not indicate what work was done in connection to the complaint (Martinez EBT 37).

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<sup>2</sup> Nico was contracted by Con Ed to perform the necessary paving work (Not. of Mot., Ex. K, EBT of John Denegall, 7; Martinez EBT 20).

<sup>3</sup> There is a discrepancy as to the date of the complaint and the date of the response to the complaint. Con Ed's records searcher Ms. Martinez, testified that the complaint of a shifted road plate in front of 400 East 57<sup>th</sup> Street was called in on October 11, 2004, however, Con Ed's records show that its workers responded to this complaint October 10, 2004, one day before the complaint was actually made (Martinez EBT 37; Brown EBT 19, 28, 29).

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Another complaint was called in by a restaurant on November 20, 2004 at 400 East 57<sup>th</sup> Street and First Avenue (Martinez EBT 37).

On September 11, 2007, Con Ed produced Joe McGee, one of its Senior Coordinators, for a deposition (McGee EBT 6). This witness testified that James Brown was the lead mechanic that responded to the complaint (McGee EBT 57). Con Ed then produced James Brown for testimony. Mr. Brown is employed by Con Ed as a mechanic, and was one of the workers who responded to the October 11, 2004 telephone complaint of a shifted road plate (Brown EBT 6; Martinez EBT 37). Mr. Brown testified that he does not recall being near the corner of East 57<sup>th</sup> Street and First Avenue within six months before the date of the accident (Brown EBT 17). Mr. McGee testifying from the emergency control ticket, which contains information based on Mr. Brown's report, stated that the plates at the location on October 10, 2004 were marked with the letters "MECC" (McGee EBT 57).

There is a requirement for subcontractors who plate streets to use an identifying marker on their construction plates (Moccia EBT 10). Each metal plate has marks on it bearing some type of lettering that indicates the name of the company that owns the plate (Not. of Mot. Ex. K, EBT of John Denegall [hereinafter Denegall EBT] 10). Here, according to the testimony of Nico's witness, Mr. Denegall, it is not entirely clear whether the initials on the construction plate on which plaintiff tripped are MGO or MCO (Denegall EBT 11).

Photographs produced by the City as Respondent's Exhibit A through D on June 21, 2005, and included in MECC's motion papers at Exhibit L, indicate that the first two letters on the plate appear to be either MC or MG. According to Con Ed's witness, Ms. Martinez, and Nico's witness, Mr. Denegall, the initials MCO is not recognized as a "mark" seen on

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construction plates in the City (Denegall EBT 13; Martinez EBT 42). However, MECC's witness, Mr. Moccia and Nico's witness, Mr. Denegall, testified that the mark "MGO" is believed to belong to the Con Ed gas group, that is, Manhattan Gas Operation (Moccia EBT 15; Denegall EBT 26).

According to the testimony of MECC's President, Mr. Moccia, MECC marks its initials "MECC" on each of its metal plates by way of raised welding (Moccia EBT 10). He further testified that it is clear from looking at the photographs of the plate that the plate identified in the photograph is not an MECC plate (Moccia EBT 14; Not. of Cross-Mot. Ex. L, Photographs). According to the President of MECC, that company does not permit its metal plates to be used by other contractors in connection with the work (Moccia EBT 16). It is the custom and practice of MECC to immediately remove its plates upon completion of the work (Moccia EBT 15,16). According to Con Ed's witness, Mr. McGee, the information provided on line 14 of the emergency call ticket indicates that MECC's plates were removed on October 19, 2004 (McGee EBT 59).

#### *Legal Analysis*

Summary judgment is proper when there is no genuine issue of material fact upon which the court could find for the non-moving party (*Di Menna & Sons, Inc., v New York*, 301 NY 118, 121 [1950]). It is a drastic remedy that should not be granted if the issue is arguable or if there is doubt as to whether a triable issue exists (*Braun v Carey*, 280 AD 1019, 1020 [3<sup>rd</sup> Dept. 1952]). Issue finding as opposed to issue determination is essential to summary judgment (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The moving party must produce evidence to conclude that summary judgment should be granted in her favor (*Shaw v Time-Life*

*Records*, 38 NY2d 201, 207 [1975]). The evidence will be construed in the light most favorable to the moving party (*Wessel v Krop*, 30 AD2d 764, 765 [4<sup>th</sup> Dept. 1968]).

Once the moving party has met its burden, and demonstrates its entitlement to summary judgment, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring trial (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). A party's bare allegations are insufficient to create a genuine issue of fact, and thus, defeat summary judgment (*S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, NY2d 338, 342 [1974]). A party will not succeed in defeating summary judgment where it offers only surmises, suspicions or conjectures that are unsupported by evidence (*Shapiro v Health Ins. Plans of Greater N.Y.*, 7 NY2d 56, 63 [1959]).

Generally, liability for a dangerous or defective condition on property is hinged upon establishing ownership, control or special use of the property (*Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957 [3<sup>rd</sup> Dept. 1992]; *see also, Kiselis v Speculator Chamber of Commerce*, 234 AD2d 677, 678 [3<sup>rd</sup> Dept. 1996]). While ownership of the metal construction plate has not been fully established,<sup>4</sup> the documentary evidence submitted shows that MECC is not the owner of the plate, and as such, did not cause or create the defect which allegedly caused the plaintiff to trip and fall.

Both Con Ed and MECC acknowledge performing work at 400 East 57<sup>th</sup> Street and First Avenue between October 10, 2004 and October 16, 2004 under the October 8, 2004 permit. The

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<sup>4</sup> While MECC and Nico have testified that the initials on the metal plate that allegedly caused plaintiff's injury may be MGO, and thus, belong to Con Ed gas group, i.e., Manhattan Gas Operation, this has not been proven with any degree of certainty.

records witness produced on behalf of Con Ed, Ms. Martinez, testified that a complaint was called in by a Mrs. Fisher on October 11, 2004, to repair shifted plates that resulted in exposed excavation on the street in front of at 400 East 57<sup>th</sup> Street and First Avenue. Importantly, the Con Ed witnesses only place the MECC plates at the scene as late as October 19, 2004 when the evidence shows they were removed. The photographs do not show “MECC” and Ms. Martinez testified that another complaint was made on November 20, 2004, just six days before plaintiff’s injury, for gas access at the same location, but provided no record of the actual work performed.

In other words, while it may not be clear whose plate it was that caused plaintiff to trip and fall, MECC has produced competent evidence excluding it as the owner. Photographs may be taken as a fair and accurate representation of the place of the injury or the injury-causing instrumentality at the time of the occurrence (*see, e.g. Taylor v. New York City Transit Authority*, 48 NY 2d 903, 904 [1979]). In this case, the photographs, one in particular, show that the initials on the metal construction plate that allegedly caused plaintiff to trip and fall begin with the letters MG or possibly MC. This photograph makes clear that the initials on the plate in question are not MECC. The deposition testimony of both MECC and Nico further support this conclusion.

The deposition testimony of the Con Ed witnesses that MECC plates were at the site in October does not contradict the evidence that the MECC plates were removed before the November accident date. This is particularly true given the testimony of the MECC witness, in conjunction with the photographs marked by the City as Respondent’s Exhibit A through D at the plaintiff’s Gen. Mun. Law 50-h hearing on June 21, 2005. In short, the evidence sufficiently supports MECC’s position that its plate was not at issue.

Con Ed’s original contention that summary judgment should be denied on the basis that

further discovery is necessary to ascertain ownership of the metal plate now lacks merit inasmuch as the court held the motion in abeyance for the outstanding Con Ed depositions. *See, Campbell v City of New York*, 220 AD2d 476, 477 (2d Dept. 1995) (holding that the mere hope that further discovery will uncover evidence to defeat summary judgment is not sufficient to deny a party its motion for summary judgment). Upon a thorough review of the two additional deposition transcripts, the evidence is still insufficient to connect MECC to ownership of the plate at issue. Further, this court finds that the evidence submitted by Con Ed in opposition to MECC's cross-motion for summary judgment, which consisted primarily of photographs and an excerpt of the plaintiff's deposition testimony, do not create a material issue of fact as to whether MECC's plate was at the site of plaintiff's accident on November 8, 2004. It is therefore

ORDERED that the cross-motion by MECC Contracting, Inc. for summary judgment is granted and the complaint and all cross-claims and counterclaims against it are dismissed with costs and disbursements to the defendant MECC as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued as against the remaining defendants (City of New York, Consolidated Edison); and it is further

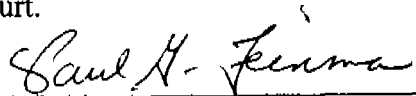
ORDERED that the caption shall be amended to reflect the dismissal of the complaint as against Nico Asphalt Paving, Inc. And MECC Contracting, Inc.; and it is further

ORDERED that the movant shall serve a copy of this decision and order on all parties, the Clerk of the Court (60 Centre, Bsmt), who shall amend the caption and enter judgment accordingly, and upon the Trial Support Office (60 Centre, Rm. 158), which shall amend the caption accordingly; and it is further

ORDERED that the remaining parties are to appear at the previously scheduled Early Settlement Conference on March 26, 2008, at 9:30 a.m. before J.H.O. William Leibovitz, 80 Centre Street, Room 103.

This constitutes the decision and order of the court.

Dated: March 12, 2006  
New York, New York

  
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J.S.C.

**FILED**  
MAR 14 2008  
NEW YORK  
COUNTY CLERK'S OFFICE