

**Hancock v City of New York**

2008 NY Slip Op 30875(U)

March 25, 2008

Supreme Court, New York County

Docket Number: 0117316/2005

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER

PART Part 5

J.S.C.  
Justice

Index Number : 117316/2005

HANCOCK, FRED A ROSS

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

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

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

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

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

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

PAPERS NUMBERED

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

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

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

1  
2, 3, 4 (x motion)

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

MAR 27 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/25/08

  
EILEEN A. RAKOWER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
FREDA ROSS HANCOCK,

Plaintiff,

Index No.  
117316/05

Seq No.: 003

- against -

Decision and  
Order

THE CITY OF NEW YORK, VERIZON,  
EMPIRE CITY SUBWAY LIMITED and  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.,

Defendants.

-----X  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK., INC.,

**FILED**

Third-Party Plaintiff

MAR 27 2008

Third-Party  
Index No.:  
590613/06

-against-

NEW YORK  
COUNTY CLERKS OFFICE

NICO ASPHALT, INC. AND TRIUMPH  
CONSTRUCTION CORP.,

Third-Party Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries she allegedly sustained when she tripped and fell over a metal spike in the crosswalk located at West 52<sup>nd</sup> Street and 5<sup>th</sup> Avenue, in the County and State of New York on April 22, 2005. Defendant the City of New York ("City") moved separately for summary judgment pursuant to CPLR 3212 on the ground that it had no notice of the defect alleged. No party

opposed the motion, and the claims and cross claims as against the City were dismissed by order of this court dated March 17, 2008. Nico Asphalt Paving, Inc. ("Nico") makes this motion to dismiss all claims and cross claims as against it. Plaintiff and Triumph Construction Corp. ("Triumph") oppose. Verizon New York, Inc. ("Verizon") and Empire City Subway Company (Limited) ("Empire") together oppose, and bring a cross motion for summary judgment on the issue of indemnification as against Nico. No party opposes the cross motion.

Nico, in support of its motion, argues that it did not perform paving work in the exact location of the claimed defect, and cannot be liable for plaintiff's injuries. Nico submits: (1) the pleadings; (2) plaintiff's notice for trial; (3) plaintiff's verified bill of particulars; (4) the deposition transcript of Freda Ross Hancock; (5) photographs identifying the place plaintiff fell and the alleged defect which caused her fall; (6) the deposition transcript of Michael Dietrich, an employee of Consolidated Edison ("Con Ed"); (7) Con Ed field data forms; (8) Dietrich's daily log sheet; (9) the deposition transcript of Dirk Rolff for Empire; (10) Empire's paving order; (11) the deposition transcript of John Denegall for Nico; (12) Con Ed's work order and report of work assigned to Nico; (13) and the contract between Con Ed and Nico.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The spike or pin plaintiff identified as causing her fall is one used by various entities to secure plates which cover excavations in the streets of Manhattan. The spike complained of here was located within the crosswalk that spans Fifth Avenue on the Southern side of 52<sup>nd</sup> Street. Specifically, plaintiff alleges that she fell one third of the street West of the Eastern curb and two thirds of the street East of the Western curb when her foot contacted a spike sticking approximately two inches up from the ground.

One week prior to plaintiff's accident, a work order reveals that Nico completed a paving order at the intersection of 52<sup>nd</sup> Street and Fifth Avenue. A Con Ed record shows that Triumph opened the area to install pipes or conduits, and backfilled and concreted the area the same day on March 22, 2005. This area was on the Southern part of the intersection of Fifth Avenue and 52<sup>nd</sup> Street, parallel to the crosswalk where plaintiff fell, but not within the crosswalk. Mr. Denegall contends Nico was to furnish and install surface paving for this opening. Nico's invoice shows that it did furnish and install surface paving from April 13, 2005 to April 20, 2005, and billed for the same. Mr. Denegall points out that while the Nico contract with Con Ed allows Nico to bill for removing "rampings and pins," the invoice generated for this job does not charge for or report that Nico removed any rampings or pins.

Nico argues that if it found roadway plates and spikes at the location, it would have contacted Con Ed, and it would be so documented on the paving order. Con Ed, in turn, would notify the contractor that installed the plates and spikes to have them removed. Nico asserts that its records do not show that it found spikes where it installed paving, and that Con Ed inspected the paving on July 9, 2005 (a date after the accident complained of here) and approved the work.

Nico makes a similar argument regarding paving work it did in the area of 52<sup>nd</sup> Street and Fifth Avenue after Empire filled its trench just off the Southeastern corner of the intersection on August 29, 2003. Also, Nico restored an area after Empire performed work just off the eastern curb line of the intersection on April 2, 2004. Again, if Nico found plates and or spikes, it would have waited for the entity which placed them there to take them away.

Nico points to the deposition of its own Mr. Denegall to show that even though it did work to restore the Triumph excavation, the restoration work did not extend into the southern crosswalk. Additionally, the 2003 and 2004 restorations were clearly not in the area described by plaintiff. Thus, Nico concludes it did not restore the crosswalk containing the spike where plaintiff fell. Further, Nico did not place roadway plates or spikes in the crosswalk described by plaintiff, and was not the entity charged with removing them.

Mr. Dietrich, a construction representative for Con Ed, clarifies that the Triumph excavation was plated in the roadway. It was plated after it was backfilled because "the concrete is wet and you cannot leave an open trench with wet concrete." Standard plates are four feet by eight feet. Mr. Dietrich was unable to state how the

plates were oriented over the excavation, whether the plates extended into the crosswalk, or when the plates and or pins were removed. He did state, however, that Triumph was responsible for removing the plates and the pins when it was time for them to come up.

Mr. Rolff testified that he works for Empire. Empire, a wholly owned subsidiary of Verizon, owns and maintains a system of underground conduits and manholes in the boroughs of Manhattan and the Bronx. He explained that Empire did excavation work from manhole to manhole, running North to South, beginning in the Southern crosswalk and running 30 feet south, in August 2003. This trench was two feet deep, and the work was done in one day. Records do not say if it was plated, but Mr. Rolff stated that "there had to be some type of protection because it was paved a number of days later." He went on to say that if it was plated, the plates would have been put down by Empire. This trench was paved over and restored on August 29, 2003 by Nico.

Rolff also identified an Empire trench that proceeded through the intersection of 52<sup>nd</sup> Street and Fifth Avenue and continued North 276 feet in March 2004. This was restored on April 2, 2004. It did not invade the crosswalk where plaintiff allegedly fell.

Finally, Mr. Denegall testifies that there were no plates covering the opening when it arrived to do the April 2005 restoration of the Triumph street opening. This is ascertainable from the documentation generated in connection with the work. Conversely, the documentation generated in connection with the work done for Empire does not indicate whether Nico found plates at the location when it arrived to do the restoration. However, Denegall explains that it would be Empire's responsibility to remove such plates and spikes prior to Nico doing its work.

Plaintiff, in opposition to Nico's motion, provides only an attorney affirmation. It asserts only that Nico failed to properly inspect the area before paving and restoring the roadway around the roadway cut.

Triumph opposes Nico's motion and provides pleadings, documents relating to Nico's work for Empire in the area in 2003 and 2004. Triumph argues that just because the openings themselves did not extend into the crosswalk, the plates and pins which overextended such openings may have. It concludes that Nico had to have seen the pins upon inspecting the area, and neglected to contact the responsible utility or

contractor to remove them.

Empire, in opposition to Nico's motion and in support of its own motion for indemnification, provides the applicable pleadings as well as the contract governing its relationship with Nico and the affidavit of Leonard Ferguson, Legal Liaison, Operations Support for Empire.

Empire takes issue with Nico's assertion that it was not required to remove plates and pins. Indeed, it points to its own contract with Nico, and asserts that Nico is the responsible party to remove plates and pins.

The contractor is responsible for the removal of traffic decking plates, in a safe manner. The traffic decking plates will NOT be overlapped upon each other, will be level with the roadway and be neatly aligned with the trench. The contractor is responsible for all fines and fees issued by the City of New York in regards to the unsafe placement of traffic decking plates. *(The contractor will immediately notify E.C.S. construction forces whenever traffic decking plates are moved.)*

Empire also points to an indemnification clause, paragraph 22 of the contract, and seeks summary judgment on the issue as against Nico. Nico does not oppose Empire's cross motion.

The language regarding removal of traffic plates is vague about when Nico is responsible to remove traffic decking plates. The testimony indicated earlier raises an issue of fact since Denegall recalled Nico was responsible to notify the utility or contractor who placed the plates if it found them at the work site. The question then is whether the contract language applies only to those times when Nico places its own plates and pins, or if it applies also when other contractors place them. The clause itself speaks to how the plates should be placed, which lends support to the conclusion that it applies where Nico places its own plates and pins. Nevertheless, it is inconclusive from the documentation provided whether the Empire openings were plated at all, and if so, by whom.

There is no proof, however, that Nico was responsible for plates and pins which documentation shows were placed by Triumph over the 2004 opening, and for which the governing contract places no burden on Nico. Clearly, if this was the origin of the offending pin, Nico would not be liable.

Regarding Empire's motion for summary judgment on the issue of indemnification, if issues of fact exist as to the negligence of the party responsible for indemnification, summary judgment must be denied. (*Zeigler-Bonds v. Structure Tone, Inc.*, 245 A.D.2d 80 [1<sup>st</sup> Dept. 1997]).

Wherefore, it is hereby

ORDERED that Nico's motion for summary judgment dismissing all claims and cross claims as against it is denied; and it is further

ORDERED that Empire's cross motion for summary judgment on the issue of indemnification is denied; and it is further

ORDERED that, pursuant to this Court's previous decision and order dated March 17, 2008, the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

All other relief requested is denied.

Dated: March 25, 2008

  
Eileen A. Rakower, J.S.C.

**FILED**  
MAR 27 2008  
NEW YORK  
COUNTY CLERK'S OFFICE