

**Perez v Consolidated Edison of N.Y., Inc.**

2008 NY Slip Op 32164(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 0115371/2005

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
SERGIO PEREZ

Plaintiff,

Index No. 115371/05  
Mtn Seq. 003

-against-

CONSOLIDATED EDISON OF NEW YORK, INC.,

Defendants.

-----x  
CONSOLIDATED EDISON OF NEW YORK, INC.,

Third-Party Plaintiff

-against-

FRANK TRICARICO CONTRACTORS, INC. and  
THE CITY OF NEW ROCHELLE,

Third-Party Defendants  
-----x

**FILED**  
AUG 04 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**WALTER B. TOLUB, J.:**

This is a motion by Defendant/Third-Party Plaintiff for summary judgment dismissing the complaint pursuant to CPLR §3212. Plaintiff's cross motion seeks summary judgment as to liability and a hearing on damages.

Facts

Plaintiff, an employee of Frank Tricarico Contractors ("Tricarico"), brought the instant personal injury action claiming that, while working on the North Avenue project on October 4, 2005, his left hand was crushed and a portion of two fingers amputated, when an improperly hoisted metal plate fell on his hand.

The City of New Rochelle entered into a construction contract with Frank Tricarico Contractors to widen a major roadway in the City of New Rochelle known as North Avenue. The North Avenue project included the construction of sidewalks, curbs, street lighting, trees and the moving of overhead utilities to underground locations. The physical work on the project was performed by Tricarico or its subcontractors.

Pursuant to the contract, Tricarico was responsible to excavate and install utility conduits and manholes for the length of North Avenue. Once Tricarico had completed installing an underground conduit, Con Edison would then come into the existing manhole and pull cable through the conduit. All of the excavation work, including the digging of trenches and the placement of plates on the roadways to cover the excavations was performed by Tricarico. It was during the removal of one such roadway plate that the Plaintiff sustained his injury.

Plaintiff commenced this action against Con Edison arguing that Con Edison is liable to Plaintiff as an owner contractor or agent pursuant to the "safe place to work" provision in Labor Law §240(1).

Defendant argues that the fact of this case preclude it from being held an owner, contractor or agent under the Labor Law and that therefore summary judgment should be granted.

### Discussion

Labor Law §240(1), also known as the Scaffold Law, provides in relevant part that:

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . .

Courts liberally construe the Scaffold Law to effect its purpose of protecting workers (Morales v. Spring Scaffolding, Inc., 24 AD3d 42 [1<sup>st</sup> Dept 2005]). The Scaffold Law protects workers by placing the ultimate responsibility for safety practices at building construction jobs on the owner and general contractor, instead of the worker (Wise v. McDonald Avenue, LLC, 297 AD2d 515 [1<sup>st</sup> Dept 2002]).

The depositions taken in this matter indicate that it was Tricarico's contractual responsibility to excavate and install utility conduits and manholes on North Avenue. Once Tricarico completed installing the underground conduits, Con Edison was to enter the existing manholes and pull the electrical cables through the conduit between the manholes. All excavation work, including the placement of steel roadway plates to cover the excavations, was performed by Tricarico.

Con Edison did have people monitoring the North Avenue project and Tricarico's work. The purpose of the monitors was to protect Con Edison's facilities when municipalities worked in the area. These facilities included, gas lines, transmission lines and electrical lines. Plaintiff argues that such inspectors could direct the work performed at the work site and could exercise control over the contractors by directing them to stop work. Therefore, Plaintiff argues, Con Edison may be held liable under Labor Law §240(1).

Val Iannino, the Chief Construction inspector for the Department of Public Improvement testified that her duties were to oversee roadway projects in Westchester County. When a contractor or subcontractor performs work, Ms. Iannino makes sure that no damage done to Con Edison's facilities. Ms. Iannino testified that neither she nor the other Con Edison inspectors dictate what the contractors do, but that the inspectors provide the contractors "advice" so that they keep a safe distance from the facilities. Specifically, Ms. Iannino testified that:

A: If they are in the area of the facility, we would dictate that we have a gas line two feet away from where you were working, you have to be diligent in the way you excavate. We don't dictate to them how to work.

Q: And what if they are not diligent in the excavation, what would happen generally?

A: If they refuse to be diligent and we indicate there is a gas line, high pressure gas line, we let them know, if you hit the

line, it could be catastrophic. I don't know how far we would take it.

Q: Did you ever stop work at a site due to unsafe practices?

A: Again, I cant stop them from doing their work. I have no authority.

(Plaintiff's Ex. C, Iannino deposition, p, 8 lns. 1-17).

To impose liability under safe workplace laws, defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (Delahaye v. Saint Anns School, 40 AD3d 679 [2d Dept 2007]). It is not defendant's title that is determinative, but the amount of control or supervision exercised (Id.).

Although Tricarico may take the inspector's advice in to protect the project and themselves and stop work so that a Con Edison crew could come in to close off a gas line, this does not constitute sufficient direction or control pursuant to Labor Law §240(1) (See generally Turner v. Sano-Rubin Construction, 6 AD3d 910 [3<sup>rd</sup> Dept 2004]; Morales v. Federated Dept Stores, 5 AD3d 744 [2<sup>nd</sup> Dept 2004]). While Con Edison maintained a presence at the job site to ensure that their facilities were not damaged, they did not direct or control the North Avenue project.

Accordingly, it is


ORDERED that Defendant's motion to dismiss the complaint is granted; and it is further

ORDERED the Plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/31/08

  
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HON. WALTER B. TOLUB, J.S.C.

**FILED**  
AUG 04 2008  
COUNTY CLERK'S OFFICE  
NEW YORK