

**Cox v City of New York**

2008 NY Slip Op 32795(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 110320/2004

Judge: Karen Smith

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

PRESENT: KAREN S. SMITH  
*Justice*

PART 62

LOIS ANN COX

INDEX NO. 110320/2004

- v -

MOTION DATE 09/18/2008

THE CITY OF NEW YORK, CONSOLIDATE EDISON, INC., EMPIRE CITY SUBWAY COMPANY, LTD., TIME WARNER CABLE, INC., NICO ASPHALT PAVING, INC., HYLAN DATACOM AND ELECTRICAL, INC., AND TRINITY COMMUNICATIONS CORP.

MOTION SEQ. NO. 009

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

The following papers, numbered 1 to 4 were read on this motion for summary judgment dismissing the complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

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

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

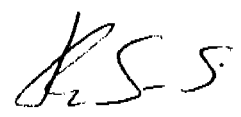
PAPERS NUMBERED
<u>1</u>
<u>2 - 3</u>
<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ORDERED that this motion is decided in accordance with the annexed memorandum decision and order.

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10-6-08



Hon. Karen S. Smith, 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 62

-----X  
LOIS ANN COX,

Plaintiff,

Index No.: 110320/2004

Motion Seq.: 009

Motion Date: 09/18/2008

-against-

THE CITY OF NEW YORK, CONSOLIDATED EDISON,  
INC., EMPIRE CITY SUBWAY COMPANY LTD., TIME  
WARNER CABLE, INC., NICO ASPHALT PAVING , INC.,  
HYLAN DATACOM AND ELECTRICAL, INC., AND  
TRINITY COMMUNICATIONS CORP.

Defendants.

**DECISION AND ORDER**

-----X  
EMPIRE CITY SUBWAY COMPANY, LTD.,

Third-Party Plaintiff,

Third-Party

Index No.: 590321/2005

Motion Date: 09/18/2008

-against-

NICO ASPHALT PAVING , INC.,

Third-Party Defendant.

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

Fourth Third-Party Plaintiff

Third-Party

Index No.: 590036/2008

Motion Date: 09/18/2008

-against-

NICO ASPHALT PAVING , INC.,

Fourth Third-Party Defendant.

-----X  
PRESENT: KAREN S. SMITH, J.S.C.:

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Nico Asphalt Paving, Inc. ("Nico")'s motion for summary judgment dismissing the complaint and all cross-claims asserted against it in the primary action captioned above, as well as the third-party complaints in the two third-Party actions captioned above is granted to the limited extent that the third-party complaint of Empire City Subway Company, Ltd. ("ECS") is

dismissed and, in all other respects, Nico's motion is denied.

This is a personal injury action in which the Plaintiff seeks to recover for injuries she allegedly sustained on April 29, 2003 when she tripped and fell in a hole in the street pavement located in the cross-walk of 9<sup>th</sup> Avenue on the south side of West 42<sup>nd</sup> Street near the east curb-line. Plaintiff has provided at least two descriptions of the location of her accident. They are; 1) between 6 and 9 feet west of the east curb and 2) 3/4 of the way across 9<sup>th</sup> Avenue (traveling west to east). The documents and records submitted with the motion papers indicate that 9<sup>th</sup> Avenue is approximately 69 feet wide. Therefore, the location of Plaintiff's accident could have been almost 20 feet from the eastern curb line of 9<sup>th</sup> Avenue. Although Plaintiff marked an "x" on at least two pictures to illustrate the location of her accident, the pictures have no scale and offer no means for the court to reach any conclusion about the distance of Plaintiff's accident from the curb line. When asked how deep the hole was, Plaintiff indicated a distance which the lawyers at the deposition characterized as between 8 and 12 inches (See page 27 of Plaintiff's deposition).

Nico now moves for summary judgment dismissing the complaint and all cross-claims as asserted against it in the primary action captioned above as well as both of the third-party complaints in the third-party actions against Nico which are captioned above. Nico contends that it performed no paving work at the location of Plaintiff's accident. Further, Nico contends that, even if it had performed such work, its paving work only extends approximately 4" from the surface of the roadway into the earth. Since the Plaintiff testified that the hole she tripped in was much deeper than that, Nico argues that it did not have responsibility for any defect which may have caused Plaintiff's accident. In support of its motion, Nico has submitted, *inter alia*, transcripts of the depositions of the Plaintiff and the representatives of Consolidated Edison

Company of New York, Inc. ("Con Ed"), ECS and Nico as well as copies of records of street openings in the area of Plaintiff's accident and the photographs marked by the Plaintiff at her deposition.

Plaintiff opposes Nico's motion. Plaintiff points to street opening and repair records, including records of excavations, for work undertaken by or on behalf of Con Ed and ECS near the location of Plaintiff's accident. Nico was engaged by both Con Ed and ECS to pave and restore the street surface of certain street openings in that vicinity around the time of Plaintiff's accident. Safeway Construction Enterprises, Inc. ("Safeway") also opposes Nico's motion. Safeway is the second third-party defendant in a second third-party action (Index No. 590925/2006) commenced by Con Ed in connection with the primary action captioned above. Safeway had been engaged by Con Ed in connection with certain street openings and excavations of Con Ed near the location of Plaintiff's accident. Safeway contends that, if the court determines there is a question of fact concerning Safeway's potential liability for Plaintiff's injuries and as Nico has acknowledged that it was the paving contractor who restored the streets after Safeway completed its work on behalf of Con Ed, there must also be a question of fact concerning Nico's potential liability.

It is well settled that the party seeking a summary judgment must make a *prima facie* showing that no material issues of fact exist requiring trial and that the movant is entitled to judgment as a matter of law.

In the instant matter, Nico has not met its burden of making a *prima facie* showing that it is entitled to judgment dismissing the claims based upon Nico's work for Con Ed. In his deposition, the representative for Con Ed testified concerning several street opening records

which related to openings for Con Ed in or around the southern crosswalk on 9<sup>th</sup> Avenue at 42<sup>nd</sup> Street. The records included street opening permits, street opening tickets and paving orders. Con Ed's representative testified that several of the records referred to street excavation work conducted at or around the time of Plaintiff's accident within the cross-walk involved in Plaintiff's accident. Con Ed's representative further testified that Nico had been engaged to restore the pavement for at least some of the work which had been undertaken. Upon reviewing the testimony of Con Ed's representative, the street opening records, the photographs of the location of Plaintiff's accident and the Plaintiff's descriptions of the location of her accident, at least one of Con Ed's excavations appears to have been very close to or at the location of Plaintiff's accident. Moreover, in the absence of expert testimony, the Court is not in a position to determine that the mere fact that the hole Plaintiff alleges she tripped in was deeper than the thickness of the pavement laid by Nico conclusively establishes that Nico bears no responsibility for the existence of the defect involved in Plaintiff's accident. Therefore questions of fact exist which preclude the grant of summary judgment to Nico dismissing the complaint and all cross-claims in the primary action captioned above as well as Con Ed's third-party complaint against Nico.

Turning to the branch of Nico's motion which seeks dismissal of ECS's third-party complaint against Nico, Nico has made a *prima facie* showing that it did not perform any work for ECS at or near the location of Plaintiff's accident. In response, none of the parties opposing Nico's motion have submitted any evidence in admissible form to raise the existence of any questions of fact requiring a trial in ECS's third-party action against Nico. Therefore, the branch of Nico's motion which seeks the dismissal of ECS's third-party complaint against Nico is

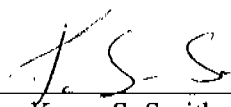
granted. Accordingly, it is;

ORDERED that, upon the service of a copy of this order, together with notice of entry hereof and such other forms and fees as the Clerk may reasonably require, on the appropriate division of the Clerk's office, the Clerk shall forthwith enter judgment, in favor of Nico, dismissing the third-party complaint in the third-party action bearing the Index No. 590321/2005 but the remainder of these cases shall continue.

The foregoing constitutes the decision and order of this court.

Dated: October 6, 2008

ENTER:

  
\_\_\_\_\_  
Hon. Karen S. Smith, J.S.C.

**FILED**  
OCT 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK