

**Stevens v City of New York**

2009 NY Slip Op 30544(U)

March 11, 2009

Supreme Court, New York County

Docket Number: 102796/05

Judge: Matthew F. Cooper

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**MATTHEW F. COOPER**

PRESENT: \_\_\_\_\_

PART 52

Index Number : 102796/2005

**STEVENS, ROSALIND**

VS.

**CITY OF NY**

SEQUENCE NUMBER : 002

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 \_\_\_\_\_

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):

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

**FILED**

MAR 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/10/09

*MSC*  
**MATTHEW F. COOPER**  
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: CIVIL TERM: PART 52

-----X  
ROSALIND STEVENS,

Plaintiff,

-against-

THE CITY OF NEW YORK and CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC.,

Defendants.  
-----X

**For the Plaintiffs:**  
Rappaport, Glass, Greene & Levine, LLP  
By James L. Forde  
500 Fifth Avenue, Suite 1150  
New York, NY 10110

**For Defendant Con Ed**  
Richard W. Babinecz  
By Charmaine L. Marlowe  
4 Irving Place  
New York, NY 10003-3598

Index No. 102796/05  
Mot. Seq. No. 002

**DECISION AND ORDER**

**FILED**  
MAR 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Papers and exhibits considered in review of the motions and cross-motions:

- |                                       |   |
|---------------------------------------|---|
| Con Ed's Notice of Motion             | 1 |
| Plaintiff's Affirmation in Opposition | 2 |
| Con Ed Reply Affirmation              | 3 |

**Matthew F. Cooper, J.**

Plaintiff commenced this action against the City of New York ("the City") and Consolidated Edison Company of New York ("Con Ed") for injuries allegedly sustained while she was crossing Lexington Avenue near its intersection with 126<sup>th</sup> Street at the southeast corner of the roadway in front of 2085 Lexington Avenue on May 4, 2004. Between 6:15 and 6:45 P.M. on this date, plaintiff was walking north along Lexington Avenue toward 126<sup>th</sup> Street when she stepped off the curb into the roadway approximately five feet south of the southernmost line of the south crosswalk on Lexington Avenue. Plaintiff then took approximately three steps in a diagonal direction toward the south crosswalk and was caused to fall by an eight to twelve inch diameter pothole in the road located three to four feet from the east curb of Lexington Avenue. As a result of the fall, plaintiff suffered multiple fractures in her right ankle. Plaintiff alleges that the pothole was caused and

created by the several and concurrent negligence of defendants Con Ed and the City. Specifically, Plaintiff alleges that Con Ed caused the pothole through its negligent backfilling of a trench and that the City had notice of and failed to repair the defect.

Defendant Con Ed now moves for summary judgment dismissing the complaint and all cross-claims based on the theories that no evidence exists to connect its work to the site of the accident and that plaintiff has failed to demonstrate that Con Ed caused or somehow worsened the roadway condition through its negligence. Supporting its contentions, Con Ed has produced numerous permits to perform work in the area around the intersection of 126<sup>th</sup> Street and Lexington Avenue, reports of street openings and work conducted at this location, pictures and measurements of the accident location, and deposition testimony of three Con Ed employees.

Although Con Ed has produced multiple street opening permits and reports of street openings, only Opening Ticket PI86524 ("PI86524") is cited by plaintiff as evidence that Con Ed conducted roadway construction at the location of plaintiff's accident. PI86524 is a report filled out by Con Ed reflecting work it performed on April 27, 2003, at the intersection of Lexington Avenue and 126<sup>th</sup> Street. The ticket indicates that a sawcut of twenty-one feet was made in a south-southwest direction, starting at the Con Ed manhole located in the northeast corner of the intersection, and that the work was completed and the opening backfilled on the same day the work commenced.

Con Ed also produced the deposition testimony of two employees interpreting PI86524. Con Ed's Senior Coordinator, Mario Smith, stated in an examination before trial ("EBT") that PI86524 depicts work conducted by Danella Contracting on behalf of Con Ed at 126<sup>th</sup> Street near the intersection of Lexington Avenue. The testimony of Joseph Russo, Con Ed's Construction Representative, goes into significantly more detail about this opening ticket and all other submitted

permits. Mr. Russo stated that he did not find a permit or opening ticket reflecting work conducted at the location where plaintiff fell. He indicated that although a few of the documents reflect work performed at the intersection of Lexington Avenue and 126<sup>th</sup> Street, these documents do not represent work which would have extended to plaintiff's accident location. Regarding PI86524, Mr. Russo stated that this document reflects an opening made on the east side of the intersection but he was unable to conclude whether the cut depicted extended to the location of plaintiff's accident, five feet south of the south line of the south crosswalk. Although Mr. Russo could not conclusively establish this fact, he did say that it appears that the cut would not extend five feet south of the south crosswalk because an intersection is generally over thirty feet wide and the cut only extended nineteen feet south of the manhole.

In opposing this motion, plaintiff argues that there is an issue of fact as to whether the cut extended past the south crosswalk and into the area in which plaintiff fell. Plaintiff, however, presents no new evidence and merely attempts to characterize the EBT testimony of Mr. Russo as inconclusive and presenting a triable issue of fact.

In reply to plaintiff's opposition papers, Con Ed submits the affidavit of John Parrales, an investigator for Con Ed's law department, and pictures of measurements he took at the intersection in question on February 12, 2009. Mr. Parrales determined, based on his on-site measurements, that the distance from the manhole depicted in PI86525 to the northern line of the south crosswalk is twenty-five feet and the width of the south crosswalk is thirteen feet; making the total distance from the manhole to the southern most edge of the south crosswalk thirty-eight feet and forty-three feet to the site of the accident. The measurements provided by Mr. Parrales, in concert with the testimony of Mr. Russo and the length of the cut depicted in PI86524, serve to refute the allegation

that this sawcut extended five feet past the south line of the south crosswalk. The cut depicted extended only nineteen feet south of the manhole, and the distance from the manhole to the accident location is more than double this distance.

In a negligence action stemming from a defective roadway condition, such as in this case, a contractor's liability hinges on whether it caused or created the defective condition which resulted in plaintiff's injury. *Melcher v. City of New York*, 38 AD3d 376, 377 (1st Dept 2007). Where a defendant moves for summary judgment in such a negligence case, the initial burden is on the moving party to establish that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965, 967 (1985); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). As shown above, defendant Con Ed met this burden by establishing that its work did not extend to the location where plaintiff's accident occurred.

Once the movant meets its initial burden, as Con Ed has done here, the burden shifts to the plaintiff to present evidence sufficient to raise a material, triable issue of fact from which the negligence of the defendant and the causation of the accident from that negligence can be reasonably inferred. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *Robinson v. City of New York*, 18 AD3d 255, 256 (1st Dept 2005). Plaintiff has failed to meet its burden as there is no evidence in the record indicating that Con Ed ever performed work at the location where plaintiff fell. Even if Mr. Russo's statements about how far Con Ed's sawcut pursuant to PI86524 extended are inconclusive, the affidavit and measurements provided by Mr. Parrales are sufficient to allow this court to conclude that the twenty-one foot sawcut could not have reached the location of plaintiff's accident, approximately forty-three feet away. Absent some evidence connecting Con Ed's work

to the location of the accident, Con Ed is entitled to summary judgment dismissing the complaint and cross-claims. *See Robinson*, 18 AD3d at 256.

In light of the foregoing, it is therefore

ORDERED that defendant Consolidated Edison Company's motion for summary judgment is granted; it is further

ORDERED that Consolidated Edison Company shall serve a copy of this order upon all parties, the Clerk of the Court (60 Centre Street, Basement), the Trial Support Office (60 Centre Street, Rm. 158) and the DCM Office (80 Centre Street, Rm. 102) with notice of its entry within 20 days of its entry; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon all parties, the Clerk of Court is directed to enter judgment dismissing the complaint in its entirety against defendant the Consolidated Edison Company.

This constitutes the Decision and Order of the Court.

Dated: March 11, 2009

ENTER:



Matthew F. Cooper, J.S.C.

**FILED**  
MAR 13 2009  
COUNTY CLERK'S OFFICE  
NEW YORK