

**Abreu v City of New York**

2009 NY Slip Op 31718(U)

July 28, 2009

Supreme Court, New York County

Docket Number: 109842/2005

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla, J.S.C.

PART 52

Index Number : 109842/2005

**ABREU, HUASCAR**

vs.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 004

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 is decided in accordance with the accompanying decision/order.

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

**FILED**

AUG 03 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/28/09

Saliann Scarpulla  
SALIANN SCARPU, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----- X  
HUASCAR ABREU,

Plaintiff,

- against-

Index No.: 109842/2005

Submission Date: 6/10/09

THE CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC.,  
EMPIRE CITY SUBWAY COMPANY, LTD.,  
AND PETROCELLI ELECTRIC CO., INC.,

**DECISION AND ORDER**

Defendants.

----- X  
For Plaintiff:  
Oliveri & Schwartz, P.C.  
1825 Park Avenue, 9<sup>th</sup> Floor  
New York, NY 10035

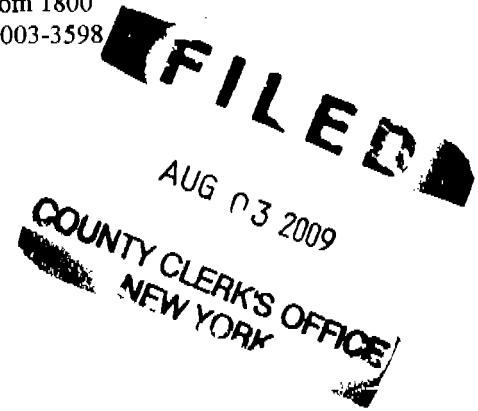
For Defendant Empire City Subway Company, Ltd.:  
Conway, Farrell, Curtin & Kelly, P.C.  
48 Wall Street  
New York, NY 10005

For Defendant Petrocelli Electric Co., Inc.:  
The Law Offices of Edward Garfinkel  
12 Metrotech Center  
Brooklyn, NY 11201-3837

For Defendant Consolidated Edison Company of New York,  
Inc.:  
Richard W. Babinecz  
4 Irving Place, Room 1800  
New York, NY 10003-3598

Papers considered in review of these motions for summary judgment:

- Notice of Motion . . . . . 1
- Notice of Motion . . . . . 2
- Notice of Motion . . . . . 3
- Aff in Opp . . . . . 4
- Reply . . . . . 5
- Reply . . . . . 6



HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant Empire City Subway Company, Ltd. ("ECS") moves for summary judgment dismissing the complaint and all cross claims asserted against it, defendant Petrocelli Electric Co., Inc.

("Petrocelli") moves for summary judgment dismissing the complaint and all cross claims asserted against it,<sup>1</sup> and defendant Consolidated Edison Company of New York, Inc. ("Con Ed") moves for summary judgment dismissing the complaint and all cross claims asserted against it.

On October 2, 2004, at approximately 7:30 p.m., plaintiff Huascar Abreu ("Abreu") tripped and fell in a water filled pothole in the crosswalk on the easterly side of Broadway at its intersection with West 158<sup>th</sup> Street between the northeast and southeast corners of Broadway and West 158<sup>th</sup> Street. Abreu filed a notice of claim on December 17, 2004 and a summons and complaint on July 18, 2005, seeking to recover damages for the injuries he sustained as a result of his fall.

ECS now moves for summary judgment dismissing the complaint insofar as asserted against it, first arguing that it did not create or cause the alleged defect that caused Abreu's fall. ECS submits its work records and the affidavit and deposition testimony of its specialist Leonard Ferguson ("Ferguson"). Ferguson had a search performed for records relating to any work performed by ECS in or around the subject intersection between October 2, 2002 and October 2, 2004. Ferguson testified that the search yielded no records. Abreu's counsel then proffered a permit M01-2000182-045 issued two years earlier, on July 5, 2000. Ferguson had another search performed, which resulted in the discovery of Job Order 088864RT associated with that July 5, 2000

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<sup>1</sup> Petrocelli's motion is unopposed.

permit. Ferguson averred that the work records for that job order show that the excavation occurred outside of the crosswalk and ran north-south along Broadway at least five feet from the eastern curb line of Broadway and the eastern crosswalk of Broadway and 158<sup>th</sup> Street. Ferguson concluded that there were no records of work performed by ECS in the subject crosswalk from 10/2/00 through 10/2/04.

ECS next argues that in any event, the excavation associated with the July 5, 2000 permit pre-dated the subject accident by more than four years, and according to DOT regulations, an excavator is only responsible for the roadway surrounding its excavation for three years.

Con Ed also moves for summary judgment dismissing the complaint insofar as asserted against it, arguing that it performed no work in the crosswalk on the easterly side of Broadway at its intersection with West 158<sup>th</sup> Street between the northeast and southeast corners of Broadway and West 158<sup>th</sup> Street within the two year time frame before Abreu's fall, and the alleged defect upon which Abreu tripped and fell was not caused or worsened by any action taken by Con Ed.

Con Ed submits the deposition testimony of its Senior Office Assistant A Genevieve Martinez ("Martinez"). Martinez testified that a search was conducted for West 158<sup>th</sup> Street at the eastern side of the intersection with Broadway for the two year period prior to Abreu's accident. Martinez explained that the search yielded (1) opening ticket PI 042002 showing one opening in the intersection of West 158<sup>th</sup> Street and Broadway, but not located in the crosswalk between the northeast and southeast corners,

and a paving order associated with this opening ticket for Nico Asphalt Paving Inc.; (2) opening ticket PI 036058C showing openings on West 158<sup>th</sup> and Broadway and on the northwestern side, but not located in the crosswalk between the northeast side to the southeast side of 158<sup>th</sup> Street; (3) opening ticket PS 312631C showing an opening in the intersection of Broadway and 158<sup>th</sup> Street in the parking lane, with work performed in the west crosswalk; (4) opening ticket PS 324310 showing work performed on the west crosswalk of 158<sup>th</sup> Street and Broadway; (5) opening ticket PI 108419C showing work performed on the southwest corner of West 158<sup>th</sup> Street and Broadway but it was for machine purposes only, and no work was done in the northeast to southeast crosswalk; (6) opening ticket PS 179610 showing work close to the west side of Broadway and 158<sup>th</sup> Street but not in any crosswalk; (7) opening ticket PI 034871 showing work at Broadway and 158<sup>th</sup> Street but not in the subject crosswalk; and (8) B Ticket or complaint for 529 West 158<sup>th</sup> Street between Amsterdam and Broadway, which is located mid-block and not in any crosswalk, and no excavation was made.

In opposition, Abreu argues that issues of fact exist as to whether Con Ed and/or ECS created the dangerous condition upon which he tripped and fell. With regard to ECS, Abreu first maintains that an issue of fact exists as to whether the work performed pursuant to the July 5, 2000 permit issued to ECS occurred in the subject crosswalk. Abreu additionally contends that the three year rule cited by ECS does not impose a three year limit on a contractor's common law liability for affirmative acts of negligence which result in the creation of a defective roadway.

With regard to Con Ed, Abreu produces a new list of permits located after a Department of Transportation search, to support his position that Con Ed performed work at the site of his accident.

In reply, Con Ed submits the affidavit of its administrative clerk George Canzaniello (“Canzaniello”), who searched for any opening tickets or field data forms prepared in connection with the new list of permits produced by Abreu in opposition to Con Ed’s motion. According to Canzaniello, any work performed in conjunction with those permits did not occur in the northeast to southeast crosswalk of 158<sup>th</sup> Street and Broadway.

### Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Where the proponent fails to meet this burden, the motion should be denied even if the papers in opposition are inadequate. *Pastoriza v. State of New York*, 108 A.D.2d 605 (1<sup>st</sup> Dept. 1985).

Here, ECS and Con Ed have met their respective burdens of establishing entitlement to judgment as a matter of law. On behalf of ECS, Ferguson averred that work performed by ECS during the four year period prior to Abreu’s accident did not occur in the subject crosswalk. On behalf of Con Ed, Martinez averred that work performed by Con Ed during the two year period prior to Abreu’s accident did not occur

in the subject crosswalk and Canzaniello averred that work performed by Con Ed during the four year period prior to Abreu's accident did not occur in the subject crosswalk. Those witnesses clearly testified as to the location of the work performed pursuant to each permit produced for the surrounding area of Abreu's fall, and none of the locations connected to the permits were in the immediate area of Abreu's fall.

To defeat this motion, Abreu has to establish the existence of facts and conditions from which the negligence of the ECS or Con Ed and the causation of the accident by that negligence may be reasonably inferred. Such proof must permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence. *See Flores v. City of New York*, 29 A.D.3d 356 (1<sup>st</sup> Dept. 2006).

Here, Abreu does not submit any expert testimony or affidavit to raise an issue of fact as to whether any work performed by ECS or Con Ed occurred in the subject crosswalk or caused the defect upon which Abreu tripped and fell. Because Abreu has submitted no evidence connecting ECS or Con Ed's work to the situs of Abreu's injury and has merely made speculative assertions about whether the repair and excavation work performed by ECS and Con Ed created or worsened the defect upon which he fell, ECS and Con Ed are both entitled to summary judgment. *See Robinson v. City of New York*, 18A.D.3d 255 (1<sup>st</sup> Dept. 2005); *Cibener v. City of New York*, 268 A.D.2d 334 (2000).

In accordance with the foregoing, it is

ORDERED that defendant Petrocelli Electric Co., Inc.'s motion for summary judgment dismissing the complaint and all cross claims asserted against it is granted without opposition; and it is further

ORDERED that defendant Empire City Subway Company, Ltd.'s motion for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

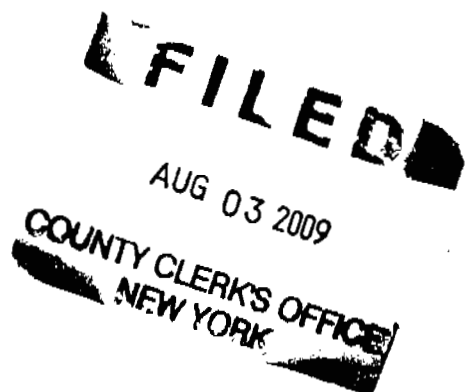
ORDERED that defendant Consolidated Edison Company of New York, Inc.'s motion for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that the action is severed and shall continue with respect to the remaining defendant The City of New York.

This constitutes the decision and order of the Court.

Dated: New York, New York  
July 28, 2009

ENTER:



*Barbara Cargill*  
J.S.C.