

**Pollack v Consolidated Edison Co. of N.Y., Inc.**

2009 NY Slip Op 32039(U)

September 2, 2009

Supreme Court, New York County

Docket Number: 107113/07

Judge: Doris Ling-Cohan

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

PRESENT **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Index Number : 107113/2007

POLLACK, MARTHA

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

vs

CONSOLIDATED EDISON

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

Sequence Number : ~~000~~ 001, 002

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

SUMMARY JUDGMENT

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

is motion to/for \_\_\_\_\_

001

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

PAPERS NUMBERED	
Motion 1, 2	002: 1, 2
3	3
4	4

Answering Affidavits — Exhibits 13

Repeating Affidavits \_\_\_\_\_

002

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion s for summary judgment as denied in accordance with remainder decision

**FILED**

SEP 09 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 9/2/09

**JUSTICE DORIS LING-COHAN**  
J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

**FILED**  
SEP 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK  
Index No. 109113/07

-----X  
MARTHA POLLACK,

Plaintiff,

- against -

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC. and ROADWAY CONTRACTING, INC.,

Motion seq. no.: 001 & 002

Defendants.  
-----X

LING-COHAN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition. Defendant Roadway Contracting, Inc. (Roadway) moves for summary judgment dismissing the complaint and all cross claims (motion sequence number 001). Defendant Consolidated Edison Company of New York, Inc. (Con Ed) also moves for summary judgment (motion sequence number 002).

Plaintiff alleges that a defect on a roadway caused her to fall and be injured. Each defendant moves to dismiss the complaint on the basis that it did not do any work on the side of the street where plaintiff was injured, and, thus, could not have created the alleged defect.

The roadway at issue is Third Avenue between 17<sup>th</sup> and 18<sup>th</sup> Streets in New York, NY. On June 2, 2004, plaintiff was walking on the east side of Third Avenue towards 17<sup>th</sup> Street in order to take a bus. At her October 2008 deposition, plaintiff testified that the bus could not pull up to the curb because a truck was parked at the bus stop (Con Ed motion, Transcript, Ex. K, at 17). To get to the bus, plaintiff had to step off the sidewalk and into the street in front of the truck (*id.* at 20). At that time, the bus was in the middle of the street (*id.* at 21). Plaintiff stated

that the distance from the curb to the bus door was ten steps (*id.* at 20-21). The roadway was full of ruts, grooves, and patches (*id.* at 23). Plaintiff testified that she “stepped off the curb and it was a rut there, very uneven, and [her] foot must have gotten caught in there and [she] flew” (*id.* at 26).

The accident took place in front of 193 Third Avenue (*id.* at 9). It is not clear from the submissions how far plaintiff was from the curb when she fell. During the October 2008 deposition, plaintiff stated that she stepped one or two feet off the curb to get to the bus and fell (*id.* at 21). In her notice of claim, plaintiff said that she went five feet into the roadway (Con Ed, Ex. J). At her 50 H hearing, plaintiff said that the accident occurred about five feet from the curb (Roadway Reply Affirmation, Transcript, Ex. B, at 12). At a March 21, 2006 deposition, plaintiff stated that the distance between where she stepped off the curb and the roadway where she fell was 3 or 4 steps (*id.*, Transcript, Ex. C, at 26).

At the October 2008 deposition, plaintiff identified photographs taken in her presence the day after the accident as showing the place where she fell (Con Ed, Ex. K, at 24-25, 28-30). The photos show a rut some feet from a curb, identified as the eastern curb (*id.*, Ex. L).

Defendants argue that any work that they did on the roadway of Third Avenue between east 17<sup>th</sup> and 18<sup>th</sup> Streets was on the west side of the avenue, close to the west curb line, and across the street from where plaintiff fell near the east curb. Each defendant produces documents and the deposition transcripts of the witnesses who explained the documents.

Con Ed’s witness searched for evidence of work done on Third Avenue between east 17<sup>th</sup> and 18<sup>th</sup> Streets for the period of June 2, 2002 to June 2, 2004. Exhibit N of Con Ed’s motion contains the results of the search, numbered from Exhibit 1 to 13. The documents consist of

permits to open a hole in or cut the Third Avenue roadway and the reports of such street openings or cuts.<sup>1</sup>

Exhibit 1 is an August 2003 report revealing that a cut was made 27 feet from the west corner of 18<sup>th</sup> Street and 11 feet from the west curb of Third Avenue. Exhibits 1 and 2 reveal that the cut was 27.1 feet long and 2.3 feet wide. Exhibit 3 (June 2002) reveals two cuts in the roadway, each 100 feet from the west corner of Third Avenue and 17<sup>th</sup> Street and 15 feet from the west curb of Third Avenue. Each cut was 8 feet long and 2 feet wide.

Exhibit 4 (August 2001) names Roadway as the contractor and shows three cuts in Third Avenue. The length of the cuts were, respectively, 97 feet, 80 feet, and 55 feet. Each was 1.7 feet wide. The diagram on Exhibit 4 shows cuts between 17<sup>th</sup> and 18<sup>th</sup> Streets. Exhibit 4 references a permit contained in Exhibit 9. The permit allows cuts to be located 1 foot north of the south curb of 18<sup>th</sup> Street and 12 feet east of the west curb of Third Avenue up to a maximum length of 25 feet. The location named on the permit is not congruous with the location shown on the diagram in Exhibit 4.

Exhibit 10 (August 2001) names Roadway as the contractor and is made up of several documents. Exhibit 10 references work at the intersection of 17<sup>th</sup> Street and Third Avenue. The first document of Exhibit 10 indicates an opening 10 feet long and 6.5 feet wide. Although the first document references the permit contained in Exhibit 9, that permit does not refer to the intersection at 17<sup>th</sup> Street.

The second document in Exhibit 10 references the permit contained in Exhibit 12. Exhibit 12 calls for a cut 1 foot north of the north curb of east 17<sup>th</sup> Street and 12 feet east of the

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<sup>1</sup> As some of the documents are repetitive, not all of them are referenced.

west curb of Third Avenue for a maximum length of 230 feet. The third document in Exhibit 10 references a permit contained in Exhibit 13, which permits a cut 1 foot south of the north curb of 17<sup>th</sup> Street and 12 feet east of the west curb of Third Avenue for a maximum length of 10 feet. The fourth document in Exhibit 10 references a permit contained in Exhibit 14, allowing a cut 20 feet north of the north curb of 18<sup>th</sup> Street and 20 feet east of the west curb of Third Avenue for a maximum length of 50 feet.

Exhibits 4 and 10 of Exhibit N of Con Ed's motion refer to a Conduit Plate. Con Ed's Exhibit P contains different versions of the Conduit Plate of the area on Third Avenue between 17<sup>th</sup> and 18<sup>th</sup> Streets, showing gas and electric lines, and other conduits. The Conduit Plate shows work associated with the reports and permits contained in Exhibit N.

After the work was completed, the cuts or holes were filled up again. Con Ed's witness testified that the material used to fill up the cut might overlap the original width of the cut by 6 inches (Con Ed, Transcript, Ex. O, at 71-72).

Defendants contend that the documents show that they could not have caused the rut or groove that allegedly caused plaintiff to fall. They contend that their work was on the west side and that none of the cuts were wide enough to extend to the area on the east side where plaintiff fell. The defect in this argument, however, is that defendants do not state the width of the roadway from the east to the west. Defendants wrongly assume that it is self-evident that none of the cuts could have reached the east side of the roadway. Without evidence about the width of the roadway, the court cannot conclude that none of the cuts in the roadway extended to the area where plaintiff fell.

It is well settled that the proponent of a motion for summary judgment must establish that

\* 6 ]

there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). As defendants have not met their burden of proof, their motions are denied.

Accordingly, it is hereby

ORDERED that motion sequence number 001 for summary judgment by defendant Roadway Contracting, Inc. and motion sequence number 002 for summary judgment by defendant Consolidated Edison Company of New York, Inc. are denied; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: \_\_\_\_\_

9/2/09

**JUSTICE DORIS LING-GOHAN**  
Hon. Doris Ling-Cohan, J.S.C.

**FILED**  
SEP 09 2009  
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