

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

2010 NY Slip Op 30783(U)

April 2, 2010

Supreme Court, New York County

Docket Number: 112406/2007

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK  
J.S.C. Justice

PART 2

Index Number : 112406/2007  
**MARKS, JOAN H.**  
vs.  
**CONSOLIDATED EDISON**  
SEQUENCE NUMBER : 003  
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 IS DECIDED WITH THE  
WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
APR 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/2/10

Luy  
J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST  REFERENCE

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 2**

-----X

JOAN H. MARKS,

Plaintiff,

Index No. 112406/07

-against-

**DECISION/ORDER**

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., VERIZON NEW YORK, INC., VERIZON COMMUNICATIONS, INC., MECC CONTRACTING CORP., and NICO ASPHALT, INC.,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant/Third-party Plaintiff,

-against-

MECC CONTRACTING, INC. and NICO ASPHALT, INC.,

Third-party Defendants.

-----X

**Louis B. York, J.S.C.:**

Plaintiff brought this action for personal injuries allegedly sustained due to a defect in the road she was crossing. Defendant MECC Contracting, Inc. (MECC) now moves for summary judgment in its favor; and Defendants Consolidated Edison Company of New York (ConEd) and NICO Asphalt, Inc. (NICO) now cross-move for summary judgment in their respective favor.

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NEW YORK  
COUNTY CLERK'S OFFICE

Discovery has revealed that on June 15, 2006, Plaintiff sustained injuries after she tripped and fell while crossing East 64<sup>th</sup> Street between 2<sup>nd</sup> and 3<sup>rd</sup> Avenues. Plaintiff claims the Defendants' negligent repair and maintenance of the roadway, namely an opening in the roadway, or a "pothole," caused her injuries. Although Plaintiff did not recall seeing the pothole prior to the accident, she remembered a young man who helped her up and pointed the pothole out to her. Prior to the accident, ConEd was contracted to perform excavation and repair work to the roadway on 64<sup>th</sup> Street. ConEd subcontracted with MECC to complete the backfilling work; and with NICO to complete the final asphalt restoration work. Now moving and cross-moving for summary judgment, Defendants assert that Plaintiff has failed to establish the breach of a duty of care or a causal nexus between Defendants' work on the roadway and Plaintiff's injuries.

For the reasons given below, Defendant MECC's motion for summary judgment and Defendants ConEd and NICO's cross-motions for summary judgment are denied.

A motion for summary judgment must be granted if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of" the moving party. C.P.L.R. 3212(b). Furthermore, a motion for summary judgment must be denied "if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* The Court of Appeals has extensively interpreted these provisions. Summary judgment has been described as a "drastic

remedy” which should not be granted where there is any doubt as to the existence of a material issue of triable fact. Glick & Dolleck, Inc. v. Tri-Pac Export Corp., 22 N.Y.2d 439 (1968). To prevail, the movant must sufficiently establish its cause of action, through “tender of evidentiary proof in admissible form,” to warrant the court to direct judgment as a matter of law. Zuckerman v. New York, 49 N.Y.2d 557 (1980).

Here, Plaintiff’s claim sounds in negligent repair and maintenance of the roadway on East 64<sup>th</sup> Street. To prevail on its motions for summary judgment, Defendants must demonstrate that based on admissible facts, Plaintiff has not met her burden to prove the elements of her case. In this negligence case, the elements are: “(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof.” Akins v. Glens Falls City School Dist., 53 N.Y.2d 325 (1981).

Defendants attack Plaintiff’s case with respect to the third element, asserting she has not submitted any admissible evidence that the work Defendants had done on the roadway caused the accident. Aside from stating that Defendants’ work had not begun until one and a half years prior to Plaintiff’s accident, Defendants give no further support to this contention. However, “[t]he mere fact that a period of time has elapsed between the negligent act and the injury will not prevent the former from being regarded as the proximate cause of the latter.” Hoggard v. Otis Elevator Co., 52 Misc. 2d 704, 707-08 (Sup. Ct. N.Y. County 1966), aff’d 28 A.D.2d 1207 (1st Dept. 1967). Therefore, Plaintiff’s submission of contracts for Defendants to repair and maintain the subject roadway as well as Plaintiff’s expert report

are sufficient to overcome Defendants' temporal causation argument.

Defendants further attack Plaintiff's case with respect to the third element, asserting that she has not submitted any admissible evidence that any Defendant's actions actually caused her injuries. Plaintiff's only evidence as to how she fell, claim Defendants, is her EBT testimony that an unidentified witness who helped her up described to her the accident he had just witnessed. While it may be hearsay, this evidence is not necessarily inadmissible. "The spontaneous declaration exception applies to statements made by bystanders as well as participants [who] need not be identified as long as the statements are sufficiently corroborated by other evidence. Taft v. New York City Transit Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). Contrary to Defendants' assertions, in this case the fact that this evidence comes from an unidentified and therefore unavailable witness goes to the weight of the evidence, and not its admissibility. As a result, the unidentified bystander's statement may be admissible hearsay at trial. Plaintiff has submitted other, corroborating evidence of the condition of the roadway, including a photo and her own testimony.

However, even if the unidentified bystander's statement were deemed inadmissible evidence, Plaintiff has submitted an affidavit clarifying the sequence of events immediately prior to and after the accident. The United States Supreme Court stated that "on summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). This

Court must view the evidence before it in the light most favorable to Plaintiff, as the party opposing the motions. Not inconsistent with her EBT testimony, Plaintiff states in her affidavit that her "forward momentum was interrupted exactly at the point where the pothole existed and that is why [she] crashed to the ground." Pl. Aff. in Opp., Ex. D.

At the very least, there remain material issues of triable fact with regard to the causal link between Defendants' actions and Plaintiff's fall and injuries. Plaintiff has submitted sufficient evidence in admissible form to defeat Defendants' motions and cross-motions for summary judgment. Accordingly, it is

**ORDERED** that Defendant MECC's motion for summary judgment and Defendants ConEd and NICO's cross-motions for summary judgment are denied.

Dated: April 2, 2010

ENTER:

*Lly*

\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK  
J.S.C.**

**FILED**

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