[* 1]

J-28-10

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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 105762/2005

CREDELL, GAIL

VS

CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/5/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
JUN 01 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequences 004, 005 and 006 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion for summary judgment brought by third-party defendant Consolidated Edison Company of New York, Inc. (sequence 004) and the cross motion of third-party defendant Empire City Subway, Ltd. are granted; and it is further

ORDERED that the motion (sequence 005) for summary judgment brought by second third-party defendant Manuel Elken Co., P.C. and defendant Trocom Construction Corp. (sequence 006) are denied; and it is further

ORDERED that the complaint is hereby severed and dismissed as against third-party defendants Consolidated Edison Company of New York, Inc. and Empire City Subway, Ltd., and any and all cross claims are dismissed as against them, and the Clerk is directed to enter judgment in favor of said defendants with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

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

Dated: _____ _____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that all remaining claims and cross claims shall continue; and it is further

ORDERED that counsel for Con Edison shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated 5/27/10 ENTER: HON. CAROL EDMEAD 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: IAS PART 35

----------X

GAIL CREDELL and WILLIAM CREDELL,

Plaintiffs,

Index No.: 105762/2005

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, TROCOM CONSTRUCTION CORP., and JUDLAU CONTRACTING, LTD.,

Defendants.

----------X

THE CITY OF NEW YORK AND THE CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION,

Third-Party Plaintiffs,

Third-party Index No.: 591025/2006

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK INC., and EMPIRE CITY SUBWAY, LTD.,

Third-Party Defendants.

----------X

THE CITY OF NEW YORK AND THE CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION, and JUDLAU CONTRACTING, INC.,

Second Third-Party Plaintiffs,

Second third-party Index No.: 590756/2008

-against-

MANUEL ELKEN CO., P.C.,

Second Third-Party Defendant.

----------X

CAROL M. EDMEAD, J.:

This personal injury action and related actions arise out of plaintiff Gail Credell's (plaintiff) alleged trip and fall as a result of uneven steel metal plates placed in the roadway at the intersection of Wall and Front Streets in Manhattan. Plaintiff's husband, William Credell (Credell) presents a claim for loss of consortium as a result of plaintiff's accident. Motion sequences 004, 005 and 006 are hereby consolidated for disposition.

In motion sequence 004, third-party defendant Consolidated Edison Company of New York, Inc. (Con Ed) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's claim, as well as any cross claims as against it.

Third-party defendant Empire City Subway, Ltd. (Empire) cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all claims and cross claims as against it.

In motion sequence 005, second third-party defendant Manuel Elken Co., P.C. (Elken) moves, pursuant to CPLR 3211 and 3212, for an order granting it summary judgment dismissing the second third-party action as against it, as well as dismissing all cross claims and counterclaims as against it.

In motion sequence 006, defendant Trocom Construction Corp. (Trocom) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's claim, as well as any cross claims as against it.

Defendants, third-party plaintiffs and second third-party plaintiffs the City of New York, the New York City Department of Transportation and Judlau Contracting, Inc. (City and Judlau), together, oppose all motions and cross motions of summary judgment.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that, at approximately 7:00 A.M. on January 28, 2004, she sustained personal injuries when she tripped, slipped and fell on a purported uneven and slippery metal roadway plate located at the intersection of Wall Street and Front Street in lower Manhattan. Plaintiff testified that as she was lawfully crossing the street, she tripped and slipped on the uneven metal plate in the roadway and fell backwards on the ground. As a result of her fall, she allegedly seriously injured her left ankle, has required numerous surgeries, and can no longer perform some of the activities which she once was able to perform. In her bill of particulars, plaintiff alleges that defendants were negligent in their "design, construction, installation, inspection, repair, and maintenance of subject area" and allowed steel plates to "remain in a raised, uneven, separated, slippery and unsafe condition." Trocom's Second Amended Motion, Exhibit E, ¶ 5. Plaintiff continues that the City had notice of this condition, and also should have placed signs or barricades around the hazardous area.

The City contracted with Judlau to perform water installation work in lower Manhattan, which was ongoing during the time of plaintiff's alleged accident. Judlau also performed curb replacement at the northeast corner of Front and Wall Streets. Judlau's representative testified that, in order to install water mains or replace curbs, there may be interference from certain utilities such as Con Ed or Empire, and these facilities would have to be removed or relocated. This work is called "interference" work. The utility company pays Judlau directly for this work. Judlau performed interference work at the accident site on several days in December 2003. During the interference work, an inspector from Con Ed and Empire was present. In its normal practice, Judlau would install plating, barricades and signs that are referred to as "MPT" or

maintenance and protection of vehicular and pedestrian traffic devices. At the end of each day's work, Judlau would place Judlau roadway plates on the excavation site, and the site would be cleaned. The Judlau plates were at the subject intersection as of December 8, 2003. According to the City and Judlau, Judlau did not perform any work at the site for 23 days prior to the accident due to inclement weather.

Con Ed contends that its inspector was there to make sure that Con Ed's facilities were not damaged during the interference work. Judlau asserts that the Con Ed inspector had the ability to alert Judlau to any dangerous condition that Con Ed noticed, and that the inspector had the authority to stop the work if it was being done in an unsafe manner. Specifically, the testimony from Con Ed's representative indicates that, when asked about his responsibility at the work site, he replied, "[t]o make sure that I have contractors that don't damage our facilities and they abide by, you know, when they work for us, that they work safely and they work according to the stipulations." Mahoney Affidavit in Opposition to Con Ed, Exhibit D, at 45-46. He also confirmed that he did not supervise the contractors. He stated that he did have to stop the work once at the accident site because he was worried that there would be damage to the Con Ed structure. Although there appear to be two invoices in the record, no contract between Con Ed and Judlau has been provided.

Empire had facilities in the area which had to be protected while Judlau was performing its interference work, and an inspector from Empire was always present at that time. Empire states that its inspectors would make sure that Judlau was working carefully around Empire's facilities. After Judlau was finished with interference work for the day on behalf of Empire, Judlau would place down metal plates. Empire's area manager for municipal operations testified

that she "would check on the progress of our work and make sure that work was being done in accordance to protect our facilities and maintain our facilities." Cross Motion, Exhibit C, at 11. She continued that the inspector would not supervise Judlau's interference work, but would inspect it to make sure that Empire's cables were not damaged. *Id.* at 18. She also mentioned that there was nothing in the interference process itself that required the use of steel plates, and that it was Judlau's responsibility to place the metal plates in a standard and safe manner.

The contract between Judlau and Empire does not indicate that Empire is responsible to safely maintain the interference site for pedestrians. The contract mentions that Empire shall not "have any obligation to exercise supervision or control of [Judlau] during performance of the Work, but shall be available for consultation and advice." Mahoney Affidavit in Opposition to Empire, Exhibit E, at 5. In the contract, Judlau agrees to discharge Empire from any liability that results from Judlau performing its work for the City, and also to indemnify Empire for any claims that arise out of the performance or non-performance of their agreement.

Elken was the resident engineer for the City on the water main project, which was in progress at the time of plaintiff's accident. Elken described its responsibilities as inspecting the work performed by Judlau for the City. It continued that, with respect to the metal plates, it would inspect Judlau's work and complete daily site patrol reports, among others, in connection with its contractual agreement to inspect Judlau's work. If there was a problem with an MPT device, Elken would notify Judlau. According to Elken, there were no problems with Judlau's placement of the MPTs between December 10, 2003 through January 28, 2004.

The Wall Street water main contract between the City and Elken provides the following, in pertinent part, with regard to Elken's responsibilities:

6.4.5 Undertake the responsibilities with respect to the inspection of the work:
(a) Provide technical inspection, management and administration of the work of the contractor(s) until final acceptance of the Project by the Commissioner, verifying that the materials furnished and work performed are in accordance with the plans and specifications and contract requirements ... ;

***

(c) Safeguard the City against deficits and deficiencies in the work by taking such action as necessary to prevent installation of work, material or equipment which has not been properly approved or otherwise fails to conform with the contract requirements ... .

***

6.4.6 Review and monitor the means and methods of construction proposed by the contractor(s) and advise the Commissioner in the event the Engineer reasonably believes that such proposed means and methods of construction will constitute or create a hazard to the work, or persons or property ... .

***

6.4.7 Undertake the following responsibilities with respect to the safety of the site:
(a) Monitor the activities of the contractor(s) to see that a clean and safe environment is maintained at the site. The Engineer shall perform a daily inspection of the entire project site at the beginning and end of each day ... ;
(b) Monitor conditions at the site for conformance with the contract documents ... so that the contractor(s) provides a safe environment for both workers and the general public;

***

6.4.21 Check the erection of structures necessary to protect the public during the construction operations.

Mahoney Affidavit in Opposition to Elken, Exhibit D.

Elken contends that it had no authority to control the work performed by Judlau. It describes itself as being retained "merely to provide Resident Engineering Inspection services ... ." Pero Affirmation, ¶ 14. It continues that, according to its contract with the City, it does not have a legal duty to plaintiff under the facts and circumstances of this matter.

At the time of the accident, Trocom was contracted with the City to construct Wall Street Park. This construction site was near where plaintiff allegedly had her accident. According to Trocom, the site was completely confined to an area outside the accident location, and was also

inaccessible to the public, as it was protected by concrete barriers, pedestrian fences and barrels. Trocom states that its work did not require the use of metal plates and that, even if it did require the use of metal plates, it was only required to monitor the installation of the plates within its own construction site. Although Judlau was responsible for installing the perimeter curbs that would be the boundary of the new park, Trocom states that it was not responsible for supervising Judlau. According to Trocom, Judlau was performing work prior to Trocom's arrival and Judlau continued to work there after Trocom commenced work. In Trocom's opinion, "it was Judlau's interference work that was adjacent to and overlapped into Trocom's work site." Tompkins Affirmation in Reply to City and Judlau, ¶ 13.

The record provided by Trocom does not reflect that it performed any work near the accident location since December 2003. However, the City and Judlau provide records which indicate that Trocom was working there in January 2004. Mahoney Affidavit in Opposition, Exhibits G, H.

The other parties in the action contend that Trocom caused or contributed to the defective condition or that Trocom inadequately provided barricades around its work. Contrary to Trocom's statements, they argue that Trocom's work area was adjacent to and overlapped a portion of Judlau's roadway plates at the accident location. They state that Trocom performed excavating work in early January 2004, and that as part of this work, Trocom's equipment was driven over Judlau's roadway plates. As such, they assert that perhaps the roadway plates could have shifted. Another theory presented by the other parties is that Trocom did not have proper MPT devices and that Trocom could have closed the crosswalk where plaintiff allegedly had her accident. As concluded by the City and Judlau, "[t]here is ample evidence that Trocom owed

Plaintiff a duty, and that Trocom breached that duty by either causing, creating and/or contributing to the dangerous condition of the roadway plates and/or in failing to adequately place, maintain and/or inspect MPT at or near its work area." City and Judlau's Memo of Law, at 9.

In response to the other parties' submissions, Trocom states that it does not have a duty to monitor other contractors' work sites, namely Judlau's. It also argues that Judlau speculates as to whether Trocom's work, which was performed within an enclosed barrier, could have had an effect on the adjacent metal roadway. Trocom suggests that it is unlikely that its trucks would have to drive over the metal plates, and even if they did, the metal plates would not move. Trocom also contends that it does not have a duty to monitor or place MPT devices outside of its work area. Furthermore, Trocom alleges that it would not legally be able to close off a pedestrian walkway where it was not performing work.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Canter*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In considering a summary judgment

motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Grasso,* 50 AD3d at 544, citing *Marine Midland Bank, N.A. v Dino and Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

Con Ed's Motion and Empire's Cross Motion for Summary Judgment Con Ed moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's claim, as well as any cross claims as against it. Con Ed states that there are no issues of fact which would make Con Ed liable for plaintiff's alleged injuries. Con Ed argues that it did not own or place the metal plates at the accident site. It also contends that its inspector was only present to oversee that the Judlau contractors did not damage Con Ed facilities during the construction projects. Con Ed also contends that it had no responsibility for the "planning, installation and maintenance of the MPT's, including the placement of steel roadway plates throughout the duration of this construction site." Richardson Affirmation, ¶ 3. The City and Judlau argue that Con Ed's inspectors had the responsibility to ensure safety around the construction site. As such, they claim that at least an issue of fact remains whether Con Ed had a duty to plaintiff to inspect the metal plate put in place by Judlau while Judlau was performing interference work.

Empire cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all claims and cross claims as against it. Empire contends that, since it did not perform any work at the accident location, no triable issue of fact remains as to its liability. It also claims that Judlau was responsible for placing the metal plates down in a way that was not hazardous to pedestrians. Empire contends that its inspectors were present only to protect Empire's facilities while Judlau was performing interference work.

The City and Judlau argue that, similar to the argument with Con Ed, Empire's inspectors had an obligation to the general public to ensure safety around the work site area by inspecting the metal plates while interference work was being performed. They assert that Empire's inspectors could have brought a dangerous condition to Judlau's attention had they noticed it. The City and Judlau suggest that questions of fact remains as to whether Empire had the duty to inspect the metal plates for safety to pedestrians, and whether it breached its inspection obligations, thereby breaching a duty to plaintiff.

The City of New York and Judlau allege that Con Ed and Empire may be liable for plaintiff's injuries, since Con Ed and Empire had the duty to safely maintain the accident location. The elements required to prove a cause of action in negligence 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 [internal quotation marks and citation omitted]." *Rodriguez v Budget Rent-A-Car Systems, Inc.*, 44 AD3d 216, 221 (1st Dept 2007).

In general, independent contractors, such as Con Ed and Empire, are not liable in tort or for breach of contract for injuries sustained by a third party. *Espinal v Melville Snow Contractors*, 98 NY2d 136 (2002) (*Espinal*). However, three exceptions occur, which include the following:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [internal citations omitted].

Id. at 140.

The City and Judlau argue that the third exception, as presented in *Espinal (supra)*,

applies to both Con Ed and Empire. As such, Con Ed and Empire would be held liable to the City and Judlau for plaintiff's injuries since they allegedly assumed the duty to safely maintain the accident location, thereby creating a duty to plaintiff.

In support of their contention that both Con Ed and Empire owed a duty to plaintiff, the City and Judlau rely on *Hunter v Perez Interboro Asphalt Co.* (237 AD2d 214 [1st Dept 1997]) (*Hunter*). In *Hunter* (*supra*), the plaintiff was injured when a timber curb that was part of a wooden construction barricade rolled onto her foot while she was on the sidewalk. The engineering inspection contractor had a contract with the city in which its duties including monitoring the work site "so as to provide a safe environment for both workers and the general public." *Id.* at 215. The contract also provided that the engineering company "[c]heck the erection of structures necessary to protect the public during the construction operations." *Id.* Due to the language in the contract, the Court denied the engineering contractor summary judgment, stating that "it is reasonable to conclude that the inspections to be performed by [the contractor] were not only for the purely commercial purpose of ensuring compliance with the requirements of the contract, but also for the broader purpose of ensuring the safety of the public." *Id.* The Court also concluded it was reasonable for pedestrians to expect that the contractor would have a duty to keep the construction site safe, as per the contract.

As Empire correctly argues, the City and Judlau's dependence on *Hunter* is misplaced. In *Hunter*, the contract between the contractor and the City explicitly placed a duty on the contractor to continuously monitor the work site to ensure safety for both the workers and the public. In contrast, the contract provided by Judlau does not indicate that Empire's inspectors had the duty to supervise the interference work being performed by Judlau, at Judlau's work

sites. Although only invoices were provided, testimony indicates that Con Ed similarly did not have a contract imposing a duty on Con Ed with regard to the safety of the public. Con Ed and Empire's inspectors were present only to ensure that their facilities were not damaged during the interference work. It was neither Empire nor Con Ed's responsibility to make sure that the steel plates were placed in a way that was safe to the general public, nor to maintain that safety standard after the interference work was completed for the day, or completed permanently. Referring back to the third exception for contractors as set forth in *Espinal (supra),* although both Con Ed and Empire had inspectors on the site during the interference work, it is evident that Con Ed and Empire did not entirely displace Judlau's or the City's duty to maintain the premises. Any assertions by the City and Judlau that Con Ed and Empire have a duty to the general public are speculative and cannot defeat a motion for summary judgment. *See Grullon v City of New York*, 297 AD2d 261, 263-264 (1st Dept 2002) (holding that "[m]ere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture or speculation [internal quotation marks and citations omitted])." As such, no question of fact remains and Con Ed and Empire are not liable for plaintiff's injuries.

In addition to the exception as set forth above, the Court has also held that "a contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury [internal quotation marks and citations omitted]." *Diaz v Vasques*, 17 AD3d 134, 135 (1st Dept 2005). Although Con Ed's contract was not provided to the court, the testimony indicates that both Empire and Con Ed were

following the conditions of their contracts. These conditions did not include inspecting the metal plates installed by Judlau during and after the interference work was concluded.

Accordingly, Con Ed's motion for summary judgment is granted and Empire's cross motion for summary judgment is granted.

Elken's Motion for Summary Judgment

Elken moves, pursuant to CPLR 3211 and 3212, for an order granting it summary judgment dismissing the second third-party action against it, as well as dismissing all cross claims and counterclaims as against it. Elken argues that, since it had no authority to control the work being performed by Judlau, it cannot be held liable for plaintiff's injuries. Elken continues that it only was authorized to inspect the work, and did not owe a duty to protect the general public.

The City and Judlau argue that Elken's contract expressly provides a duty for Elken to ensure safety around the accident site by inspecting the MPT devices. The City notes that, even in inclement weather, if work was not being performed, Elken would still be responsible for inspecting the MPT devices. Additionally, the City and Judlau contend that, despite any independent obligation owed to plaintiff in tort, the contract provided both indemnity and insurance obligations to the City and Judlau. The court notes that any and all indemnity and insurance claims between Elken and the City and Judlau are not a part of the current summary judgment motion and will not be discussed at this time.

Elken's reliance on *Surlano v City of New York* (240 AD2d 486, 487 [2d Dept 1997]), among other similar cases, is misplaced. In *Surlano (supra),* Elken, a defendant, was granted summary judgment when a construction worker was injured while working. The Court held that

under Labor Law and common-law negligence provisions applicable to injured construction workers, Elken was not liable as the City's agent since it did not supervise and control the work site or create the defective condition. This is different than the present case, which involves a pedestrian rather than an employee working on the site, and presumably, a different contract.

The present case can be properly compared to *Hunter* (237 AD2d 214, *supra)*. Similar to the engineering inspection contractor in *Hunter*, in the present case, Elken was charged with monitoring the work site to ensure safety to the workers and to the public and, under the list of services, Elken was responsible to check the structures designed to protect the public during construction. Therefore, under the third exception for contractors, as set forth in *Espinal* (98 NY2d 136, *supra)*, Elken may be liable to the City and Judlau for plaintiff's injuries. The contract between the City and Elken evidences that Elken was responsible to ensure the safety of the construction site, including the inspection of the metal plates. Elken was directed to daily inspect the construction site at dawn and dusk, and to provide a daily report on the maintenance and inspection of the MPT devices. The contract specifically provides that Elken was to monitor the site so that it was safe for both the contractors and the public. Elken was directly in charge of inspecting the installation of the metal plates and was required to inspect twice daily, even if Judlau was performing interference work, and even if Judlau was not performing work at all. In essence, it appears that Elken was supervising, to ensure that double layer of safety which included the contractors and the public.

Since it is apparent from the contract and testimony that Elken may have assumed the duty to safely maintain the accident location, Elken's motion for summary judgment is denied.

Trocom's Motion for Summary Judgment

Trocom moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff's claim, as well as any cross claims as against it. Trocom argues that it did not place the metal plate on the accident site, nor was it required to maintain the plate. Trocom also contends that it did not perform any work in the alleged accident site and relies on cases similar to *Kenney v City of New York* (30 AD3d 261, 262 [1st Dept 2006])(holding that "[o]ne who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at the site"). As such, Trocom cannot be held liable for creating the purported defective condition, nor did it have either actual or constructive notice of such condition.

In a slip-and-fall case, the plaintiff must present evidence that the landowner defendant either created the defective condition which caused the accident, or that defendant had actual or constructive notice of it. *Mullin v 100 Church LLC,* 12 AD3d 263, 264 (1st Dept 2004). With regard to constructive notice, the Court has held:

> Liability based on constructive notice may only be imposed where a defect is visible and apparent and has existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. Moreover, there is no per se rule with regard to the dimensions of a defect that will give rise to liability, and the issue of whether a dangerous or defective condition exists which is sufficiently hazardous to create liability is generally a question of fact, to be resolved by a jury, on the facts particular to the case [internal quotation marks and citations omitted].

Alexander v New York City Transit, 34 AD3d 312, 313 (1st Dept 2006).

Judlau does not dispute that it did not monitor its metal plates for at least 23 days prior to plaintiff's accident. The City and Judlau maintain that Trocom was performing excavation work

there in early January 2004 and that Trocom's contract with the City required it to place MPT devices around the area where plaintiff allegedly fell. Trocom responds that this section of the contract is a "boilerplate" section included in all City contracts and that it does not have a duty to monitor or place MPT devices outside of its work area. Tompkins Affirmation in Reply to Plaintiff, ¶ 15. Trocom contends that it had not been present at its work site since December 2003, and that plaintiff's alleged accident happened outside of Trocom's barricaded work area. Plaintiff alleges that Trocom should have closed a portion of the roadway or erected barriers around the cross walk where she fell.

On a motion for summary judgment, it is not plaintiff's burden to establish that the defendant had actual or constructive notice of the dangerous condition. It is Trocom's burden, as a matter of law, to establish the lack of notice. As the Court held in *Giuffrida v Metro North Commuter R.R. Co.* (279 AD2d 403, 404 [1st Dept 2001]), "[w]here the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed."

Trocom does not establish that it lacked constructive notice, if, indeed, the metal plates were within Trocom's work site or responsibility. The plaintiff described the plates as being slippery and uneven. Judlau alleges that Trocom worked on or around the area prior to the accident and that Judlau was not present at the work site for 23 days prior to plaintiff's accident, yet Trocom was present around the work site after Judlau's departure. Accordingly, a question of fact remains for a jury to decide whether constructive notice could be found, based on the circumstances of the case, and Trocom's motion for summary judgment is denied.

Furthermore, it is well settled that questions of credibility and fact may not be determined on a motion for summary judgment unless it clearly appears that the issues are not genuine. *Perez v Bronx Park South Associates*, 285 AD2d 402, 403, 404 (1st Dept 2001). Judlau and the City also allege, despite being controverted by Trocom, that Trocom's work site overlapped a portion of Judlau's site. Judlau and the City also state that Trocom's equipment drove over the metal plates. Although Trocom claims that this is highly unlikely, and contends that even if so, the metal plates should not have shifted positions, this amounts to a question of credibility. As such, Trocom's motion for summary judgment should be denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment brought by third-party defendant Consolidated Edison Company of New York, Inc. (sequence 004) and the cross motion of third-party defendant Empire City Subway, Ltd. are granted; and it is further

ORDERED that the motion (sequence 005) for summary judgment brought by second third-party defendant Manuel Elken Co., P.C. and defendant Trocom Construction Corp. (sequence 006) are denied; and it is further

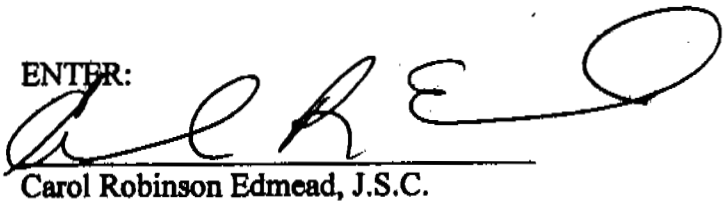
ORDERED that the complaint is hereby severed and dismissed as against third-party defendants Consolidated Edison Company of New York, Inc. and Empire City Subway, Ltd., and any and all cross claims are dismissed as against them, and the Clerk is directed to enter judgment in favor of said defendants with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that all remaining claims and cross claims shall continue; and it is further

ORDERED that counsel for Con Edison shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: May 27, 2010

ENTER:



Carol Robinson Edmead, J.S.C.