

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

2010 NY Slip Op 32588(U)

September 16, 2010

Sup Ct, NY County

Docket Number: 106295/05

Judge: Barbara Jaffe

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

PRESENT. **BARBARA JAFFE** *JAFFE*  
J.S.C.

PART 5

Index Number : 106295/2005

GUTHEIL, ERIK

vs

CONSOLIDATED EDISON

Sequence Number : 010

DISMISS

*CAL #72*

INDEX NO. 106295/05

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

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

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

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
SEP. 21 2010  
NEW YORK  
COUNTY CLERKS OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 9/16/10  
SEP 16 2010

*BJ*  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
ERIK GUTHEIL,

Plaintiff,

-against-

Index No. 106295/05

Motion Subm: 7/30/10  
Motion Seq. No.: 010  
Calendar No.: 72

**DECISION AND ORDER**

CONSOLIDATED EDISON OF NEW YORK COMPANY,  
INC., THE CITY OF NEW YORK, NICO ASPHALT  
PAVING INC., and SEVEN HANOVER ASSOCIATES,  
LLC, and FELIX EQUITIES, INC.,

Defendants.

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**

**For City of New York:**  
Jessica Wisniewski, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church St.  
New York, NY 10007

**FILED**  
**SEP. 21 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

By notice of motion dated July 9, 2010, submitted on default, defendant City moves pursuant to CPLR 3211 and 3212 for an order summarily dismissing the complaint and any cross-claims against it.

On January 14, 2005, plaintiff was allegedly injured during the course of his employment as a City firefighter when, while responding to a fire, he tripped over a metal spike in a roadway. (Affirmation of Jessica Wisniewski, ACC, dated July 9, 2010 [Wisniewski Aff.], Exhs. A, B, D). In his notice of claim and complaint, plaintiff asserted claims for common-law negligence and negligence pursuant to General Municipal Law (GML) § 205-a, based on violations of New York City Charter § 2903(b)(2) and 34 RCNY 2-11(c)(2), (c)(3), (e)(9)(iii), (e)(12)(vi), (e)(12)(vii),

(e)(12)(viii), (e)(15)(i), (e)(15)(ii), and (f)(4)(iv). (*Id.*). On May 17, 2005, plaintiff testified at a 50-h hearing that the accident occurred while he was responding to a fire after he stepped off the fire truck and onto the street. (*Id.*, Exh. D).

City asserts that plaintiff's negligence claims are barred by the "firefighter's rule," which precludes a firefighter from recovering damages for injuries caused by negligence "where the performance of the [ ] firefighter's duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury." (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423 [1995]).

As plaintiff was injured while responding to a fire, his common-law negligence claim against City is barred. (*See eg Foley v City of New York*, 43 AD3d 702 [1<sup>st</sup> Dept 2007] [plaintiff's claim dismissed as she slipped and fell on stairs while performing duties as police officer]; *Grogan v City of New York*, 259 AD2d 240 [1<sup>st</sup> Dept 1999] [dismissing plaintiff's negligence claim as he slipped and fell on sidewalk while pursuing suspect]; *Byrnes v City of New York*, 249 AD2d 352 [2d Dept 1998] [claimed barred as firefighter injured after he lost footing on broken curb while turning on fire hydrant]).

Moreover, a negligence claim pursuant to GML 205-a requires the plaintiff to "identify the statute or ordinance with which the defendant failed to comply, describe the manner in which the firefighter was injured, and set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter." (*Zanghi*, 85 NY2d at 423).

City argues that the regulations on which plaintiff relies are not applicable here and absent written notice of the alleged defect, plaintiff's claim that City violated New York City

Charter § 2903(b) cannot proceed, alleging that its search did not result in any documents showing that City, over the two-year period before and including the date of plaintiff's accident, received notice of a metal spike in the roadway. Rather, the only documentation discovered relates to a street cut, potholes, and a cave-in. (Wisniewski Aff., Exhs. F, G).

Sections (c)(2) and (3) of 34 RCNY 2-11 pertain to permittees and owners of underground facilities and require, *inter alia*, that they remove all debris on the street at the permit's expiration; sections e(9), (12), and (15) likewise apply to permittees. As City has demonstrated, *prima facie*, that it received no permits to perform work at the location for two years prior to and including the date of plaintiff's accident, the Rules cited by plaintiff are inapplicable. (*See eg Golden v Barasch & McGarry, P.C.*, 11 AD3d 314 [1<sup>st</sup> Dept 2004] [plaintiff could not show that predicate statutes and regulations on which he relied to state a claim under GML 205-a were applicable to facts of his accident]).

New York City Charter § 2903(b) provides that the Commissioner of the Department of Transportation "shall have charge and control of" functions relating to the construction, maintenance and repair of, *inter alia*, public roads and streets. While a violation of this provision may serve as a predicate for a GML 205-a claim (*Gonzalez v Iocovello*, 93 NY2d 539 [1999], *see Desmond v City of New York*, 88 NY2d 455 [1996] [GML 205-a and 205-e should be construed and applied in same way]), the plaintiff must prove that City had prior written notice of the alleged violation (*Montalvo v City of New York*, 46 AD3d 772 [2d Dept 2007], *lv denied* 10 NY3d 707 [2008]).

Here, City has established, *prima facie*, that none of the permits or work orders it found for the location for the two years prior to and including the date of plaintiff's accident relate to a

metal spike in the roadway, and that it thus had no prior written notice of the defect. (*See eg LiFrieri v Town of Smithtown*, 72 AD3d 750 [2d Dept 2010] [defendant established entitlement to judgment based on affidavit of clerk wherein he stated that search of town's records did not reflect prior written notice of defect on road where accident happened]; *Gabriele v Edgewater Park Owners Co-op Corp., Inc.*, 67 AD3d 484 [1<sup>st</sup> Dept 2009] [issuance of permits does not constitute written notice]; *Khemraj v City of New York*, 37 AD3d 419 [2d Dept 2007] [defendant met *prima facie* burden as Big Apple map did not reflect defect, and issued permits and repair orders do not constitute written notice]).

Accordingly, it is hereby

ORDERED, that the City of New York's motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant City of New York with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City trial waiting list and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:

  
 Barbara Jaffe, JSC  
**BARBARA JAFFE**  
 J.S.C.

**FILED**  
 SEP 21 2010  
 NEW YORK  
 COUNTY CLERK'S OFFICE

DATED: September 16, 2010  
 New York, New York

SEP 16 2010