

**Winfield v City of New York**

2010 NY Slip Op 33088(U)

October 25, 2010

Supreme Court, New York County

Docket Number: 100968/2007

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

RICHARD WINFIELD and PENNY WINFIELD,

INDEX NO. 100968/07

Plaintiffs,

- v -

MOTION DATE 9/9/10

MOTION SEQ. NO. 005

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and NEW YORK PAVING, INC.,

MOTION CAL. NO. 125

Defendants.

(And a Third-Party Action).

The following papers, numbered 1 to 3 and the papers numbered in Seq. 006 were read on this motion for summary judgment

	<u>Papers Numbered</u>
Notice of Motion— Affirmation — Exhibits	<u>1-2</u>
Affirmation in Opposition—Exhibits A-D	<u>(See Seq. 006-4)</u>
Replying Affirmation — Exhibits	<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

**FILED**

NOV 03 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/25/10  
New York, New York

[Signature], J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

HON. MICHAEL D. STALLMAN

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
RICHARD WINFIELD and PENNY WINFIELD,

Plaintiffs,

Index No. 100968/2007

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY  
TRANSIT AUTHORITY, CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC., and NEW YORK  
PAVING, INC.,

Decision and Order

Defendants.

-----X  
CONSOLIDATED EDISON COMPANY OF NEW YORK,  
INC., ,

Third Party Plaintiff,

**FILED**

NOV 03 2010

- against -

NEW YORK

**COUNTY CLERK'S OFFICE**

NEW YORK PAVING, INC.,

Third Party Defendants.

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**HON. MICHAEL D. STALLMAN, J.:**

In this action, plaintiffs allege that, on June 16, 2006, at approximately 9:00 a.m., plaintiff Richard Winfield stepped off the curb of West 32<sup>nd</sup> Street to board a bus that had stopped approximately 12 to 14 feet away from the curb of a bus stop. According to Winfield, he stepped onto a crack in the roadway, which caused his foot to turn sideways and thereby caused him to fall. At his EBT, Winfield testified that the accident occurred in front of premises known as 140 West 32<sup>nd</sup> Street in Manhattan.

On February 9, 2007, plaintiffs commenced this action against the City of New York, the

New York City Transit Authority (NYCTA), and Consolidated Edison Company of New York, Inc. (Con Edison). Plaintiff Penny Winfield asserts a derivative claim.

Con Edison impleaded New York Paving, Inc. (New York Paving), and plaintiffs subsequently amended the complaint to name New York Paving as a direct defendant.

New York Paving moves to dismiss the complaint and any cross claims and third-party claims against it (Motion Seq No. 005). Con Edison also moves for summary judgment dismissing the complaint and cross claims against it (Motion Seq. No. 006). This decision addresses both motions.

### DISCUSSION

New York Paving and Con Edison essentially contend that the work, as shown in the work records and described by witnesses from New York Paving and Con Edison, does not match in size, shape, color, or location to the defect that Winfield described at his deposition. New York Paving further asserts that its work was not performed until July 15, 2006, over a month after the accident.

Winfield testified at his EBT that he was standing at a bus stop on the south side of West 32<sup>nd</sup> Street, approximately 50 feet east of Seventh Avenue. Price Affirm., Ex F [Winfield EBT], at 10-11, 17-18. Winfield stated that the bus stopped in the roadway, approximately 12 to 14 feet from the curb, and in line with the bus stop pole. *Id.* at 25-26. Winfield testified that, as he approached the bus, he stepped on a crack in the road, his right foot turned sideways to the right, and he fell. *Id.* at 32-33. Winfield described the crack in the road as running “perpendicular, meaning directly — not parallel” to the sidewalk on West 32<sup>nd</sup> Street. *Id.* at 21. At his EBT, Winfield was shown a photograph (marked as Exhibit B at the EBT), and asked to point to the area where Winfield said his foot had turned. *Id.* at 60. Plaintiff pointed to an area in the photo “in the concrete section as

opposed to the darker asphalt section” of the roadway. *Id.* In opposition to New York Paving’s and Con Edison’s motions, plaintiff submitted a photograph, previously marked at his EBT as Plaintiff’s Exhibit 3, with the defect circled in the photograph. Plaintiffs and Con Edison refer to the concrete area as a “bus pad.” *See* Fox Affirm. ¶ 2; Abate Opp. Affirm. ¶ 5.

Con Edison does not dispute that its business records indicate that it had performed excavation work in the concrete bus pad, which began on April 13, 2006 and was completed on April 19, 2006. A Con Edison “Report of Street and/or Sidewalk Openings” indicates that a cut measuring five feet long by five feet wide by six inches deep was made in the bus pad. *See* Price Affirm., Ex H. The report, which contains a diagram, indicates that it was prepared by Hector Colon, who was a Con Edison operating supervisor at the time. *See* Price Affirm., Ex J [Colon EBT], at 6, 27. *Id.* Colon testified at his EBT that the significance of the diagram was to let the paving department know that a cut was made into a concrete bus pad, indicated by a handwritten broken line on the diagram,<sup>1</sup> and that the paving department was to restore the entire bus pad after the work. *Id.* at 42. According to Colon, the smaller square on the diagram indicates the small cut by the curb. *Id.* at 43. On the diagram, the number one inside a circle leads with an arrow to the smaller square. *See* Price Affirm., Ex H. Colon testified that the number one signified “Cut number one, because it could be multiple cuts.” Colon EBT, at 43.

Ralph LeGrand, another Con Edison operations supervisor at the time of Winfield’s alleged accident, also reviewed the report at his EBT. Based on his review of the Report of Street and/or Sidewalk Openings, LeGrand testified that a five foot by five foot hole was made in a parking lane

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<sup>1</sup> Colon testified at his EBT that the area to be restored was specified “by the dotted line.” *Id.* at 42. The handwritten line on the diagram appears to a broken line ( - - - ) rather than a dotted line ( . . . ). *See* Price Affirm., Ex H.

in front of 140 West 32<sup>nd</sup> Street. Price Affirm., Ex I [LeGrand EBT] , at 11-14, 20. LeGrand testified that the cut into the street was to be made five feet from the curb and that the excavation was five feet by five feet. *Id.* at 31-32, 63. According to LeGrand, the excavated area would be later backfilled with sand, and “temp mack” placed on top of the backfill. LeGrand EBT, at 65-66. LeGrand described the temp mack as black in color, which would dry to a dull finish. *Id.* at 83.

New York Paving and Con Edison both conclude that, because Winfield neither mentioned a nor described a change in materials upon which he was walking, Winfield was not walking in the area where Con Edison had excavated. They essentially reason that, had the defect been in the area where Con Edison had excavated, they would have expected Winfield to describe the area as black in color, due to the temp mack material, or as a change in color where the concrete bus pad abutted the temp mack material.

The fact that Winfield did not mention at his deposition any dark area of where his accident occurred does not lead to the conclusion that the alleged defect was not in the area of excavation. New York Paving and Con Edison do not cite to any part of Winfield’s EBT where he was specifically asked the color of the surface that contained the alleged defect. Rather, Winfield was asked questions about the differences between the color of the concrete area of the bus pad and the asphalt beyond the bus the pad. *See* Winfield EBT, at 60. Insofar as New York Paving and Con Edison are basing their summary judgment on what Winfield ought to have said, a movant cannot obtain summary judgment by pointing to gaps in plaintiffs’ proof. *Torres v Indus. Container*, 305 AD2d 136 (1st Dept 2003); *Orcutt v American Linen Supply*, 212 AD2d 979 (4th Dept 1995).

In the Court’s view, the EBT testimony and documentary evidence do not establish, as a matter of law, that the area of the bus pad where Con Edison had excavated was not the area where

Winfield allegedly tripped and fell. Exact measurements were given as to the area in the bus pad where Con Edison excavated, but New York Paving and Con Edison offered no exact measurements were given as to the location of the area of the alleged defect that caused Winfield to trip and fall. Winfield circled the alleged defect in a photo, which appears to be near a Con Edison manhole. And yet, New York Paving and Con Edison do not offer on these motions the distance of the manhole to the curb, and the distance of the manhole in relation to where the excavation allegedly took place, all of which could have been easily measured.

Contrary to New York Paving's argument, Winfield did not the accident location as "smack in the middle of the road." Winfield EBT, at 65. Winfield testified as follows:

"Q. And was it on the darker portion? Was the bus passenger door over the darker portion of the roadway or the concrete portion of the roadway.

A. I really didn't pay attention. It was smack in the middle of the road.

Mr. Schwartz: You're talking about 'it' being the bus?

A. The bus. In other words –

Q. There is a parking lane?"

Winfield EBT, at 65. When viewed in context, Winfield was clearly referring to the bus, not to the defect, as being "smack in the middle of the road."

Therefore, Con Edison's motion for summary judgment dismissing the complaint and any cross claims as against it is denied.

New York Paving's motion for summary judgment dismissing the complaint is granted. Plaintiffs concede that New York Paving did not perform the temporary backfill and paving. Abate Opp. Affirm. ¶ 9. It is undisputed that New York Paving performed its work on July 15, 2006, almost a month after Winfield allegedly tripped and fell.

It is clear that dismissal of the complaint as against New York Paving necessarily leads to

dismissal of NYCTA's cross claim for common-law indemnification and contribution as against New York Paving, and to dismissal of Con Edison's first cross claim for common-law indemnification and contribution as against New York Paving. The third cause of action of Con Edison's third-party complaint against New York Paving, for common-law indemnification, is also dismissed. Because New York Paving cannot be held liable to plaintiff, its first cross claim and first cross claim/counterclaim of its answer to the third-party complaint, which both seek contribution and common-law indemnification against the City, NYCTA, and Con Edison, are dismissed.

Although New York Paving argues that General Obligations Law § 5-322.1 bars Con Edison from seeking contractual indemnification from New York Paving, this argument was not raised in New York Paving's moving papers. Because New York Paving failed to meet its prima facie burden as to dismissal of third-party claims, summary judgment is denied, irrespective of the sufficiency of the opposition papers. *See Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985).

New York Paving's moving papers did not address the other cross claims and third-party claims that were not discussed above. Generally speaking, these cross claims and third-party claims of the various co-defendants seek contractual indemnification and allege breach of an agreement to procure insurance. Accordingly, summary judgment dismissing these cross claims and third-party claims is denied for lack of a prima facie showing of entitlement to summary judgment.

### CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant New York Paving, Inc. (Motion Seq. 005) is granted to the extent that the complaint is severed and dismissed as against this defendant, with costs and disbursements to this defendant as taxed by the Clerk upon submission of

an appropriate bill of costs, and the Clerk is directed to enter judgment in this defendant's favor accordingly; and it is further

ORDERED that the cross claim of New York City Transit Authority, and the first cross claim of defendant Consolidated Edison Company of New York, Inc., are dismissed as against New York Paving; and it is further


ORDERED that the first cross claim of New York Paving, Inc. and the first cross claim/counterclaim of New York Paving, Inc.'s answer to the third-party complaint are dismissed in their entirety; and it is further

ORDERED that the third cause of action of the third-party complaint against New York Paving, Inc. is dismissed, and the motion for summary judgment by defendant New York Paving, Inc. is otherwise denied; and it is further

ORDERED that the motion for summary judgment by defendant Consolidated Edison Company of New York, Inc. is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: October 25, 2010  
New York, New York

ENTER:   
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J.S.C.

**FILED**

HON. MICHAEL D. STALLMAN

NOV 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE