

<b>Gill v Consolidated Edison Co. of N.Y., Inc.</b>
2011 NY Slip Op 30634(U)
March 16, 2011
Sup Ct, NY County
Docket Number: 109293/2010
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice

PART 55

Index Number: 109293/2010  
GILL, MARY C.  
vs.  
CONSOLIDATED EDISON  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 2/10/11  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-3  
4-5  
6-7

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided  
by the annexed memorandum Decision and Order.

**FILED**

MAR 17 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/16/11

JANE S. SOLOMON J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

MARY C. GILL,

Index No. 109293/2010

Plaintiff,

**DECISION & ORDER**

-against-

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., S3 TUNNEL CONSTRUCTORS,  
INC., and HALLEN CONSTRUCTION, INC.,  
And DANELLA CONSTRUCTION COMPANY OF  
NY, INC.,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC.,

Third-Party Plaintiff,

**FILED**

-against-

**MAR 17 2011**

DANELLA CONSTRUCTION COMPANY OF NY,  
INC.,

NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party Defendant.

-----X

**SOLOMON, J.:**

Plaintiff Mary C. Gill (Gill) sues the defendants for injuries suffered when a safety barricade at a construction site fell on top of her. Though discovery is not complete, Defendant S3 Tunnel Constructors JV (a Joint Venture) s/h/a S3 Tunnel Constructors, Inc. (S3) moves for summary judgment dismissing the complaint and all cross claims as against it on the ground that it did not work at, and has no connection to, the accident location, and for costs and attorneys' fees under CPLR 8303-a.

On December 11, 2009, Gill was walking on First Avenue,

near East 72<sup>nd</sup> Street, in Manhattan, when she was struck by an "orange and white saw-horse barricade" that had been blown over by strong wind (Complaint, ¶ 14; Gill Deposition, p. 16-17).

Defendant Consolidated Edison Company of New York, Inc. (Con Ed) hired S3 to construct the Second Avenue Subway Tunnel. According to Con Ed's third-party complaint, it hired Danella Construction Company of NY, Inc. (Danella) to perform work "in and about First Avenue, near 72<sup>nd</sup> Street, Manhattan" (Third Party Complaint, ¶ 4).

S3 argues that it did not perform any work on First Avenue and 72<sup>nd</sup> Street, and did not use orange and white sawhorse barricades on its construction sites on Second Avenue. In support, it submits the affidavit of its Project Manager, Alaeden Jlelaty (Jlelaty), who states that: S3 was hired to work on the Second Avenue tunnel; S3 did not work anywhere near First Avenue; S3 uses interlocking metal safety barriers, painted yellow; all work done at 72<sup>nd</sup> Street and Second Avenue at the time of the incident was located below the roadway surface and all areas were fenced in by chain link (Jlelaty affidavit, attached to Motion, Ex. 2).

In opposition, Gill supplies her own affidavit, stating that she was hit by an orange and white saw-horse barricade, and two witness affidavits. The first witness stated that he "observed an elderly lady laying on her back in the crosswalk

with a barricade on top of her. The barricade was an orange & white colored saw-horse type like the ones by Con Edison. The barricade had been in the intersection around a work spot" (Farell affidavit, attached to Opposition, Ex. B). The second witness stated that he saw "[Gill] had been hit by a barricade which had been blown over from a work spot in the intersection . . . I think that the barricade had been blown over from the middle of the intersection where it had been placed by a work area" (Lisboa affidavit, attached to Opposition, Ex. B).

A party who has not performed or is not responsible for any construction work at an accident site owes no duty to a plaintiff injured at that site (*Kenney v. City of New York*, 30 AD3d 261 [1<sup>st</sup> Dept., 2006]). Jlelaty's affidavit, and its attendant exhibit, establishes that S3 worked on Second Avenue, not First Avenue. Gill's submissions reinforce that she was injured by an object located at a work site on First Avenue. Moreover, Con Ed alleges that Danella was the entity responsible for the First Avenue work. Accordingly, S3 owed no duty to Gill, and cannot be negligent for her injury as a matter of law, and the cause of action against it must be dismissed.

S3 also argues that the action against it was frivolous and sanctions should be awarded because pre-action discovery showed that S3 was not a proper party and there was no reasonable basis to sue. Gill argues that this suit against S3 is not

frivolous because she learned through a FOIL request that S3 had NYC DOT permits to "open the sidewalk at 72<sup>nd</sup> Street between 1<sup>st</sup> and 2<sup>nd</sup> Avenue" (Opposition, Ex. A), and reasonably believed that they may have been the party responsible for the under-secured barricade. Such information is a reasonable basis for suit, and Gill's commencement of suit against S3 was not frivolous.

Accordingly, it hereby is

ORDERED that the branch of defendant S3's motion seeking attorneys' fees under CPLR 8303-a is denied; and it further is

ORDERED that the branch of defendant S3's motion for summary judgment is granted and the complaint is severed and dismissed as against it, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: 3/16/11

ENTER: 

J.S.C.  
JAMES S. SOLOMON

**FILED**  
MAR 17 2011  
NEW YORK  
COUNTY CLERK'S OFFICE