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

PRESENT: Saliann Scarpulla PART 19

Index Number : 127954/2002

LEEDS JEANNETTE FINKBINER

VS

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 4/5/11
which disposes of motion sequence(s) no.

003, 004, 005, 006, 007

FILED

APR 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/5/11

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

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

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: PART 19

----------X

JEANETTE FINKBINDER LEEDS and DAVID LEEDS,

Index No.: 127954/02

Plaintiffs,

-against-

Decision and Order

THE CITY OF NEW YORK, JUDLAU CONTRACTING, INC., and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., FELIX EQUITIES, INC., EMPIRE CITY SUBWAY CO. LTD., MANUEL ELKEN CO. P.C. and VERIZON COMMUNICATIONS, INC.,

Defendants.

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THE CITY OF NEW YORK and JUDLAU CONTRACTING, INC.,

Third-Party Index No: 590552/05

Third-Party Plaintiffs,

-against-

FELIX EQUITIES INC. and EMPIRE CITY SUBWAY CO. LTD.,

Third-Party Defendants.

----------X

PRESENT: HON. SALIANN SCARPULLA, J.S.C:

This is an action for personal injuries sustained by plaintiff Jeanette Finkbinder Leeds ("plaintiff") when she stumbled on a depression in the roadway located in the crosswalk between the northeast corner and northwest corner of the intersection of William Street and John Street in Manhattan on November 10, 2001. Now that discovery is complete, several of the defendants have cross-moved for summary judgment.

Background

Plaintiff testified that, on the day of the accident, she and her husband were headed by foot from their hotel near the South Street Seaport to the World Trade Center. The weather was pleasant, and it was not raining. As they were walking on John Street and crossing William Street, plaintiff encountered and stumbled over a saucer-like depression in the road. Plaintiff maintained that she did not see the depression, which measured two to three feet in diameter and two to three inches deep, before falling into it.

Specifically, plaintiff stated that, as her right foot hit the slope of the depression, her foot "snapped" and she "fell almost straight forward." (Judlau's Notice of Motion, Exhibit K, Plaintiff's Deposition, at 20). Plaintiff maintained that she did not observe any ongoing construction work taking place in the area of the accident, although she noticed some steel plates in the road within a couple of feet of where she fell. Plaintiff also observed some barricades at the intersection where she fell. Plaintiff explained that she did not fall exactly within the crosswalk, as she had to walk a step or two outside of the crosswalk in order to avoid a barrier which consisted of "two white parts of a fence," and which completely covered the opposite corner of the street (*id.* at 46).

David Leeds ("Leeds"), plaintiff's husband, testified that he was walking slightly behind plaintiff when the accident occurred. He stated that, near the area where he and his wife were walking, he noticed tar and asphalt ramps leading up to the plates. He also

observed a barrier on the far side of the street, which blocked the curb area and forced pedestrians to walk around it.

Michael Iovino ("Iovino"), defendant Judlau's Project Manager, testified that Judlau was hired by the New York City Department of Design and Construction ("the DDC") to serve as general contractor on a project to replace the water mains in the downtown area of Wall Street. He noted that work was performed at the corner of William Street and John Street, although he could not remember the dates.

Iovino stated that he was responsible for organizing the crews for the daily work, as well as generating daily reports, time sheets and overseeing superintendents. He also explained that defendant Elken was an engineering consultant on the project. Together, they acted as inspectors, kept records, oversaw job set-up and monitored safety. If something was done incorrectly, Elken would give Judlau a field order to correct the situation. Iovino also noted that, due to "all of the interference that's in the way of the water main," Judlau had a working relationship with Con Edison, and that an inspector from Con Edison was on site every day (Judlau's Notice of Motion, Exhibit O, Iovino Deposition, at 24).

To perform the work, Judlau would open the street and then dig down to the water main and expose it. At night, Judlau would replace the water mains and then backfill the area with sand and temporarily asphalt it. Later, Judlau would lay down a concrete base

and put in permanent asphalt. It would take approximately one year from the opening of the trench to the placement of the permanent asphalt.

Krishna Manikarnika (Manikarnika), the DDC's Engineer in Charge, testified that he had been in charge of the project since the pre-excavation stage. Manikarnika's duties on the project included monitoring safety and ensuring that the specifications of the contract drawings that he prepared were being followed. He stated that Elken's duties on the project where similar to his own and included assisting him in supervising the work to make sure that it was being done in accordance with the contract and keeping daily records. Manikarnika testified that the DDC, Elken and Judlau were all responsible for safety on the project.

In her bill of particulars, plaintiff asserts that her injuries were caused as a result of defendants' negligence, recklessness and carelessness in, among other things, repairing, repaving and/or maintaining the roadway, which caused a dangerous and trap-like condition to exist for an extensive period of time, causing her debilitating injuries. In addition, plaintiff's husband, David Leeds, alleges that the accident deprived him of his wife's care, comfort and society, and that he is entitled to damages for loss of consortium.

In motion sequence number 003, defendant The City of New York ("the City") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, as well as all cross claims, against it. In motion sequence number 004, defendant Manuel Elken

Co. P.C. ("Elken") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

In motion sequence number 005, defendant Verizon Communications, Inc. ("Verizon") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it. In motion sequence number 006, defendant Con Edison Company of New York, Inc. ("Con Edison") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it.

Finally, In motion sequence number 007, defendant Judlau Contracting, Inc. ("Judlau") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. Motion sequence numbers 003, 004, 005, 006 and 007 are hereby consolidated for disposition.

Discussion

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st

Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). In accordance with these principles, the Court reviews each defendant's summary judgment motion.

A. Verizon's Summary Judgment Motion (Motion Sequence No. 5)

Plaintiff states in her opposition papers that she does not oppose Verizon's summary judgment motion. Thus, as plaintiff's claims against Verizon have been abandoned, Verizon is entitled to summary judgment dismissing plaintiff's complaint (*see Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion seeking to dismiss the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

B. The City's Summary Judgment Motion (Motion Sequence No. 3)

Plaintiff contends that she sustained her injuries as a result of an allegedly defective portion of the roadway. Section 7-102 © (2) of the Administrative Code of the City of New York provides that, to maintain an action against the City for personal injury arising out of a street condition, the claimant must demonstrate prior written notice of the alleged defect (*Schleif v City of New York*, 60 AD3d 926, 927-928 [2d Dept 2009]). The

City maintains that, as plaintiff has failed to show prior written notice of the defect, it is entitled to summary judgment dismissing the complaint and all cross claims against it.

Administrative Code Section 7-201 © (2) states, in pertinent part:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway ... sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice ... and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

There are exceptions to the prior written notice rule. "The prior written notice requirement will be obviated only if the plaintiff establishes that a special use resulted in a special benefit to the locality or that the municipality affirmatively created the defect by performing work that *immediately* resulted in the existence of a dangerous condition" (*Schleif v City of New York*, 60 AD3d at 928 ["Even if a municipality performs negligent pothole repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable"]; *Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Torres v City of New York,* 39 AD3d 438, 438 [1st Dept 2007] [the complained-of roadway depressions, although traceable to negligence on the part of the City, did not appear immediately, but developed over time]).

Here, plaintiff has not shown that the City received prior written notice of the roadway defect.[1] Plaintiff's theory of liability is that the facts of this case fall within an exception to the notice requirement of Section 7-201 © (2).

Plaintiff has not, however, presented any evidence or argument of any special benefit conferred upon the City. In addition, plaintiff has only offered speculation as to whether the affirmative negligence exception applies to the facts of this case. Plaintiff has not put forth any evidence establishing that the City caused or created the roadway defect, or even when and/or how the alleged defect arose in the first place (*see Oboler v City of New York*, 8 NY3d at 890 [exception to the written notice requirement did not apply where plaintiff presented no evidence of who last repaved the subject section of the roadway before the accident or when the work may have been carried out]; *Lawler v City of Yonkers*, 45 AD3d at 813).

Plaintiff has not put forth any reliable evidence to demonstrate that any work by the City immediately resulted in the existence of the dangerous condition.

> [O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for

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[1] Contrary to plaintiff's argument, prior written notice cannot be established by way of inspections performed following the issuance of permits, as "constructive notice of a defect may not override the statutory requirement of prior written notice" (*Amabile v City of Buffalo*, 93 NY2d at 475-476). In any event, "[w]here, as here, there is no evidence indicating the length of time the defect was in existence prior to plaintiff's accident, constructive notice is not established" (*Garcia v New York City Hous. Auth.*, 183 AD2d 619, 620 [1st Dept 1992]).

> his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.

(Zuckerman v City of New York, 49 NY2d at 562).[2]

As plaintiff failed to supply any reliable evidence as to the elements of the exceptions to the prior written notice rule, the City is entitled to summary judgment dismissing the complaint and all cross claims against it (*see Oboler v City of N.Y.*, 8 NY3d at 890).

C. Judlau's Summary Judgment Motion (Motion Sequence No. 7)

Judlau argues that the roadway defect upon which plaintiff allegedly tripped is trivial and non-actionable as a matter of law. After consideration of the relevant facts regarding the roadway defect, including its location on a public thoroughfare in an area frequented by tourists, the slope of the depression, as well as its width and depth, the Court concludes that the depression was not trivial as a matter of law (*see Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997]; *Rivera v 2300 X-tra Wholesalers*, 239 AD2d 268, 268 [1st Dept 1997]).

Judlau also argues that it is entitled to summary judgment dismissing the complaint because it neither created, nor had notice of, the roadway defect that caused plaintiff to

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[2] Moreover, it is of no legal consequence that the City did not present any records documenting its cable work in the accident area at the time of the accident, as plaintiff failed to satisfy the condition precedent necessary to proceed with this action (*see Katz v City of New York*, 87 NY2d 241, 245 [1995]).

fall (*see Lewis v Guy Pratt, Inc.*, 264 AD2d 383, 383 [2d Dept 1999]). "In a slip and fall case, the plaintiff must show the existence of a hazardous condition and that the defendant created the condition or had actual or constructive notice of it" (*King v JNV Ltd.*, 275 AD2d 733, 734 [2d Dept 2000]; *see Gregg v Key Food Supermarket*, 50 AD3d 1093, 1093 [2d Dept 2008]; *Prisco v Long Is. Univ.*, 258 AD2d 451, 451-452 [2d Dept 1999]). In the absence of evidence that a defendant created a defect or received actual notice of a defect, the defendant is entitled to summary judgment (*Schiano v TGI Friday's*, 205 AD2d 407, 408 [1st Dept 1994]).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Garcia v New York City Hous. Auth.*, 183 AD2d 619, 620 [1st Dept 1992]).

Judlau has submitted evidence which shows that the project was completed in the area of the accident in July of 2001, and, thus, Judlau's work on the project in this area was over at least four months prior to the alleged accident. Iovino testified that the entire area of John Street, William Street and Broadway, which encompassed the accident area, was permanently restored on July 21, 2001. In addition, Judlau's daily report of July 12, 2001 states, "John from Broadway to William Complete!" (Judlau's Notice of Motion, Exhibit R, Judlau Daily Work Force Report of July 12, 2001).

However, in his deposition, John Barbaro ("Barbaro"), Elken's resident engineer, conceded that only temporary restoration work was completed in the accident area at the time of the accident. Barbaro also testified that the permanent restoration work would have been done much later than November of 2001, because "we didn't get into reconstruction of roadways until much later. First we were still doing regular water main work" (Judlau's Notice of Motion, Exhibit P, Barbaro Deposition, at 77). Barbaro also testified that Judlau ceased working on the project at the subject location at the time that "the trenches were restored on March 22nd - between March 22nd and March 24, 2001" (*id.* at 51-52). Manikarnika also testified that, after March of 2001, no work was done on the project at the intersection of William Street and John Street.

In any event, the testimonial evidence in this case clearly establishes that, after 9/11, although work still continued on the project in other areas, all work on the project in the accident area ceased, not resuming until well after the date of the accident. Iovino testified that, after 9/11, Judlau did not continue working on the water project, as the roads were closed and an emergency situation was at hand.

Instead, during the three months following 9/11, Judlau did a lot of work for Con Edison and ECS, as "Con Ed and ECS had an enormous amount of work to be done," which included getting "downtown running with any kind of their wires ... and we, basically, boxed out the wiring after it was laid on the sidewalk" (Judlau's Notice of Motion, Exhibit O, Iovino Deposition, at 38). This "box[ing] out" entailed placing a

"coffin" around the electric and telephone lines after they were laid out on the sidewalk, so that there would be no loose wires on the sidewalk (*id.* at 38). Iovino maintained that, after 9/11, Judlau did not do any work dealing with the water main duties and the trenches until at least the end of December. After 9/11, Judlau's work for Con Edison and ECS was limited to the sidewalk areas. In addition, during his deposition, when Iovino was shown photographs of the accident area, he testified that Judlau was not working in the area at the time that said photographs were taken.

Manikarnika also asserted that, after 9/11, although work still continued on the project in some areas, there was an embargo in effect which resulted in Judlau being told to stop working on the project, though he could not recall the exact areas. Judlau was told to resume work on the project in those areas about one year later. After 9/11, during site visits, Manikarnika only observed Judlau assisting Con Edison and Empire City Subway in putting in cables and restoring electricity.

Abe Panagi ("Panagi"), Con Edison's chief construction inspector, testified that, at the time that it was working in the area of William Street and John Street, "[t]here was a city project going on with Judlau," in the area of William Street and John Street, which had been going on before 9/11, but which, like "all projects were suspended" (*id.*). Panagi also noted that "[e]verything downtown was suspended for that time frame" (*id.*). In fact, Panagi asserted that he did not recall observing anyone from Judlau working at the intersection after 9/11, and he did not know if the project was going on during this

time either. He also noted that Judlau's work for Con Edison was limited to sidewalk work.

In opposition, plaintiff argues that plates, identified as belonging to Judlau, were present in the accident area at the time of the accident. However, Iovino testified that the plates, reflected in photographs, were used to cover electric lines, which went the length of Williams Street. The plates used in conjunction with the project ran along John Street. Iovino also explained that, although the plates in the photographs looked like Judlau's plates, Judlau did not necessarily put down the plates. Referring to the conditions in the accident area after 9/11, Iovino testified that "at the time it was a free for all. Anybody took whatever they wanted, what they needed. At the time it's not uncommon that somebody else might have taken my plates" (Judlau's Notice of Motion, Exhibit O, Iovino Deposition, at 103). Iovino also noted that the barricades shown in the photographs were not of the type utilized by Judlau. For pedestrian fencing at the site, Judlau would use only orange bicycle racks, and not saw horses or cones.

Moreover, other testimonial evidence in this case reveals that, in the aftermath of 9/11, it was common for workers to borrow and use each other's plates. For example, Manikarnika testified that, although the contractors were required to write their names on their plates, after 9/11, it was common for companies to use each other's plates. (*see Blake v City of Albany*, 48 NY2d 875, 877 [1979] [mere fact that a rolling machine bearing defendant's name was observed in the area of the accident two days after it took

place was not enough to establish that the barricades plaintiff found in the roadway were either owned or placed there by that defendant]).

As evidence of Judlau's ongoing project work, plaintiff claims that Iovino identified a work permit for water main installation work at the subject intersection for October 4, 2001 to November 17, 2001, as well as a permit for temporary road closure for August 7, 2001 to November 14, 2001 for William Street between Fulton Street and John Street. In addition, plaintiff puts forth a letter from the DDC, dated February 15, 2002, concerning a summons received by Judlau, wherein it was noted that, prior to 9/11, Judlau had pre-excavated and steel plated several locations as part of the project. One of these locations was William Street between John Street and Fulton Street. The letter noted that Judlau "has on several occasions requested work permits to remove and backfill the excavated trench on William Street. However, DOT has denied their request" (Plaintiff's Affirmation in Opposition, Exhibit C, DDC Letter of February 15, 2002).

The issuance of the work permits alone without evidence of Judlau's creation of the defect, or notice of the defect, is insufficient to defeat its summary judgment motion (see *Gee v City of New York*, 304 AD2d 615, 617 [2d Dept 2003][issuance of permit did not constitute evidence of notice]; *Levbarg v City of New York*, 282 AD2d 239, 242 [1st Dept 2001]; *Meltzer v City of New York*, 156 AD2d 124, 124 [1st Dept 1989]).

Importantly, although plaintiff has established that Judlau performed excavation work in the area of the accident at some point prior to the accident, this evidence alone is

insufficient to prove that Judlau created the roadway defect that caused the accident, or that it had actual or constructive notice of the defect (*see Piccola v Incorporated Vil. of Val. Stream*, 213 AD2d 465, 465 [2d Dept 1995] [no issue of fact found where, "[a]lthough there [was] evidence in the record that the appellant repaved his driveway and the sidewalk adjoining the raised slab a few years before the accident, there [was] no evidence that the repaving was done in a negligent manner or that it created or exacerbated the defect" that caused plaintiff's accident]). "Mere proof that the defendants were involved in the construction project prior to the date of the plaintiff's accident [is] insufficient" (*Lewis v Guy Pratt, Inc.*, 264 AD2d at 383; *Blake v City of Albany*, 48 NY2d at 877 [in finding that the case against the defendants was properly dismissed, the Court noted that "the evidence on which negligence on the part of these defendants could be grounded, at best, was speculative"]).

Finally, during the aftermath of 9/11, the subject area of lower Manhattan was in full emergency mode, as police, firefighters, emergency vehicles and utility companies all scrambled to restore order. Under these circumstances, and on this record, any assertion on the part of plaintiff that the roadway defect which caused her accident was, in fact, caused by Judlau, rather than wear and tear created by traffic, exposure to the elements, the passage of time or the work of other companies, is wholly speculative. Also, as plaintiff has not submitted any evidence indicating the length of time that the defect was

in existence, plaintiff has not raised an issue of fact as to constructive notice (*Garcia v New York City Hous. Auth.*, 183 AD2d at 620).

As plaintiff has failed to establish that it was Judlau's work that created the roadway defect, or that Judlau had actual or constructive notice of the defect, Judlau is entitled to summary judgment dismissing plaintiff's complaint against it (*see Manson v Consolidated Edison Co. of N.Y.*, 220 AD2d 374, 374 [1st Dept 1995] [where the record failed to reveal any connection between the defendant and the trench into which the plaintiff fell, defendant's cross motion granted]; *Pina v New York Paving*, 266 AD2d 120, 120 [1st Dept 1999] [action properly dismissed against defendants for lack of evidence tending to show that either performed any work that could have created or exacerbated the defect in the curb that caused plaintiff to trip]).

This conclusion, that Judlau may not be held liable to plaintiff for her injuries necessarily defeats any cross claims for indemnification and contribution asserted against it (*see Stone v Williams*, 64 NY2d 639, 642 [1984]).

D. Elken's Summary Judgment Motion (Motion Sequence No. 4)

Elken argues that it is entitled to summary judgment dismissing plaintiff's complaint against it on the grounds that its work on the project was not responsible for creating the roadway depression that caused plaintiff's accident, and, in any event, it owed no duty to plaintiff under the contract to keep the subject roadway safe in the first place. "In the absence of a duty there can be no liability for negligence" (*Pina v New*

York Paving, Inc., 266 AD2d at 120). No duty is owed to the general public "to make repairs to an existing defect near their work site, which defect had nothing to do with the work they contracted to perform" (*id.*).

In its papers, plaintiff does not argue that Elken created the roadway defect that caused plaintiff's accident. As put forth by Elken, pursuant to the contract, Elken's duties as a resident engineer consultant for the project consisted of conducting inspections for compliance with the plans and specifications of the project's contracts and drawings, as well as maintaining the project's records in the form of daily field inspection reports. Manikarnika testified that Elken provided no physical labor at the job site.

Elken's argument that it did not owe a duty to plaintiff to keep the subject area safe for pedestrians is unavailing. As stated in its contract, Elken was responsible for ensuring public safety under the contract (*see Hunter v Perez Interboro Asphalt Co.*, 237 AD2d 214, 215 [1st Dept 1997] ["The reasonable expectation of pedestrians that the construction site would be maintained so as to permit safe passage is altogether consonant with the expectation of defendant [engineering inspection contractor] regarding its duty under the contract]).

Specifically, with respect to Elken's responsibility for safety at the site, the contract stated, in pertinent part, that Elken:

> 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 ...

> and shall issue directives to the contractor to correct any deficiencies which may be identified

(Elken's Notice of Motion, Exhibit I, DDC/Elken Contract, at 7-8). In addition, the contract required that, although Elken was "not responsible for prescribing, instituting or maintaining a safety program, nor for providing safety engineers," it was to "[p]romptly notify the Commissioner and the contractor[s] if the Engineer observes any hazardous conditions at the site" (*id.*).

Manikarnika testified that the DDC, Elken and Judlau were all responsible for safety on the project. Manikarnika explained that, if any contractors failed to follow the specifications properly, they would be notified with a Field Order issued by Barbaro, or himself. Barbaro also testified that the DDC hired Elken to act as a consultant on the project, and that, in addition to making sure that the contractors on the project followed the contract specifications and drawings, Elken was responsible for making sure that the subject intersection was kept in a safe condition, and for making sure that there were barricades to lead pedestrians across the street.

However, as discussed previously, evidence submitted by defendants shows that Judlau's and Elken's work on the project in the area of the accident was finished in July of 2001, months before plaintiff's accident. More importantly, the evidence is clear that all work on the project in the accident area was suspended following the events of 9/11, and did not resume until well after the date of the accident. Thus, at the time of the

accident, Elken no longer owed a duty under the contract to keep the construction area at issue safe for pedestrians.

In opposition, plaintiff speculates that, since Elken may have been responsible for placing, or causing to placed, the barricades which were present at the intersection at the time of the accident, it is possible that Elken may have negligently directed plaintiff into the path of the defective condition. However, it has also been established, by sworn testimony, that the barricades seen in the photograph of the accident site were not of the type used by Judlau on the project that Elken was contracted to inspect. Thus, no connection can be made between these barricades and Elken's work on the project.

As Elken has demonstrated that it did not create the roadway defect at issue, and that it did not have actual or constructive notice of the defect at a time when it owed a duty to pedestrians to keep the area safe, Elken may not be held liable for plaintiff's accident. Thus, Elken is entitled to summary judgment dismissing the complaint and all cross claims asserted against it (*see Stone v Williams*, 64 NY2d at 642).

E. Con Ed's Summary Judgment Motion (Motion Sequence No. 6)

Con Edison is not entitled to summary judgment dismissing the complaint, as material issues of fact exist as to whether it created the roadway defect which caused plaintiff's alleged accident (*Velez v Montefiore Med. Ctr.*, 300 AD2d 142, 142 [1st Dept 2002]; *Koeppel v City of New York*, 205 AD2d 402, 403 [1st Dept 1994]).

[* 21]

Panagi of Con Edison testified that he began work in the area of the accident on September 12, 2001. At this time, Con Edison "initially did the temporary restoration to get power downtown by placing cables all throughout the downtown district" (Judlau's Notice of Motion, Exhibit S, Panagi Deposition, at 9). To lay new cable or replace old cable, it was sometimes necessary to cut open roads and sidewalks. At the time that Con Edison was opening the roadways and laying cable, other utility companies were also busy in the area doing their respective work. However, only Con Edison would close the roadways that they opened.

Panagi explained that intersections were treated differently from the streets. To this effect, Panagi stated, "We excavated maybe nine inches down just through the asphalt, installed the cable and put the pavement right over it what we call "direct burial"' (*id.* at 13). He also explained that trenches created during the excavation process were approximately a foot wide and a foot deep. In addition, the trenches "would continue straight across from the north side of the intersection to the south side of the intersection" (*id.* at 20). Panagi testified that, on William Street, the cable was laid north to south, the excavated areas were backfilled immediately, and the task was completed in a couple of hours.

Notably, although he was unclear on the specifics, Panagi stated that Con Edison and its subcontractors were involved in excavation and the laying of cable at William Street and John Street for approximately the next six months following 9/11, which

included the intersection of William and John Street. In addition, when shown a photograph of the accident scene and asked if Con Edison placed the orange-and-white barriers reflected on each side of the photograph, Panagi replied, "I'm not sure. I'm not sure if these are ours" (*id.* at 56).

The evidence submitted shows that Con Edison was performing cable work in the area of the accident at or near the time of the accident, thus issues of fact exist as to whether it may have created and/or had actual or constructive notice of the roadway defect. Con Edison is not entitled to summary judgment dismissing the complaint against it, but, as plaintiff's complaint has been dismissed as to the other defendants, Con Edison is entitled to that part of its motion seeking to dismiss all cross claims asserted against it, as these claims are now moot.

For the foregoing reasons, it is hereby

ORDERED that defendant The City of New York's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Jeanette Finkbinder Leeds and David Leeds's complaint, as well as all cross claims as against it, is granted, and the complaint and all cross claims are severed and dismissed as to this defendant; and it is further

ORDERED that defendant Manuel Elken Co. P.C.'s motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint

and all cross claims against it is granted, and the complaint and all cross claims are severed and dismissed as to this defendant; and it is further

ORDERED that defendant Verizon Communications, Inc.'s motion (motion sequence number 005, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is granted, and the complaint is severed and dismissed as to this defendant; and it is further

ORDERED that the part of defendant Con Edison Company of New York, Inc.'s motion (motion sequence number 006), pursuant to CPLR 3212, for summary judgment dismissing the cross claims asserted against it is granted, and these cross claims are severed and dismissed as moot, and the motion is otherwise denied; and it is further

ORDERED that defendant Judlau Contracting, Inc.'s motion (motion sequence number 007), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it is granted, and the complaint and all cross claims are severed and dismissed as to this defendant; and it is further

ORDERED that the remainder of the action shall continue. The Clerk of the Court is directed to enter judgment accordingly.

Dated: April 5, 2011

ENTER:

Hon. Saliann Scarpulla, J.S.C.