

<b>Cruz v City of New York</b>
2011 NY Slip Op 32782(U)
October 24, 2011
Supreme Court, New York County
Docket Number: 102762/09
Judge: Barbara Jaffe
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Jaffe

PART 5

Index Number : 102762/2009  
**CRUZ, PATRICIO**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 002  
DISMISS

Justice

INDEX NO. 102762/09  
MOTION DATE 8/11/11  
MOTION SEQ. NO. 002

Motion to/for summary judgment  
No(s). 1  
No(s). 2  
No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

**FILED**

OCT 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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Dated: 10/24/11

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

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

PATRICIO CRUZ, as administrator of the estate of KIM MURPHY,  
  
Plaintiff,

-against-

Index No. 102762/09  
  
Motion date: 8/4/11  
Motion Seq. No.: 002  
Motion Cal. No.: 23

**DECISION AND ORDER**

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, METRO TRANSIT AUTHORITY, NEW YORK CITY HOUSING AUTHORITY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND TRIUMPH CONSTRUCTION CORP.,

Defendants.

-----X

NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

-against-

TIME WARNER CABLE, LLC, d/b/a TIME WARNER CABLE OF NEW YORK CITY,

Third-Party Defendant.

-----X

BARBARA JAFFE, J.S.C.:

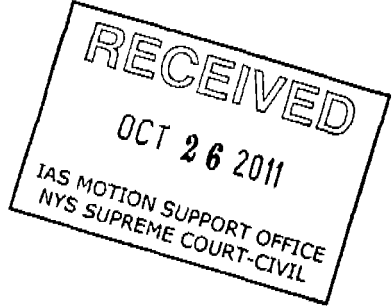
**For Triumph:**  
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212-480-3030

**For Time Warner:**  
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Richard W. Babinecz, Esq.  
4 Irving Place, Room 1800  
New York, NY 10003-3598  
212-460-3355

**FILED**

OCT 26 2011

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COUNTY CLERK'S OFFICE



By notice of motion dated July 5, 2011, submitted on default, defendant Triumph Construction Corporation (Triumph) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it.

By notice of cross-motion dated July 27, 2011, submitted on default, defendant Consolidated Edison Company of New York (Con Edison) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it.

### I. BACKGROUND

On April 8, 2008, at approximately 12:30 p.m., plaintiff tripped and fell on a portion of sidewalk adjacent to a rectangular metal plate marked “TPT” in front of the Polo Grounds Towers, 2931 Eighth Avenue, in Manhattan. (Affirmation of Tod S. Fichtelberg, Esq., dated July 5, 2011 [Fichtelberg Aff.], Exhs. A, C).

On May 7, 2008, plaintiff served City defendants with a notice of claim (*id.*, Exh. D), and on October 7, 2008, she was examined pursuant to General Municipal Law § 50-h, testifying that her accident occurred when her right foot “fell” into a crevice in the sidewalk adjacent to the rectangular plate and that no construction work was being performed “in the vicinity” (*id.*, Exh. F).

On or about February 10, 2009, plaintiff served defendants with a summons and verified complaint, asserting negligence claims against them arising from their “ownership, operation, management, maintenance, supervision, repair, and control” of the sidewalk and plate. (*Id.*, Exh. A).

On March 24, 2009, defendant the New York City Housing Authority (NYCHA) served Time Warner Cable, LLC (Time Warner) with a third-party summons and complaint. (*Id.*, Exh. B).

On March 25 and 27 and May 26, 2009, NYCHA, City defendants, and Triumph, respectively, joined issue with service of their answers. (*Id.*, Exh. A).

On June 2, 2009, Time Warner joined issue on the third-party complaint with service of its answer. (*Id.*, Exh. B).

At a deposition held on April 11, 2011, John Lobianco, Con Edison's lead mechanic, having inspected the plate in November of 2009 and upon being presented with photographs of the plate and the wires beneath it, testified that Con Edison owns neither. (Affirmation of Roxana E. Barsalona, Esq., dated July 27, 2011 [Barasalona Aff.], Exh. B). He also testified that he reviewed Con Edison's "mains and services plate" and that there is no indication thereon of the metal plate at issue. (*Id.*).

At a deposition held on April 12, 2011, Robert Charles, superintendent for Triumph, testified that a Street Opening Permit City issued to Triumph on September 27, 2006 was for work to be performed on the sidewalk on the east side of Eighth Avenue, between Riverside Drive and West 155<sup>th</sup> Street, across Eighth Avenue from the sidewalk on which the accident occurred, that he "ran" the job, which involved reconstruction of the east side sidewalk, and that Triumph never worked on the west side sidewalk. (Fichtelberg Aff., Exh. G).

At a deposition held on May 16, 2011, Victor Flores, foreman in third-party defendant Time Warner's Survey and Design Department, when presented with a "construction print" for the metal plate, testified that it was installed for Time Warner, then called Teleprompter, in 1973 and that Time Warner still uses it today. (*Id.*, Exh. I). And, when presented with photographs of the plate itself, he testified that it is owned by Time Warner and that "TPT" stands for "the Teleprompter box." (*Id.*).

By affidavit dated July 26, 2011, George A. Canzaniello, a specialist in Con Edison's Law Department, stated that he performed a fruitless search of Con Edison's records, including street

opening tickets, paving orders, permits, and emergency tickets, for the sidewalk in front of 2931 Eighth Avenue, from the two years before and including the date of the accident. (Barasalona Aff., Exh. E).

## II. CONTENTIONS

Both Triumph and Con Edison assert that they cannot be held liable for plaintiff's injuries, as they did not perform any work on the accident site, and they do not own the metal plate. (Fichtelberg Aff.; Barasalona Aff.).

## III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

To establish a *prima facie* case of negligence, a plaintiff must show duty, breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1<sup>st</sup> Dept 2006]). As "liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control, or special use" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1<sup>st</sup> Dept 2005]), a contractor "who has not performed or is not responsible for any construction work on an accident site owes no duty to a plaintiff injured at the site" (*Kenney*, 30 AD3d at 262).

Pursuant to section 7-210 of the New York City Administrative Code, the owner of real property abutting a sidewalk has the duty to "maintain such sidewalk in a reasonably safe condition" and is liable for injuries arising from its failure to do so. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]). However, as 34 RCNY 2-07(b)(1) provides that the "[t]he owners of covers or gratings on a street are responsible for monitoring [their] condition . . . and the area extending twelve inches outward from the perimeter of the hardware," the owners of such hardware may be held liable for injuries caused by sidewalk defects within this area. (*Storper v Kobe Club*, 76 AD3d 426 [1<sup>st</sup> Dept 2010]).

Here, Charles testified that Triumph performed construction work on the sidewalk on the east side of Eighth Avenue only, Canzaniello swore that Con Edison performed no work on the accident site during the two years before and including the accident date, Flores testified that Time Warner owns the plate, and Lobiano testified that Con Edison owns neither the plate nor the wires beneath it and that the plate does not appear on its mains and services plate. Absent evidence to the contrary, or any dispute that the crevice in which plaintiff tripped was located directly adjacent to the plate and within twelve inches thereof, both Triumph and Con Edison have established *prima facie* entitlement to summary judgment.

#### IV. CONCLUSION

Accordingly, it is hereby

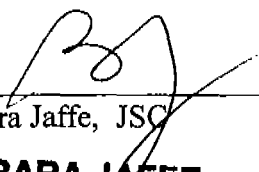
ORDERED, that defendant Triumph Construction Corporation's motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant Triumph Construction Corporation, with costs and disbursements to Triumph Construction Corporation, as taxed by the Clerk of the Court, and the Clerk is directed to enter

judgment accordingly in favor of Triumph Construction Corporation; and it is further

ORDERED, that defendant Consolidated Edison Company of New York, Inc.'s cross-motion for summary judgment is granted to the extent that the complaint is dismissed in its entirety, with costs and disbursements to Consolidated Edison Company of New York, Inc. and the Clerk is directed to enter judgment accordingly in favor of Consolidated Edison Company of New York, Inc.; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

  
Barbara Jaffe, JSC

**BARBARA JAFFE**

DATED:       October 24, 2011  
              New York, New York

**FILED**

OCT 26 2011

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