

**Miller v City of New York**

2011 NY Slip Op 32934(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 108972/09

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Index Number : 108972/2009  
MILLER, JODI  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT  
CAL # 8Y

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for summary judgment

PAPERS NUMBERED  
1  
23  
45

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

**FILED**

NOV 07 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 11/3/11  
NOV 03 2011

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  
JODI MILLER,

Plaintiff,

Index No. 108972/09

Motion Subm.: 8/9/11

Motion Seq. Nos.: 002.

-against-

**DECISION & ORDER**

CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC.,  
SAFEWAY CONSTRUCTION ENTERPRISES, INC.  
and NICO ASPHALT, INC.,

Defendants.

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

Third-Party Plaintiff,

Third-Party Index No. 591010/09

-against-

**FILED**

NOV 07 2011

SAFEWAY CONSTRUCTION ENTERPRISES, INC.  
and NICO ASPHALT, INC.,

Third-Party Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
BARBARA JAFFE, JSC:

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**For Nico:**

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By notice of motion dated April 12, 2011, defendant/third-party defendant Safeway

Construction Enterprises, Inc. (Safeway) moves pursuant to CPLR 3212 for an order summarily

dismissing plaintiff's complaint and the third-party complaint and any cross claims against it. Plaintiff and defendant/third-party plaintiff Consolidated Edison Company of New York, Inc. (Con Edison) oppose.

By notice of motion dated May 3, 2011, defendant/third-party defendant Nico Asphalt Paving, Inc. i/s/h/a Nico Asphalt, Inc. (Nico) moves pursuant to CPLR 3212 for an order dismissing all claims and cross claims against it. Safeway and City oppose.

By notice of cross motion dated May 18, 2011 and submitted without opposition, City moves pursuant to CPLR 3211 and/or 3212 for an order dismissing the complaint and all cross claims against it.

#### I. BACKGROUND

By purchase order dated April 17, 2007, Con Edison hired Safeway to "furnish supervision, labor, material, tools, and equipment to excavate, install electric distribution facilities, backfill and restore sidewalk and roadway openings in the Borough of Manhattan," although "permanent roadway restoration" would be restored by others. Safeway agreed that it was responsible "for any failure or neglect on its or its Subcontractor's part to perform the obligations [in the agreement], and shall defend and indemnify Con Edison against any liability resulting in whole or in part from such failure or neglect." (Affirmation of Thomas J. Moran, Esq., dated Apr. 12, 2011 [Moran Aff.], Exh. H).

Pursuant to Con Edison's construction manual, a contractor hired by Con Edison must maintain excavations for five working days from the date excavations are available for use by Con Edison or other authorized contractors. (Affirmation of Rita C. Marin, Esq., dated May 2, 2011 [Marin Aff.], Exh. A).

A layout prepared by Con Edison reflects that Safeway was hired to perform work on the street at Sixth Avenue at its intersection with West 9<sup>th</sup> Street (also known as Christopher Street), and that Safeway commenced its work there on September 20, 2008 and completed it on September 21, 2008. (Moran Aff., Exh. J). On September 22, 2008, Con Edison generated a paving order directing Nico to pave the location at which Safeway had performed its work. At the bottom of the order, a handwritten notation reflects that the pavement was restored on or by October 6, 2008. (*Id.*). A document dated September 22, 2008, addressed to Nico and listing locations for it to pave, was signed as received by Nico on September 23, 2008. (Affirmation of Barry N. Greenberg, Esq., dated May 3, 2011 [Greenberg Aff.], Exh. H).

For the restoration of pavement in New York City, Con Edison generally requires the issuance of paving orders to contractors, who must daily retrieve them and agree to assume all responsibility and perform all work necessary for the proper maintenance of all openings indicated thereon from 48 hours after receipt of the paving order or from the time work is commenced, whichever is earlier, until such time as the permanent restoration work is complete. Contractors must also agree to assume all responsibility and liability for any injuries to persons or property resulting from such openings from 48 hours after receipt of the paving order or from the time work is commenced, whichever is earlier, until such time as the permanent restoration work is complete. (*Id.*, Exh. I).

On September 24, 2008, plaintiff was allegedly injured when she tripped and fell on Christopher Street within the crosswalk on the west side of Sixth Avenue in Manhattan. (Moran Aff., Exh. A).

On or about October 5, 2009, Con Ed commenced the third-party action by serving a

third-party summons and complaint, and Safeway served its answer on or about December 22, 2009. (*Id.*, Exhs. C, D). On or about January 4, 2010, plaintiff served on defendants a supplemental summons and amended complaint. (*Id.*). On or about March 22, 2010, Safeway served its answer. (*Id.*, Exh. B).

On May 27, 2010, plaintiff testified at an examination before trial (EBT) that, as pertinent here, on the date of her accident, she was riding a scooter on the street at Sixth Avenue at its intersection with Christopher Street when the wheel of the scooter entered a hole or trench in the crosswalk, which was approximately two feet wide and intersected the crosswalk, and that she noticed no construction work or cones or barricades in the area. (*Id.*, Exh. G).

The same day, City employee Leslie Smalls testified at an EBT that a fruitless search was conducted of City's records for permits, contracts, in-house resurfacing documents, maintenance and repair records, complaints, and gang sheets for roadway defects and milling and resurfacing work for the two years prior to and including the date of plaintiff's accident. (Affirmation of Lynn M. Leopold, ACC, dated May 18, 2011, Exhs. 3, 4).

At an EBT held on June 17, 2010, Con Edison Construction Representative Michael Chinchio testified that on September 22, 2008, he reviewed a layout issued by Con Edison's engineering department that showed the scope of the work performed by Safeway at the accident location and that Safeway had installed four four-inch conduits in the ground and dug a trench there. Once its work was complete, it did not backfill or asphalt the street to grade but left it an inch and a half below grade pursuant to its contract with Con Edison. Nico was then required, pursuant to its contract with Con Edison, to pave and restore the street to grade. According to Chinchio, pictures taken of the trench in which plaintiff fell do not reflect that Nico had paved

the section, and although the paving order is dated September 22, 2008, Chinchio did not know when Nico was to perform the paving or whether Nico received the paving order. (Moran Aff., Exh. I).

On August 11, 2010, Nico Superintendent John Denegall testified at an EBT that on September 23, 2008, Nico received the paving order which listed the locations Con Edison wanted paved, including the location of plaintiff's accident, and that Nico paved at the location on October 6, 2008. According to Denegall, City parking rules were responsible for Nico's two-week delay in commencing the job, notwithstanding Nico's contractual responsibility to complete its work within eight days. (*Id.*, Exh. K).

On December 15, 2010, Guido Dire, Safeway's Secretary/Treasurer and Operations Manager, testified at an EBT that Safeway's work at the accident location consisted of saw cutting the roadway, removing the asphalt and concrete below the roadway, excavating the soil, installing conduits, and then backfilling with soil and compacting it, and restoring the roadway base and moving it one inch below grade for another contractor to pave. (*Id.*, Exh. L).

II. SAFEWAY'S MOTION

A. Dismissal of plaintiffs' complaint

1. Contentions

Safeway denies owing plaintiff a duty of care, as it performed its work for Con Edison pursuant to their contract which provides that final restoration of the street would be performed by other contractors. It denies that plaintiff reasonably relied on its continuing performance of its contractual obligations, having completed its work before plaintiff's accident, and denies having displaced Con Edison in its responsibility to maintain the area. (Moran Aff.).

Con Edison claims that Safeway had a duty to it and to plaintiff to maintain the work on the roadway in a safe condition for five days from the date that the worksite was available for use by other contractors. (Marin Aff.).

Plaintiff argues that Safeway launched a force or instrument of harm by constructing and leaving the trench which caused her accident. (Affirmation of Joseph Orlian, Esq., dated May 10, 2011).

In reply, Safeway contends that even if the trench constituted a dangerous condition, it may not be held liable as its contract with Con Edison required it to create and leave the trench. (Reply Affirmation, dated May 12, 2011).

## 2. Analysis

An independent contractor owes no duty to a third party, unless, as pertinent here, it fails to exercise reasonable care in the performance of its duties, and “launche[s] a force or instrument of harm.” (*Espinal v Melville Snow Contractors*, an 98 NY2d 136 [2002]). Consequently, in determining the duty owed by a contractor to a third party, the relevant issue is whether the contractor undertook to render services and then negligently created or exacerbated a dangerous condition. (*Id.* at 141-142; *see also Church ex rel. Smith v Callanan Indus., Inc.*, 99 NY2d 104 [2002] [contractor “subject to tort liability for failing to exercise due care in the execution of the contract”]).

Here, as conceded by Con Edison’s witness, Safeway established that it was contractually required, upon completion of its work at the location, to leave the pavement one inch below grade for Nico to pave it. Thus, even if the trench constituted a dangerous condition, there is no evidence that Safeway failed to exercise reasonable care in performing its contractual duties or

that it negligently created or exacerbated a dangerous condition. (*See Agosto v 30<sup>th</sup> Place Holding, LLC*, 73 AD3d 492 [1<sup>st</sup> Dept 2010] [contractor owed no duty of care to plaintiff where contract only required it to remove tiles from and not refinish lobby floor, and there was no evidence that contractor failed to exercise due care in performing contract as, even though it had exposed concrete section of floor, “the creation of that allegedly dangerous condition was precisely what was called for in defendant’s contract”]; *Peluso v ERM*, 63 AD3d 1025 [2d Dept 2009] [as contractor was required to backfill excavated parking lot and tamp it down, but not repave it after its work was complete, it owed no duty to plaintiff and did not affirmatively create dangerous condition absent evidence it breached its contractual obligation to backfill area]; *see also Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351 [2007] [as contract required contractor only to plow snow and even if its plowing created mounds of snow which then melted and refroze, contract did not require contractor to salt or sand area absent request to do so, and it thus did not create or exacerbate dangerous condition]; *Laster v 125-129 Park Ave. Realty LLC*, 23 Misc 3d 1139[A], 2009 NY Slip Op 51191[U] [Sup Ct, Kings County 2009] [even if contractor’s failure to cover roof after removing asbestos membrane from roof caused injury, contractor’s agreement required it only to remove membrane and not to cover roof and it thus owed no duty to plaintiffs]; *compare Brown v German Rock Asphalt Co.*, 236 NY 271 [1923] [as contractor opened street and dug trench, and as its contract required it to repave street and restore it to original condition, it had duty to exercise reasonable care to keep street in safe condition until repaving was complete]).

Nor is there any evidence that Safeway failed to maintain its work at the location in a safe condition absent any allegation that the work itself was defective.

### B. Dismissal of third-party complaint

Safeway contends that as it performed its work for Con Edison pursuant to their contract and as Con Edison inspected and approved its work, its compliance with its contractual obligations is established. (Moran Aff.).

Con Edison argues that Safeway failed to maintain the area in a safe condition and thus violated the terms of their contract. (Marin Aff.).

In reply, Safeway contends that absent any indication that the materials it used on the street had deteriorated or caused plaintiff's accident, there is no evidence that it failed to maintain the area in a safe condition or violate the contract. (Reply Affirmation, dated May 12, 2011).

Absent any evidence that Safeway's work failed to comply with its contractual requirements, there is no basis for Con Edison's claim against Safeway.

### III. NICO'S MOTION

Nico has established that it assumed no responsibility for the accident location on September 24, 2008, having received the paving order on September 23, 2008 and in light of its agreement with Con Edison which relieved it of any responsibility within the first 48 hours after receipt of the order and that it owed plaintiff no duty of care and may not be held liable here.

### IV. CITY'S MOTION

As it is undisputed that City had no prior written notice of and absent any proof that it caused or created a dangerous condition at the accident location before plaintiff's accident, it may not be held liable here. (New York City Admin. Code § 7-201[c][2]; *Campisi v Bronx Water & Sewer Serv., Inc.*, 1 AD3d 166 [1<sup>st</sup> Dept 2003] [prior written notice is condition precedent to action against City arising out of street defect]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Safeway Construction Enterprises, Inc.'s motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; it is further

ORDERED, that defendant Nico Asphalt, Inc.'s motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; it is further

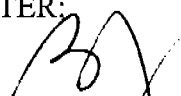
ORDERED, that defendant City of New York's cross motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; it is further

ORDERED, that the third-party complaint is dismissed in its entirety;

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 part 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

DATED: November 3, 2011  
New York, New York  
NOV 03 2011

**BARBARA JAFFE**  
J.S.C.  
**FILED**

NOV 07 2011