[* 1]

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

PRESENT: GEOFFREY D,S. WRIGHT PART 62
Justice

MARY LENARD and EDWARD M. LENARD,

Plaintiff/Petitioner(s)

- v -

THE CITY OF NEW YORK, NATIONAL REALTY & DEVELOPMENT CORP., BLR LIMITED PARTNERSHIP, BLR MADISON, LLC, 645 MADISON LLC, THE EQUITABLE NISSEI MADISON LLC and ANN TAYLOR, INC.

Defendant/Respondent(s)
and Third and Fourth Party Actions

INDEX NO. 100984/09

MOTION DATE

MOTION SEQ. NO. 004

The following papers, numbered 1 to 8 were read on this motion/petition to dismiss the complaint and cross-claims against 645 Madison Avenue, Con Edison and Manetta Industries

	NUMBERED PAPERS
Notice of Motion/Petition Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	4,5,6
Replying Affidavits	7,8
Other	

Cross-Motion: X Yes No 2,3

Upon the foregoing papers, it is ordered that this motion/petition by the 645 Madison Avenue LLC, Consolidated Edison and Manetta Industries are decided as follows: the motion by 645 Madison Avenue LLC to dismiss the complaint and cross-claims is granted. The cross-motions by Manetta Industries and Consolidated Edison are denied without prejudice

Dated: June 17, 2011

GEOFFREY D. WRIGHT
A.J.S.C. J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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 62

----------X

MARY LENARD and EDWARD M. LENARD,

Plaintiff(s),

-against-

THE CITY OF NEW YORK, NATIONAL REALTY & DEVELOPMENT CORP., BLR LIMITED PARTNERSHIP, BLR MADISON LLC, 645 MADISON LLC, THE EQUITABLE-NISSEI MADISON LLC and ANN TAYLOR, INC.

Defendant(s).

----------X

645 MADISON LLC,

Third-Party Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Defendant.

----------X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Fourth-Party Plaintiff,

-against-

MANETTA INDUSTIRES, INC.,

Fourth-Party Defendant.

----------X

Index #100984/09
Motion Cal. #
Motion Seq. #
DECISION/ORDER
Present:
Hon. Geoffrey Wright
Judge, Supreme Court

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

----------X

MARY LENARD,

Plaintiff,

Action No. 2

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., MANETTA ENTERPRISES, INC. and ABM INDUSTRIES, INC.,

Defendants.

----------X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

PAPERS	NUMBERED
Notice of Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	3,4,5
Replying Affidavits & Exhibits Annexed	6,7
Other (Cross-motion) & Exhibits Annexed	2,3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff Mary Lenard was injured while walking along the sidewalk just east of Madison Avenue at 60th Street, when she tripped on a metal plate in the pavement. The assembled Defendants are entities associated in one way or another with that address.

645 Madison LLC, now moves to dismiss the complaint and any cross-claims against it on the ground that the metal plate was placed on the sidewalk by Defendant Manetta Industries as a part of a Consolidated Edison project. Manetta and Consolidated Edison, also move to dismiss the complaint and any cross-claims against them. Manetta and Con Edison, for their parts, argue that the plates covering the sidewalk were open and obvious, and that the weather condition, falling sleet, made the surface slippery, and that the Plaintiff should have been well aware of possible dangers.

As to the open and obvious argument, the movants are on firm ground. Photographs of the plates that are annexed to various papers, show that they completely cover the sidewalk, from

the building line to the curb. One walking from Park Avenue to Madison Avenue had no choice but to walk across the plates or into the street. I find then, that the metal plates were open and obvious. "The "open and obvious defect" exception derives from the common sense proposition that one who voluntarily encounters an obvious danger voluntarily assumes the risk of injury. Evaluation of a hazard and the parties' respective liability requires analysis of the underlying circumstances, including the plaintiff's familiarity with the route and the visibility of the hazard, which ordinarily present triable questions of fact. (Argenio v. Metropolitan Transp. Auth., 277 A.D.2d 165, 716 N.Y.S.2d 657, supra; Stern v. Ofori-Okai, 246 A.D.2d 807, 668 N.Y.S.2d 68 [3d Dept 1998]). A hazard is open and obvious if its dangerous nature "can be readily observed with the normal use of one's senses" (see Russell v. Archer Bldg. Ctrs., Inc., 219 A.D.2d 772, 773, 631 N.Y.S.2d 102 [3d Dept 1995]. It is neither dispositive nor disputed that the plates themselves were obvious, and that plaintiff previously saw them." [***COHEN v. EMPIRE CITY SUBWAY CO. (LTD.)***, 1 Misc.3d 902(A), 781 N.Y.S.2d 623 (Table), 2003 WL 22939407 (N.Y.Sup.), 2003 N.Y. Slip Op. 51477(U)]. In the foregoing case, the issue was whether a one inch height differential between the plates and the pavement was also open and obvious. Here, the issue is different. It is whether the presence of sleet due to a storm in progress, was open and obvious. A fair reading of the deposition of the Plaintiff can only lead to the conclusion that the presence of sleet was to be expected wherever the Plaintiff chose to walk. It is also a fair reading of the Plaintiff's testimony to conclude that there was no problem of a height differential. Both the Plaintiff and the defense agree that there was no tripping hazard.

I would be inclined to grant the motions to dismiss but for the issue of the requirements of the permit that the City issued for the purpose of opening the sidewalk. The permit dictates the need for a five foot border around the work area. The permit, annexed to the Plaintiff's opposing papers as exhibit 2 to the affidavit of Irwin Loewenstein, contains an inherent conflict that cannot be resolved on the papers submitted to me. However, I have enough to grant the motion of 645 Madison Avenue. Although there is some discussion of the project being for the special use of the building owner and/or its tenants, the reply to that claim is that Con Edison obtained for the permit for "franchise" purposes. This is reflected in the language of the permit itself, which was based, I presume on a submission by Con Edison. Therefore, the motion by Con Edison and Manetta must be denied without prejudice to a renewal upon an explanation or discussion of the five foot requirement in the permit, and whether it is a general rule that does not apply to this project, and an explanation of why not.

This constitutes the decision and order of the Court.

GEOFFREY D. WRIGHT
AJSC

Dated: June 17, 2011