

**Poplaski v City of New York**

2013 NY Slip Op 30107(U)

January 15, 2013

Supreme Court, New York County

Docket Number: 115636/2006

Judge: Geoffrey D. Wright

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

JUDGE GEOFFREY D. WRIGHT

PRESENT: \_\_\_\_\_  
Justice

PART 62

Index Number : 115636/2006  
POPLASKI, DAVID  
vs  
CITY OF NEW YORK  
Sequence Number : 005  
DISMISS

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

The following papers, numbered 1 to 5, were read on this motion to/for dismiss/summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2, 3</u>
Replying Affidavits _____	No(s). <u>4, 5</u>

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the annexed hereto decision

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

## FILED

JAN 23 2013

NEW YORK  
COUNTY CLERK'S OFFICE

  
GEOFFREY D. WRIGHT  
AJSC

Dated: 1/15/13

\_\_\_\_\_, J.S.C.

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

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

-----X

DAVID POPLASKI,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED  
EDISON CO. OF NEW YORK, INC.,

Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW  
YORK INC.,

Third- Party Plaintiff,

-against-

NICO ASPHALT, INC., AND TRIUMPH  
CONSTRUCTION CORP.,

Third-Party Defendants.

-----X

CONSOLIDATED EDISON COMPANY OF NEW  
YORK INC.,

Fourth- Party Plaintiff,

-against-

HALCYON CONSTRUCTION CORP.

Fourth-Party Defendant.

-----X

Index # 116011/09

DECISION

Seq number: 005, 006

**Present:**

Hon. Geoffrey D. Wright

Acting Justice Supreme Court

**FILED**

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RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____ 1,2 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 3,4, 5, 6, 7 _____
Replying Affidavits.....	_____ 8, 9, 10, 11, 12 _____
Exhibits.....	_____
Other.....	_____

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

The instant motion by Third-Party Defendant Triumph Construction Corp., (“Triumph”) is for an order pursuant to CPLR §3212(b) dismissing the third party complaint and all cross-claims with prejudice, on the grounds there is no basis which plaintiff can prevail. The motion is opposed by Plaintiff, David Poplaski, (“Plaintiff”), Defendant/Third-Party Plaintiff/Fourth-Party Plaintiff, Consolidated Edison Company of New York Inc., (“Con Ed”), Third Party Defendant Nico Asphalt, Inc., (“NICO”). The motion is denied.

In addition, Third-Party Defendants Nico move pursuant to CPLR section 3212 to dismiss the complaint, the third party complaint and all cross claims and counter claims against them. The motion is denied.

The Plaintiff, a police officer was injured while on duty. Plaintiff claims that on January 27, 2006 near 22 West 23<sup>rd</sup> Street in the County of New York, while traveling with a group of fifteen officers, he was caused to fall from his scooter after he lost control. He testified that the rear tire of the scooter touched either the edge of a grate in the street or the pavement surrounding the grate. He claims there was a height differential between the grate and surrounding pavement that caused the accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law demonstrating the absence of material issues of fact. (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]); Winegrad v. New York

[\* 4]

University Med. Center, 64 N.Y.2d 851, 853; 487 N.Y.S2d 316 [1985]). However, summary judgment must be denied where the proponent fails to make a prima facie showing of entitlement to judgment as a matter of law. Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (Zuckerman v City of New York, 49 NY2d 557 (1980).

### **TRIUMPH**

Triumph was hired by Con Ed to upgrade a casting which involves opening and raising the casting to street level then backfilling the area. Nico was the restoration contractor who performed the final restoration around the casting for the Triumph work. Triumph argues that the work they performed was started and completed within a few hours on the same day and that Con Ed inspected, approved and paid them for the work they completed. They argue that once completed, NICO was then hired by Con Ed to perform the final restoration.

At a deposition, Mr. Charles, ("Charles") a supervisor at Triumph and a person familiar with installation and re-grade of castings, testified the work was performed in accordance with opening ticket 408627. He testified, the work encompassed three castings (a rectangle grate cover that protects the electrical box that sits below the street level) upgraded to street level on June 4, 2005. Under opening ticket 360934, one casting was upgraded to street level on July 17, 2004. Charles stated the street was opened by a jackhammer and that the castings were called "SC" casting which have three covers. The casting frame is steel which holds the casting covers in place above the electrical box. Charles explained that once the jackhammer is used to open the street, the casting cover and frame are removed so that the area can be backfilled to make the frame fit to grade level with the street. Cement is used and the frame is placed back. In order to raise the frame evenly with the road, steel shim (small pieces of metal) are used to even the frame with the roadway. Once the frame is level with the roadway the casting covers are replaced. The casting covers lock into the frame. If the covers do not fit the frame or are not to grade level once placed in frame, Triumph does not manipulate the casting covers to fit into the frame or to bring them to the grade level. Instead, this would be viewed as a product defect and Triumph would request a new casting from Con Edison. After the cement is cured for 24 hours, the final restoration is done (NICO performed the final restoration work). Charles stated that heavy road traffic and buses can cause the casting to sink, which is unavoidable under these conditions. The work Triumph performed under both opening tickets took place on West 23<sup>rd</sup> Street between Fifth Avenue and Sixth Avenue.

Additionally, in furtherance of their argument, Triumph points to the deposition testimony of George Jensen, a program manager for Con Edison's given in an "unrelated manner". In his testimony he states:

Q: What is the purpose of the grating?

A: Allow ventilation.

Q: Now if repair is needed surrounded a grating who would be responsible for this repair?

A: This would get furnished to a Con Edison rep or representative and potentially a contractor. A Con Edison representative would handle the specific task. Either it would be handled internally or given to an outside contractor.

Q: How many inches off the grating does Con Edison maintain?

A: According to our specs, I believe that it is twelve inches within the frame and the cover.

Q: So the frame and cover would be the edge of the grating, the edge of the metal?

A: That's correct.

Q: And the twelve inches, it's twelve inches off the edge of the metal?

A: That's correct.

Lastly, Triumph includes the testimony of Mr. Dunn ("Dunn"), a Con Edison supervisor who inspected and approved the work performed by Triumph under both Opening Tickets. Dunn testified that if he were unsatisfied with the work performed by Triumph he would not have signed off on the Opening Tickets. If he were unsatisfied he would tell the Triumph foreman and have them fix the problem before he would sign off on the Opening Ticket. Dunn testified that castings degrade due to wear and tear on the street and that he did not know whether Con Ed inspects all castings or only inspects the casting when cited by the New York City Department of Transportation. Con Ed signed off on all of Triumph's work.

Con Ed opposes the motion and argues that the height differential between the roadway and the grating may have been caused by Triumph's failure to properly backfill, compact and tamp the area adjacent to the frame of the grating. Further, they argue that Triumph's reliance on Con Ed's inspection of its work or lack of objection to the work is misplaced because pursuant to the terms of their contract, Triumph is responsible for their work at the site, irrespective of an inspection by Con Ed. In addition, the contract expressly states that contractors are obligated to warrant their work for at least One (1) year from the date of completion (the work was done less than eight months before Plaintiff's accident).

In opposition NICO argues there is a height differential between the outer edge of the grating and the inner edge of the grating and annexes pictures which they argue show a height differential between the outer and inner edge of the grating. They argue that Triumph installed the grating where Plaintiff had his accident and that the frame placed by Triumph is required to

be the same level as the surrounding roadway.

Plaintiff relies and adopts the arguments of Con Ed in their opposition to both Triumph and NICO's motion for summary judgment.

### NICO

NICO performed paving work in front of 22 West 23<sup>rd</sup> Street. The paving work was performed around a casting that was 8.5 feet y 7.6 feet and was inspected by Con Ed. In support of their motion, NICO argues there was no defect with the asphalt roadway surrounding the grating. According to NICO, the only claimed defect is "a sag in the vault grate" which relates to the placement of the vault in the roadway which is the responsibility of Con Ed and the vault re-grade contractor Triumph. Additionally, NICO was not responsible for the placement of the vault nor the leveling of the vault with the surrounding roadway. NICO contends that Con Ed's own supervisors established that their work was done without defect and that the deposition testimony of Mr. Russo, a Con Ed supervisor who testified that Con Ed makes sure the paving is done properly; that it is properly rolled out; that the roller vibrates to compact the asphalt; and that the asphalt sealer is properly applied in addition to ensuring NICO's work was level with the surrounding street. Lastly, NICO references the deposition of Mr. Denegall ("Denegall") a superintendent for NICO who testified the work of NICO was properly performed, inspected and approved. This, they argue is evidence they were not responsible or did not contribute to Plaintiff's accident.

Triumph opposes on the grounds that questions of fact exist as to whether NICO caused or contributed to Plaintiff's accident by failing to adequately lay asphalt around the grate. They argue that Plaintiff was unable to identify what caused the back wheel of the scooter to skid and they point out that NICO was responsible for the final paving of the area around the grate.

In opposition to NICO's motion, Con Ed argues that the alleged height differential may have been caused by NICO's failure to properly restore and permanently re-pave the area adjacent to the frame of the grating during their work. To the extent that NICO and Triumph argue that Con Edison inspected and approved their work, Con Ed argues that pursuant to the terms of their contract with Con Ed, both NICO and Triumph are responsible for their work at the site irrespective of Con Ed's inspection or approval of the work. Further, Con Ed argues the Standard Terms and Conditions of Construction Contracts expressly state that contractors are obligated to warrant their work for at least one (1) year from date of completion unless a longer period is specified. Further, Con Ed argues that under Section 2-11(e) 16(ii) of the New York City Administrative Code, regarding street openings and Excavations, Triumph and NICO were obligated to warrant their work for at least three (3) years from date of completion. Further, they contend that both NICO and Triumph agreed to purchase insurance to protect Con Ed's interest. Con Ed does not deny they are responsible for the area within 12 inches of its facilities. Instead, they argue the contractor's obligation under their contracts is not altered by this fact and to this end, Con Ed seeks indemnity and/or contribution form the contractors who did the work and created the condition. Lastly, Con Ed contends that Plaintiff was unsure what caused his scooter to lose control. They argue that Plaintiff testified the rear tire touched either the edge of a grate

could not say whether the rear wheel of the scooter skidded due to a raised grate in the street or the pavement surrounding the grate and that Plaintiff claims there was a height differential between the grate and the surrounding pavement that cause his accident.

**CONCLUSION**

The questions as to whether a height differential existed between the roadway, and the subject grating and whether it may have been caused by Triumph's failure to properly backfill, compact and tamp the area adjacent to the frame, or whether it was caused by NICO's failure to properly restore and permanently re-pave the area adjacent to the frame of the grating is a question of fact for the jury to decide. (Epstein v. Scally, 99 AD2d 713, 472 NYS2d 318 [1<sup>st</sup> Dept. 1984]). Issue finding, not issue determination, is the appropriate function of summary judgment. (Magi Communications v. Jac-Lu Assoc., 65 AD2d 727, 410 NYS2d 297 [1<sup>st</sup> Dept, 1978]). Moreover, it is clear from the testimony of the Plaintiff that he is uncertain whether the edge of the grate or the pavement surrounding the grate caused the rear wheel of the scooter to skid. As such, NICO's motion for summary dismissing the complaint, the third party complaint, and any and all cross claims or counterclaims against them is denied. In addition, Triumph's motion for summary judgment is denied. This constitutes the decision and order of the Court.

**FILED**

JAN 23 2013

NEW YORK  
COUNTY CLERK'S OFFICE



**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: January 15, 2013

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court