SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

JILLIANN L. HASBROUCK, as Executrix of the Estate of NELIDA ELIAS, deceased,
Plaintiff,

-against-

THE CITY OF NEW YORK, GB DEVELOPMENT GROUP II, LLC, HRH CONSTRUCTION LLC, EMPIRE CITY SUBWAY COMPANY (LIMITED), VERIZON NEW YORK INC. and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendants.

INDEX NUMBER 109452/2008
Mot. Seq. 004 & 005
DECISION & ORDER

JOAN M. KENNEY, J.:

Motion sequences bearing the numbers 004 and 005 are hereby consolidated for disposition.

In this personal injury action, defendant GB Development Group II, LLC (GB) seeks an Order, pursuant to CPLR 3212, dismissing the complaint. Defendant HRH Construction LLC (HRH) cross-moves for an Order, pursuant to CPLR 3212, dismissing the complaint as against it and for other relief (collectively, Mot. Seq. 004).

Defendant Consolidated Edison Company of New York, Inc. (Con Ed) moves, pursuant to CPLR 3212, to dismiss the complaint as against it (Mot. Seq. 005).

FACTUAL BACKGROUND

Nelida Elias (Elias) was allegedly injured on October 31, 2007, at about 8:30 PM, when she tripped and fell in the roadway of Sixth Avenue, at or about West 18th Street, New York County.

Elias commenced the instant action on July 10, 2008, asserting negligence by the City of New York (the City) as owner of the property, and by the other defendants in performing construction work at the location. Marlow affirmation (mot. seq. 005), exhibit A (the

Complaint). Elias died on October 4, 2012, and, pursuant to the decree of the Sullivan County Surrogate's Court, Jilliann L. Hasbrouck (plaintiff) was appointed executrix of Elias's estate, and the caption was amended accordingly. *Id.*, exhibit K.

TESTIMONY

Elias was deposed on June 19, 2009. Zecca affirmation (mot. seq. 004), exhibit G (Elias tr). She said that she was returning to her car at the time of the incident, after visiting a store on Sixth Avenue. *Id.* at 10-11. Wilfredo Badillo (Badillo), a family friend, whom she had just met, was walking with her. *Id.* at 12.

Elias stated that she had to walk on the roadway, because the sidewalk on the west side of Sixth Avenue was blocked by barricades. *Id.* at 14-15. She testified that orange construction barricades kept her off the sidewalk itself, and that blue police barricades set up a path on the roadway, which was otherwise occupied by the annual Halloween parade. *Id.* at 16-17. She said that "[y]ou couldn't see a thing. There were so many people there." *Id.* at 18. However, the parade had not yet reached West 18th Street. *Id.* at 127. Badillo walked next to Elias, to her left, maybe a half pace ahead of her. *Id.* at 130. He was closer to the parade and she was closer to the sidewalk, very close to the curb. *Id.* at 87. Elias testified that no one pushed her before she fell. *Id.* at 153.

When Elias crossed West 18th Street, "I felt this leg go like this, twist to the side. And my foot, I felt like it was going down. And this whole foot went into the hole." *Id.* She said that she did not see the hole before she stepped into it. *Id.* at 19. After the incident, she saw it, and described it as triangular, left exposed by a metal plate that had shifted. *Id.* at 20. "I saw this heavy metal plate that was like this thick. And when they got me out, I definitely looked. I

wanted to know where I fell and that's when I saw the hole." *Id.* at 139. She had not seen the metal plate before as she walked in the street. *Id.* at 21. She estimated at first that the hole was about six inches deep after feeling the ground underneath with her toes, but she also said that her "whole leg is in there." *Id.* at 21-22. It was big enough to allow her thigh to fit in. *Id.* at 37.

She thought that she was stuck in the hole about ten minutes, until police officers got her out. *Id.* at 37-38. However, she said that it took about two hours for an ambulance to arrive, because the streets were closed for the parade. *Id.* at 40. She was taken to an emergency room, and told that her left ankle was fractured. Her left leg was put in a cast, and she was given painkillers and crutches. She was discharged after several hours. *Id.* at 43-45.

When Badillo returned to the scene the next day to take photographs, Elias said that he told her that "the whole thing is different" (*id.* at 150), which accords with her unwillingness to identify the resulting photographs as showing the area looking substantially the same as it did when the accident occurred (*see id.* at 26-28, 136-137, 139-140).

Scott Heller, a consultant to GB, the owner of the adjacent property at 100 West 18th Street, testified on October 28, 2011. Zecca affirmation (mot. seq. 004), exhibit H (Heller tr). He said that GB was constructing a new building at the corner of Sixth Avenue and West 18th Street, with HRH as general contractor. Heller would regularly visit the construction site to check progress, and to attend weekly meetings with HRH. *Id.* at 15. He never heard of defendant Empire City Subway Company (Limited) (Empire), but he knew that defendant Verizon New York Inc. (Verizon) was providing communication services to the new building. *Id.* at 23-24. He identified Con Ed as installing gas and electric connections, working inside and outside the building. *Id.* at 36, 55. He said that nonparty Time Warner installed

telecommunications facilities or equipment, as well. *Id.* at 37.

Heller did not recall seeing any metal construction plates in the immediate area of the building. *Id.* at 28. He was unaware of the presence of any metal plates at or near the construction site. *Id.* at 32-33. He did not see or know of any work by the City at the construction site. *Id.* at 45. He said that the project involved reconstructing the sidewalk in front of the building on Sixth Avenue. *Id.* at 49.

Heller said that GB made no preparations at the site for the 2007 Halloween parade. *Id.* at 34. As far as he knew, GB had no communications with the City, or any of its agencies regarding the 2007 Halloween parade. *Id.* No questions to or answers by Heller dealt with the issue of notice, by any entity public or private, about the condition of the sidewalk or roadway in front the building site.

Fatima Rosas (Rosas), a record searcher with the City's Department of Transportation (DOT), testified on May 9, 2012. Zecca affirmation (mot. seq. 004), exhibit I (Rosas tr). She said that she conducted a roadway search for records pertaining to Sixth Avenue between West 17th Street and West 18th Street, for the period October 31, 2005 to October 31, 2007, pursuant to plaintiff's demand. *Id.* at 13. Rosas did not perform an intersection search or a sidewalk search for the indicated location. *Id.* at 65-66. Her roadway search produced 56 permits, among other records, and she was asked particularly about permits granted Empire, HRH, and non-parties Tonar Construction Corp. and Atlantic Hoisting & Scaffold to place equipment or material on the roadway, or to create a temporary pedestrian walkway. Metal plates were not mentioned in any of the questions or answers about these permits.

Rosas was asked about specific references to metal plates appearing on a listing of

complaints to the City's 311 line about conditions in the vicinity of the accident. None of the complaints arose in 2007. "Plate condition noisy" is cited seven times between June 1, 2006 and September 15, 2006. *Id.* at 49-50. Where details are provided, the records state "Plate loose and noisy," "two loose noisy plates," "Noisy street plate middle of the street," "Caller stated a steel plate is making noise every time a vehicle drives over it." In one instance, on June 1, 2006, DOT "inspected the condition and issued a corrective action repair to the contractor or utility corporation." *Id.* at 51. The responsible party was unnamed, however, and Rosas had no independent knowledge of its identity. She said that she had no personal knowledge of any of the work represented by the records produced. *Id.* at 61. For a complaint dated August 14, 2006, about "a metal plate in the street put there by construction workers," the followup said "Con Ed crew on site working to repair the situation." *Id.* at 55.

Jennifer Teasley (Teasely), a record searcher for Con Ed, testified on August 1, 2012. Zecca affirmation (mot. seq. 004), exhibit J (Teasely tr). She commented on a search for records dealing with the intersection of Sixth Avenue and West 18th Street, for the period October 31, 2005-October 31, 2007, conducted by a co-worker. *Id.* at 11. She said that the search produced no record of opening tickets[1] or permits. *Id.* at 12. There was, however, an "emergency ticket," for February 12, 2007. *Id.* at 13. While it is unclear what work was needed and/or performed that day, Teasley testified that no metal plates on the ground were involved with that emergency ticket. *Id.* at 14.

Teasley was asked about a permit granted to Con Ed for the period October 6, 2007-November 6, 2007, for installation of gas lines at the subject location. *Id.* She said that the

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[1] Teasley explained that an opening ticket "is a Con Ed document that is generated whenever excavation or restoration is performed." Teasley tr at 12-13.

permit "was to open the roadway and/or sidewalk at West 18th Street between 6th and 7th Avenues." *Id.* She contended that the absence of opening tickets or paving orders for this permit demonstrates that "there was no work done under this permit number." *Id.* at 15. She gave the same response regarding work permits granted Con Ed on October 25, 2007 to construct or alter a manhole, and on September 21, 2007, to remove or install electric equipment. *Id.* at 15-16.

Teasley said that an opening ticket accompanied a permit granted Con Ed on July 28, 2006 to construct or alter a manhole on Sixth Avenue, "70 feet north of West 17th Street," which seems to contradict her testimony that no opening tickets were found in the record search for the period October 31, 2005-October 31, 2007. *Id.* at 17. She read the opening ticket as to not involve any metal roadway plates, but she could not answer whether the work involved the moving of any metal plates already in place. *Id.* at 18-19.

Teasley had no information about a permit granted to Con Ed on October 16, 2006 to open the open the roadway, because she was only given a copy the morning of her deposition. *Id.* at 20. That was also the case with a permit granted to Con Ed on December 23, 2005, to repair a traffic light. *Id.* at 20-22. She had no explanation why these permits did not emerge from Con Ed's original record search, unless they fell outside the boundaries of the record search. *Id.* at 22, 28-29. She said that she made a quick search against these newly-discovered permits before testifying, without finding any associated records, but that she would make another, presumably more thorough, search. *Id.* at 29-31.

Calvin Gordon (Gordon), a records searcher for Empire, testified on August 13, 2012. Zecca affirmation (mot. seq. 004), exhibit K (Gordon tr). He said that he duplicated a record search done previously by a colleague, going back three years, for Sixth Avenue between West

17th Street and West 18th Street. *Id.* at 11-12. He stated that three jobs fit the search criteria. *Id.* at 12. They were all excavations performed by Empire personnel. *Id.* at 13. The "paving restoration" was done by an outside contractor, a nonparty. *Id.* at 14. He had no personal knowledge of any of the work performed.

According to the records Gordon produced (Silverstein affirmation [mot. seq. 004], exhibit L), the first job was a trench approximately 62.5 feet long, repaved on February 18, 2005. *Id.* at 15-16. The second job was an excavation to lay a pipe (no dimensions given), completed on March 14, 2007. *Id.* at 18-19. The third job involved the construction of a 40-foot conduit from October 28, 2007 to November 4, 2007, the period in which Elias was injured. *Id.* at 20-22. The conduit was meant to carry cable separately for Verizon and Time Warner. *Id.* at 23.

Gordon said that it was normal practice for Empire to put down a metal plate over an open excavation. *Id.* at 41. His records did not indicate actual plate usage. *Id.* When shown Badillo's photographs, he identified a metal plate pictured as Empire's, by the markings.[2] *Id.* at 43. He said that, unless it received notice that a plate has shifted, Empire did not inspect the condition of plates between work sessions. *Id.* at 50. Empire did not receive a violation on or about October 31, 2007, while the third job was being performed, when presumptively one or more metal plates were laid down to cover the open excavation. *Id.* at 52. He acknowledged that that was no proof that the area had been inspected satisfactorily or at all. *Id.*

Gordon testified that foremen may have kept detailed notes about each job, but they would not be retrieved under a normal record search. *Id.* at 74. He was certain that Verizon performed no work in connection with the work of constructing the conduit, and had no role in

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[2] Three of the four photographs attached to the Brauser affidavit (Zecca affirmation, exhibit L) show metal plates on the roadway, abutting the sidewalk. Two of them are prominently engraved "ECS 24," which Gordon identified as Empire's markings.

placing the metal plates, although it was a beneficiary of the job. *Id.* at 80.

LEGAL STANDARDS

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, 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).

To establish a prima facie case of negligence, "a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence." *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 (1st Dept), *affd* 64 NY2d 670 (1984). "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).

DISCUSSION

GB's Motion for Summary Judgment – Mot. Seq. 004

GB owns the property adjacent to the location of the incident. It argues that it had no

duty of care to pedestrians walking on the roadway, and that it did not own, operate, control, install, maintain or have a special use of metal plates in the roadway. *See generally* Brauser aff, Zecca affirmation (mot. seq. 004), exhibit L. Further, GB contends that it did not create the hole in the roadway upon which the metal plate rested, and that it had no notice of the alleged hazard that caused Elias's injury.

Elias's description of the incident places her on the roadway, that is, on the street, not the sidewalk, as she walked down Sixth Avenue between West 18th Street and West 17th Street.

"Q. But at the time the accident happened, were you walking on the roadway?

A. Yes.

Q. Was any part of your body on the sidewalk at the time the accident occurred?

A. No."

Elias tr at 137-138.

Access to the sidewalk was blocked by construction barricades, and Elias said that police barricades channeled foot traffic on the roadway, keeping pedestrians from interfering with the Halloween parade moving up Sixth Avenue. Plaintiff repeats this in opposing the instant motion. "There was a blue police barricade separating decedent from the Halloween parade and an orange barricade separating Ms. Elias and the sidewalk." Slavitt aff (mot. seq. 004) at 3. Elias described stepping into a triangular hole formed by heavy metal plates lying on the roadway, and placed it "[a]round 18 inches away from the sidewalk." Elias tr at 19. The metal plates, identified as Empire's, seen in Badillo's photographs, sit in the roadway, along the curb.

Plaintiff's bill of particulars describes the location of the incident as the "roadway of Sixth Avenue . . . in front of the subject building premises bearing street address 100 West 18th Street," the building site owned by GB. Zecca affirmation (mot. seq. 004), exhibit F, ¶ 2. Access

to the sidewalk was barred by the orange construction barriers. "Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner." *Pevzner v 1397 E. 2nd, LLC*, 96 AD3d 921, 922 (2d Dept 2012). The term "sidewalk," is described at section 19-101 (d) of the Administrative Code as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." *Stoloyvitskaya v Dennis Boardwalk, LLC*, 101 AD3d 1106, 1107 (2d Dept 2012). The public sidewalk in front of 100 West 18th Street was GB's responsibility. The public roadway on Sixth Avenue was not GB's property or ordinarily its responsibility, and there are no allegations to the contrary.

Plaintiff, however, opposes GB's summary judgment motion, because of GB's alleged "nondelegable duty as owner of premises 100 West 18th Street, to safely maintain the public roadway in front of the building premises, where the negligence of their independent contractor creates the dangerous condition." Slavitt aff (mot. seq. 004) at 5.

> "Although one retaining an independent contractor generally is not liable for the independent contractor's negligence, there are exceptions to this rule of non-liability, including situations where the work of the independent contractor is for the benefit of the owner of a building under a non-delegable duty not to cause harm to members of the public traveling on the nearby public sidewalk."

Emmons v City of New York, 283 AD2d 244, 245 (1st Dept 2001); *Rothstein v State of New York* (284 AD2d 130, 131 [1st Dept 2001] ("One of a number of settled exceptions to the rule exempting a property owner from liability for the negligence of its independent contractor is a situation where the contractor's negligence causes a dangerous condition on a sidewalk or public highway").

The cases relied upon by plaintiff hold the property owner liable for the negligence of its

contractor where the contractor's negligence causes a dangerous condition on a sidewalk or public highway. For instance, in *Emmons*, "the evidence indicates that plaintiff fell in a thoroughfare at or near the area recently excavated by an independent contractor repairing appellant building owner's main control water valve . . ." 283 AD2d at 245. In *Rothstein*, the property owner may be liable because its contractor's work "involved removing a fence next to the sidewalk and repeatedly using the path across the sidewalk for its trucks to gain access to the work site . . ." 284 AD2d at 131. GB counters with the critical observation that there is no evidence that it hired Empire as an independent contractor, because it asserts that it never, in fact, hired Empire as an independent contractor.

Heller, GB's witness, testified that he never heard of Empire. The only time GB is mentioned in Gordon's transcript, Empire's witness, is to identify counsel. Gordon identifies the customers of the work order for the period October 28, 2007 to November 4, 2007, at the accident site, as "Verizon and Time Warner Cable." Gordon tr at 25. GB argues that the only connection between GB and Empire is found in plaintiff's conclusory allegations, which are not a substitute for material fact. The teachings of *Emmons*, *Rothstein* et alia do not comport with the circumstances at issue here. The alleged dangerous condition posed by Empire's metal plates cannot be attributed to GB, whose premises ended at the sidewalk's curb.

Plaintiff also maintains that GB had a "nondelegable duty to not divert persons using the public sidewalk in front of their premises to a defective passageway." Slavitt aff (mot. seq. 004) at 5. Even when engaging a contractor, a property owner's "duty to the public to refrain from diverting persons lawfully using the municipal sidewalk to a defective passageway thereon during the progress of the work was nondelegable." *Ryan v Gordon L. Hayes, Inc.*, 22 AD2d 985, 985 (3d Dept 1964), *affd* 17 NY2d 765 (1966); *Hunter v City of New York*, 23 AD3d 223,

224 (1st Dept 2005) ("denial of summary judgment dismissing the action as against the . . . defendants was correct, since there are triable factual issues as to whether the sidewalk encroachment . . . proximately caused plaintiff's harm by directing her toward the alleged defect").

HRH was indisputably GB's general contractor for the building project, which Heller, for GB, testified involved reconstructing the sidewalk in front of the building on Sixth Avenue. Heller tr at 49. There is no suggestion that the orange construction barricades that blocked access to the sidewalk were the work of anyone but HRH. That raises the issue of GB's responsibility, vicariously from HRH, for directing pedestrians to a defective passageway, the available space on the roadway, between the construction barricades and the police barricades, covered by the metal plates. *Cf. Ryan*, 22 AD2d 985; *Hunter*, 23 AD3d 223. Elias described the environment, starting with the barricades on her left as she walked south.

> "A. It's a blue – with the police thing on it. That looks like --
>
> Q. A blue police barricade?
>
> A. Yeah.
>
> Q. So, the blue police barricade was between you and the parade or between you and the sidewalk?
>
> A. I'm in the middle of both barricades. Everybody is walking. It's the street, the sidewalk is barricaded, and this part going to the parade is barricaded."

Elias tr at 16-17.

HRH placed the barricades on the boundary of its construction site, on behalf of GB. There has to be consideration of risk to others as a result of this act. There is an instructive ruling in *Coulton v City of New York* (29 AD3d 301, 302 [1st Dept 2006]), with a fact pattern similar to the instant action.

> "Although [defendant] was not responsible for causing the breaks and irregularities in the sidewalk, it did have a duty not to create an unsafe condition when it narrowed the sidewalk by erecting the plywood cover around the building, and to that extent it may have increased the risk that pedestrians might trip on the broken and uneven portion of the sidewalk."

In *Coulton,* the defendant's motion for summary judgment was denied, because "the relevant portion of the sidewalk was in a broken and irregular condition before [the defendant] began working." *Id.* As Gordon testified, Empire, at the time of the accident, was in the middle of a project to construct a conduit to carry cable for Verizon and Time Warner, which he identified as the customers for the job. The work began on or about October 28, 2007, a Sunday, and ended on or about November 4, 2007, a Sunday. Gordon said that the work had a "weekend stipulation," that is, the work was to be performed only on weekends. Gordon tr at 23, 39-40. He stated that "[t]here was an excavation opening" in between the two weekends. *Id.* at 37. He said that he was "pretty sure" that plates were put down to cover the open trench, because "it is the normal practice for us to plate an open excavation if we are not there [working]." *Id.* at 41. Empire's records normally did not track the placement of metal plates on streets, but Gordon identified the metal plates in Badillo's photographs as Empire's. While no time line for GB's project is provided, Heller testified that demolition on the site began in "the spring of '05." Heller tr at 23.

Elias's path was delineated by the orange construction barriers at the edge of the sidewalk and the blue police barriers on the roadway, in her own words. GB, through its agent HRH, was responsible for the orange construction barriers, and there is no disputed factual basis for concluding that they were erected before October 28, 2007, when, arguably, there might have been no hazardous condition on the roadway. GB's "papers also fail to attach any records establishing lack of notice or state what records if any were checked to substantiate their claim

that GB lacked notice." Slavitt aff (mot. seq. 004) at 19. GB offers two unconvincing arguments regarding notice: (1) Heller never saw metal plates in the vicinity; (2) Elias never saw the hole before she stepped into it. Since GB has failed to provide evidentiary proof on the issues of whether HRH created an unsafe condition by erecting the orange construction barriers after Empire began its excavation, for which GB might be held accountable, and whether it had notice of the hazardous condition on the roadway, its motion for summary judgment shall be denied.

Besides dismissal of the complaint and any other claims as against it, GB requests summary judgment on its claims for common-law indemnification against Empire and contractual indemnification against HRH. On April 4, 2014, the court issued an order in this action that, among other things, precluded Empire and Verizon "from offering any evidence at the trial of this action respecting any defenses to cross claims interposed by GB Development Group II, LLC against them" for failing to comply with certain discovery demands/orders. Upon reargument, on July 30, 2014, the court restored the right of Empire and Verizon to offer evidence respecting GB's cross claims.

Empire faults GB's motion on two procedural grounds: GB's failure to annex HRH's answer to the complaint, pursuant to CPLR 3212 (b), and the alleged late submission of the motion. GB did not possess HRH's answer when it filed its notice of motion. Zecca affirmation (mot. seq. 004), ¶ 10. HRH subsequently acknowledged that it had an incorrect address for service to GB's counsel. Zecca reply affirmation (mot. seq. 004), exhibit 1. In any event, HRH's answer is annexed to HRH's cross motion, allowing the court to proceed to the merits of the applications before it, because the record is sufficiently complete. *Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590 (1st Dept 2008) (defendant remedied defect of failing to provide a copy of the answer in its moving papers, by annexing it to reply papers).

The progress of this litigation was disrupted by Elias's death, on October 4, 2012, just days after the note of issue was filed, on September 19, 2012. Plaintiff was substituted on November 26, 2012, and GB's motion is dated December 11, 2012, within the 15 days permitted by CPLR 1022. The court will proceed to the merits of the dispute on this basis.

GB seeks to apply the principles of common-law indemnity against Empire, in case GB must compensate plaintiff. *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 (2011) ("our case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity"); *Murray Bresky Consultants, Ltd v New York Compensation Manager's Inc.*, 106 AD3d 1255, 1258 (3d Dept 2013) ("Common-law indemnification, as alleged here, is a quasi-contract claim in which a contract is implied in law in order to avoid unjust enrichment, accomplished by shifting a loss by placing the obligation where in equity it belongs") (internal quotation marks and citation omitted).

GB did not own or control the site of the accident, the Sixth Avenue roadway; it did not create the defect at issue; it was not responsible for the placement of the metal plates on the roadway. The misaligned metal plates, which created the hole that Elias stepped into, were owned by Empire, according to its own witness. However, GB may be liable for plaintiff's injuries under the theory that it may have increased the risk to pedestrians by placement of the orange construction barriers. Under those circumstances, GB's motion for summary judgment on its claim for common-law indemnification against Empire is conditionally granted, awaiting a trial on the issue of liability.

HRH did not formally oppose GB's motion for contractual indemnification, but, instead,

cross-moved for summary judgment, dismissing the complaint and all claims as against it. Therefore, GB's motion for contractual indemnification against HRH will be determined below along with HRH's cross motion.

HRH's Cross Motion for Summary Judgment

Plaintiff initially opposes HRH's cross motion, brought in motion sequence 004, instituted by GB, because it is made against a nonmoving party, that is, plaintiff. "The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party." *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 (1st Dept 2013). However, *Kershaw* also notes that "courts have deemed this mislabeling a 'technical' defect which will be disregarded, particularly where the nonmovant does not object and it results in no prejudice to the nonmoving party." *Id.*; *see also Volpe v Canfield*, 237 AD2d 282, 283 (2d Dept 1997) ("Such a technical defect [as seeking affirmative relief from a nonmoving party] may be disregarded where, as here, there is no prejudice, and the plaintiff had ample opportunity to be heard on the merits of the relief sought [*see,* CPLR 2001]"). Indeed, plaintiff proceeds to oppose HRH's cross motion, at length, on the merits. The court, therefore, will proceed to the merits, as well.

HRH argues for dismissal of the complaint as against it, because it had no connection to the accident. It claims that Elias fell on metal plates on the Sixth Avenue roadway, which were adjacent to its construction project, but in no way associated with the construction project. Here, it is known that Empire's work began on October 28, 2007, under a weekend stipulation, requiring the open trench to be covered until the work resumed the following weekend, after the date of the incident. HRH states that Empire's ownership of the metal plates was established by the testimony of Gordon, Empire's witness. HRH contends that it did not engage Empire to

perform any work at the construction site, and that HRH had no responsibility for Empire's work.

HRH submits a copy of a license agreement between GB and Verizon, dated September 8, 2007, allowing Verizon to construct "Fiber optic network facilities, including but not limited to: 4" PVC entrance pipes," for GB's building. Silverstein affirmation (mot. seq. 004), exhibit K. Empire's work order report, printed on October 30, 2007, describes the work requested for the customer Verizon, at 18th Street and Sixth Avenue, as "CONSTRUCT 2-4" CONDUITS." *Id.*, exhibit L. By contrast, there is no evidence of HRH's involvement with Empire's work for Verizon. In this instance, HRH cannot be liable for the creation or maintenance of the hazardous condition, the alleged misalignment of the metal plates on the Sixth Avenue roadway, that caused Elias's injury.

Plaintiff attempts to implicate HRH in this incident, because it placed barricades on the sidewalk in front of the building under construction, thereby forcing Elias, and other pedestrians, onto an allegedly defective passageway. Plaintiff insists that "HRH offers no proof whatsoever in admissible form to demonstrate that they are not liable for the defective public roadway that caused plaintiff decedent's accident." Slavitt aff (mot. seq. 004) at 26. As discussed above, in regard to GB's motion, there is no finding that GB or HRH had any role in creating the hazardous condition that resulted in plaintiff's injuries, the hole caused by misaligned metal plates on the roadway. However, HRH has not met its burden of establishing that it did not increase the risk to pedestrians by placement of the orange construction barriers. Therefore, its motion for summary judgment shall be denied.

HRH's cross motion also requested dismissal of all cross claims as against it, thus including GB's application for contractual indemnity. GB's contract, as Owner, with HRH, as

Construction Manager, provides that

> "Construction Manager shall indemnify and hold harmless the Owner from and against all claims, damages, losses, liabilities and expenses, including, but not limited to, reasonable attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss, liability or expense (1) is attributable to bodily injury . . . and (2) is caused in whole or in part by any negligent act or omission of the Construction Manager or anyone directly employed by it."

Zecca affirmation (mot. seq. 004), exhibit M (the Contract), ¶ 17.1.

HRH, as found herein, may not be free of any liability in this action. The placement of the orange construction barriers is part of "the Work" HRH was performing for GB, thereby extending possible contractual indemnification to Elias's claim. GB's motion for contractual indemnification against HRH is granted conditionally, pending a final determination of liability. HRH's cross motion to dismiss all claims as against it is denied accordingly.

Con Ed's Motion for Summary Judgment – Mot. Seq. 005

By order of the court, dated April 4, 2014, Con Ed's answer to the complaint was stricken. Upon reargument, on July 30, 2014, the court restored the right of Con Ed to offer evidence respecting the complaint.

Con Ed requests dismissal of the complaint and all claims as against it, because it claims that it had no ownership or control of the accident site, and no involvement with the creation or maintenance of the allegedly hazardous condition. In Teasley's testimony, which exposed gaps in Con Ed's record searching/keeping, she denied or stated that she had no knowledge that any relevant Con Ed work involved the use of metal plates to cover any excavation in the vicinity. In spite of some confusion, she ultimately denied that Con Ed did any excavations at the accident site any later than February 12, 2007. In particular, she stated that there was no record of

excavation work in the period October 6, 2007 to November 6, 2007, in spite of a corresponding DOT permit. Even assuming she was incorrect, that would not diminish the significance of Empire's records of its work on Sixth Avenue at West 18th Street, and Gordon's identification of Empire's plates at the location as photographed by Badillo the next day.

Additionally, Con Ed supplies the sworn affidavit of George Canzaniello (Canzaniello), another record searcher. Marlowe affirmation (mot. seq. 005), exhibit O. Canzaniello states that he conducted the record searches on the items produced on the morning of Teasley's deposition, work permits granted Con Ed on October 16, 2006 and December 23, 2005, attaching the documents. Canzaniello says that no metal plates were used in connection with the excavation under the October 16, 2006 work permit. *Id.*, ¶ 5. He makes no explicit mention of the use of metal plates on the December 23, 2005 project, nor do the associated documents, although they include the stipulated language that "Full width of roadway shall be opened to traffic when site is unattended." More significantly, the December 23, 2005 work permit actually applies to the east side of Sixth Avenue between West 18th Street and West 19th Street, east and north of the accident site.

While Con Ed's evidence regarding its connection to the accident site is spotty at points, plaintiff offers no facts to the contrary. *Bernstein v City of New York*, 69 NY2d 1020, 1022 (1987) ("plaintiff has failed to show facts and conditions from which the negligence of defendant could have been reasonably inferred"). Under these circumstances, Con Ed's motion for summary judgment shall be granted, and the complaint dismissed as against it.

Con Ed also requests dismissal of all claims for contribution and/or indemnification as against it. "[O]ur case law imposes indemnification obligations upon those actively at fault in

bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity." *McCarthy*, 17 NY3d at 375. Here, Con Ed was not at fault for plaintiff's injuries, and cannot be obliged to compensate or indemnify any other defendant for a damage award to her. All claims as against Con Ed, therefore, shall be dismissed.

Accordingly, it is

ORDERED that that part of defendant GB Development Group II, LLC's motion (mot. seq. 004), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it is denied; and it is further

ORDERED that that part of defendant GB Development Group II, LLC's motion (mot. seq. 004) for summary judgment on its claim for common-law indemnification against defendant Empire City Subway Company (Limited) is conditionally granted; and it is further

ORDERED that that part of defendant GB Development Group II, LLC's motion (mot. seq. 004) for summary judgment on its claim for contractual indemnification against defendant HRH Construction LLC is granted conditionally, pending a final determination of liability; and it is further

ORDERED that defendant HRH Construction LLC's cross motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all claims as against it is denied; and it is further

ORDERED that defendant Consolidated Edison Company of New York, Inc.'s motion (mot. seq. 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all claims as against it is granted, and the complaint is severed and dismissed as against it, with costs and disbursements to it as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that the parties proceed to mediation/trial forthwith.

DATED: September 8, 2014

ENTER:

JOAN M. KENNEY
J.S.C.