| **Gonzalez v City of New York** |
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| 2021 NY Slip Op 30478(U) |
| February 19, 2021 |
| Supreme Court, New York County |
| Docket Number: 161445/2014 |
| Judge: David Benjamin Cohen |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

*Justice*

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**INDEX NO.** 161445/2014

MARIA GONZALEZ,

Plaintiff,

**MOTION SEQ. NO.** 003

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON OF NEW YORK, INC., and SAFEWAY CONSTRUCTION ENTERPRISES, INC.,

**DECISION + ORDER ON MOTION**

Defendants.

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CONSOLIDATED EDISON OF NEW YORK, INC.

Third-Party Plaintiff,

Third-Party
Index No. 595469/2016

-against-

SAFEWAY CONSTRUCTION ENTERPRISES, INC.

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 108, 109, 111, 112, 113, 114, 115, 120

were read on this motion to/for SUMMARY JUDGMENT.

In this trip and fall action commenced by plaintiff Maria Gonzalez, defendants Consolidated Edison ("Con Ed") and Safeway Construction Enterprises ("Safeway") move, pursuant to CPLR 3212, to dismiss all claims and cross claims against them. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

## FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an incident on February 11, 2014, in which plaintiff was allegedly injured when she tripped and fell on a roadway plate located at the intersection of 93rd Street and Columbus Avenue in Manhattan. Doc. 1. The location where plaintiff fell was allegedly owned by defendant The City of New York ("the City"), which "had granted permits, licenses and/or contracts" to Con Ed to perform work there. Id. Con Ed allegedly installed metal road plates at the intersection but failed to properly secure them, thereby creating a tripping hazard. Id.

In her notice of claim filed in April 2014, plaintiff alleged that she was injured when she tripped and fell on a raised metal plate at the intersection of 93rd Street and Columbus Avenue. Doc. 64. At her 50-h hearing in June 2014, plaintiff testified that she was injured when she tripped on a metal plate in the roadway at that intersection. Doc. 74 at 43.

Plaintiff commenced the captioned action by filing a summons and complaint against the City and Con Ed on November 17, 2014. Id. Con Ed joined issue by its answer filed December 23, 2014. Doc. 2.

In her bill of particulars against Con Ed dated April 29, 2015, plaintiff alleged that she was injured on February 11, 2014 when she tripped and fell in the crosswalk on the east side of the intersection of West 93rd Street and Columbus Avenue in Manhattan. Doc. 102. She further claimed, inter alia, that the incident occurred due to the negligence of Con Ed in its operation, control, repair and maintenance of the road plates at that location, including its failure to secure the plates to the roadway, and alleged violations of multiple provisions of the New York City Administrative Code ("NYCAC"). Id.

In her bill of particulars against Safeway, plaintiff alleged, inter alia, that it was negligent and created a public nuisance by failing to properly install the metal plates, and that it violated numerous sections of the NYCAC. Doc. 103.

On June 15, 2016, Con Ed commenced a third-party action against Safeway alleging contribution, contractual and common law indemnification, and breach of contract to procure insurance. Doc. 10.

On July 28, 2016, plaintiff amended the complaint to name Safeway as a defendant. Doc. 18. In her amended complaint, plaintiff alleged that the City and/or Con Ed had granted Safeway "permits, licenses and/or contracts" to work at the site, that Safeway had opened the road at that location, and that metal plates placed by Safeway at the site were improperly secured or not secured at all, thereby creating a tripping hazard. Id.

Con Ed filed its answer to the amended complaint on August 11, 2016, denying all substantive allegations of wrongdoing, asserting several affirmative defenses, and cross-claiming against the City and Safeway for contribution, common law and contractual indemnification, and breach of contract to procure insurance. Doc. 21.

Safeway joined issue by its verified answer filed December 8, 2016, in which it denied all substantive allegations of wrongdoing, asserted several affirmative defenses, and cross-claimed against the City and Con Ed for contribution and common law indemnification. Doc. 24.

At her examination before trial in September 2017, plaintiff testified that she was injured when she tripped and fell "on a metal plate that was in the middle of the street." Doc. 101 at 27. Although she did not see the plate before she fell, she saw it when she looked back after falling and noticed that, although it was surrounded by tar, a portion of the tar approximately 3" wide was missing where she tripped. Id. at 115-117. The plate was approximately 2" above the road

in the area where she fell. Id. at 119. Although she lived one block from the intersection, she never saw the plate prior to the incident and did not know how long the plate was there, who installed it, or how long the 3" section of tar was missing. Id. at 40-41, 102, 119.

In March 2019, Margaret White, a retired inspector for the New York City Department of Transportation ("DOT"), appeared for a deposition pursuant to a subpoena served by plaintiff because her name appeared in records regarding inspections of the accident site. Doc. 114 at 10. Unfortunately, however, White was extremely uncooperative and provided no useful information.

Vincent Farran, a highway and sewer inspector for the DOT, appeared for deposition on behalf of the City in April 2019. Doc. 97. His duties included inspecting roadways to ensure that they were level. Id. at 33. According to Farran, an inspection report dated February 1, 2014 revealed that a notice of violation ("NOV") was issued to Con Ed, which had a permit to work on West 93rd Street between Central Park West and Columbus Avenue, because steel plates at the site, marked "SCE", were not flush with the roadway. Id. at 55-61. The "SCE" marking denoted that Safeway, a subcontractor for Con Ed, owned the plate. Id. at 116. However, Con Ed passed a subsequent inspection at the same site, where holes had been cut in the crosswalk on Columbus Avenue, on February 3, 2014. Id. at 64-66.

Farran was also shown a NOV which he issued on February 6, 2014 (Doc. 96), after he received a complaint about noisy road plates at Columbus Avenue and West 93rd Street on February 5, 2014. Id. at 68-70, 79. The report also reflected that the plates were marked with the letters "SCE" and that, in January 2014, Con Ed had been issued a street opening permit (Doc. 92) to perform gas work at that location. Id. at 70-72, 77-78. Farran issued the NOV because the metal plates at the site had shifted and were not flush with the roadway. Id. at 73, 83-84. On

February 7, 2014, DOT inspector Margaret White inspected the site (Doc. 99) and noted that the condition had been corrected. Id. at 91-92.[1]

On February 8 and 9, 2014, additional noise complaints were made about the plates at the intersection. Id. at 105-108. For this reason, Farran went to the intersection at approximately 4 a.m. on February 10, 2014 to inspect the plates. Id. at 105. He found no loose or noisy plates at the intersection and the plates passed the inspection (Doc. 99) despite the fact that two of them were only "pinned and ramped" but not flush with the ground. Id. at 110-111, 119-120, 123, 174-175.

Farran explained that, in certain circumstances, such as where the metal frame of a manhole was in the way, a plate could not be made to rest flush with the ground, and instead had to be "pinned and ramped", meaning that the plate was secured to the ground with spikes, and then asphalt was applied around the edges of the plate on an angle from grade to the top of the plate. Id. at 166-167, 176, 188-189. Although Farran initially stated that, if a plate were pinned and ramped, it would not have presented a tripping hazard (*id*. at 141), he later stated that a plate which was pinned and ramped could create a tripping hazard because it was uneven (*id*. at 190), and then changed his testimony again to say that pinning and ramping was "an acceptable way of reducing or eliminating tripping hazards when roadway plates [were] being used." Id. at 192.

Farran could not recall whether any part of the ramping at the intersection in question was missing on February 10, 2014 and represented that, had there been asphalt missing from the perimeter of the plate, it would not have passed inspection. Id. at 176. He then stated that there was a "[p]ossibility" that the plate would not have passed inspection if asphalt was missing from the perimeter of the same. Id. at 178. He explained that this would have depended on the amount

[1] Farran represented that he never did an inspection with White. Id. at 50.

of missing asphalt and that if only "a smidgen" of the asphalt had been missing, the plate would have passed inspection. Id. at 178. When asked to describe a "smidgen", he replied "[m]aybe three inches . . . [f]our inches here." Id. at 179. He then stated that if the amount of missing asphalt would have been large enough to create a tripping hazard, Con Ed definitely would not have passed the inspection on February 10, 2014. Id. at 179-180.

Sephir Hamilton, Executive Vice-President of Safeway, appeared for deposition on behalf of that entity in June 2019. Doc. 98 at 7. He confirmed that Safeway was hired by Con Ed pursuant to a purchase order in July 2014 (Doc. 93) and that it was present at the site in January 2014 and on February 10-12, 2014 working on a "gas job." Id. at 25, 30, 32-33, 73. Safeway was required to open the road in that area and placed road plates marked "SCE" down after it was finished working in order to protect the public from the openings. Id. at 29-30. He explained that, whenever plates were set, the Safeway crew used cold patch, a sticky and spreadable asphalt product, to create "a gradient ramp between the road surface and the top of the plate", and that the purpose of the ramp was to protect pedestrians, bicyclists, and motorists from being subject to a sudden gradient." Id. at 39-40. He conceded that an improperly laid plate could cause one to trip and fall. Id. at 40-41. He insisted that, although every plate Safeway used was pinned and ramped, it was still possible that one could come loose and make noise. Id. at 54. Hamilton further testified that Con Ed did not perform any work at the site or supervise or control Safeway's work. Id. at 78-79.

Adelino Azevedo, foreman for Safeway, appeared for deposition on behalf of that entity in September 2019. Doc. 95 at 8, 11. He testified that Safeway installed metal plates at the site, that they were to be flush with the road surface, and that a plate could not be flush with the road surface if placed over a manhole. Id. at 30, 40, 46, 52-53.

Plaintiff filed a note of issue and certificate of readiness on January 31, 2020. Doc. 91.

By order entered October 5, 2020, this Court (Frank, J.) granted the City's motion for summary judgment (motion sequence 002) dismissing the complaint against it.

Con Ed and Safeway now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Doc. 82. In support of the motion, their attorney argues that said defendants did not owe any duty to plaintiff. Doc. 104. Counsel further asserts that neither of said defendants created the allegedly dangerous condition nor had actual or constructive notice of the same. Id.

In opposition, plaintiff's counsel argues that defendants failed to establish their prima facie entitlement to summary judgment as a matter of law by adducing documentary evidence in admissible form. Doc. 111. Counsel further asserts that the motion must be denied because defendants created the alleged defect and/or had constructive and actual notice of the same. Id. Additionally, plaintiff's attorney maintains that, even if defendants established their entitlement to summary judgment, issues of material fact exist which warrant the denial of their motion. Id.

Plaintiff submits an affidavit in opposition to the motion in which she states that, on February 11, 2014, she tripped on the edge of a metal plate at the intersection of West 93rd Street and Columbus Avenue. Doc. 112. She further states that she saw "a gap in the asphalt/tar ramping" around the plate and that she could see into the hole opened in the roadway, which was beneath the plate, where the asphalt was missing. Id.

Plaintiff's counsel also submits the affidavit of Nicholas Bellizzi, P.E., a licensed professional engineer, who opines that defendants failed to comply with 34 RCNY section 2-11, entitled Street Openings and Excavations, which requires, inter alia, that a plate covering an

opening in a roadway must be large enough to cover the entire opening. Doc. 113. He further opines that the missing asphalt created a tripping hazard known as a "toe trap". Id.

In reply, defendants assert that they did not owe plaintiff a duty of care. Doc. 120. They further assert that they did not create or have actual and/or constructive notice of the alleged condition. Id.

**LEGAL CONCLUSIONS**

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Such a motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as by pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If the moving party meets its burden, it becomes incumbent upon the non-moving party to establish the existence of material issues of fact (*Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers.*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

Before a party may be found negligent, it must owe a duty to the injured party (*see Espinal v Melville Snow Contractors Inc.*, 98 NY2d 136, 137 [2002]). "[A] contractual

obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal,* 98 NY2d at 138). The Court of Appeals has noted three exceptions to this rule:

> "in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

*(Espinal,* 98 NY2d at 140 [citations, internal quotation marks and alterations omitted]).

"As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" (*Barone v Nickerson*, 140 AD3d 1100, 1101 [2d Dept 2016] [citations omitted]). Here, since plaintiff does not allege the second and third exceptions, this Court will focus solely on the first, i.e., whether Con Ed and/or Safeway failed to exercise reasonable care and launched an instrument of harm.

As noted above, Hamilton admitted that Con Ed did not install the plates or supervise or control Safeway's work. Since Con Ed demonstrated that it did not launch an instrument of harm, it has established its prima facie entitlement to summary judgment and plaintiff has failed to raise a material issue of fact warranting the denial of such relief. Thus, the complaint is dismissed as against Con Ed.

Safeway also demonstrated its prima facie entitlement to summary judgment insofar as it demonstrated that Farran went to the premises in response to a noise complaint at approximately 4 a.m. on February 10, 2014, within 36 hours before the alleged incident, inspected the plates, determined that they were not noisy or loose, and the plates passed the inspection. Farran further stated that the plates would not have passed inspection if *any* asphalt surrounding them had been

missing. Thus, Safeway successfully demonstrated that it did not launch an instrument of harm.[2] This shifted the burden to plaintiff to establish the existence of a triable issue of material fact and plaintiff in turn demonstrated the existence of such a factual issue by submitting Farran's testimony that there was only a "[p]ossibility" that the plates would not have passed inspection if asphalt was missing from the perimeter of the plate and that this would have depended on the amount of asphalt missing. He represented that the plates would have passed inspection if only "a smidgen" of asphalt had been missing, and defined a "smidgen" as "[m]aybe three inches . . . [f]our inches here" and that the plates definitely would not have passed the February 10, 2014 inspection if the amount of missing asphalt had been large enough to create a tripping hazard. Farran's contradictory testimony regarding the circumstances under which plates would pass inspection creates "an issue of credibility as to material facts that is not appropriate for summary determination" (*Mejia v Kennedy*, 124 AD3d 731, 731 [2d Dept 2015] [citation omitted]) and, thus, Safeway's motion must be denied.

Additionally, although not raised by plaintiff, Farran's testimony was contradictory in another significant manner. He initially stated that, if a plate were pinned and ramped, it would not have presented a tripping hazard. He then testified that a plate which was pinned and ramped could create a tripping hazard because it was uneven. Later, he changed his testimony again to say that pinning and ramping was "an acceptable way of reducing or eliminating tripping hazards when roadway plates [were] being used." These contradictions further militate in favor of the denial of Safeway's motion.

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[2] To the extent that Safeway relies on the fact that the plates passed White's inspection of February 7, 2014 to establish that they were properly installed, this Court notes that her inspection reports are not properly authenticated. As noted previously, White gave no meaningful testimony at her deposition. Additionally, since Farran admitted that he never did an inspection with White, he cannot authenticate the results of her report.

Plaintiff's testimony that she was able to see into the hole under the plate and that a portion of the tar approximately 3" wide was missing where she tripped, as well as Bellizzi's opinion that the plate violated 34 RCNY section 2-11 because it did not completely cover the street opening, also raise additional issues of fact regarding whether the plates were properly installed or represented a tripping hazzard.

The parties' remaining contentions are either without merit or need not be addressed given the findings above.

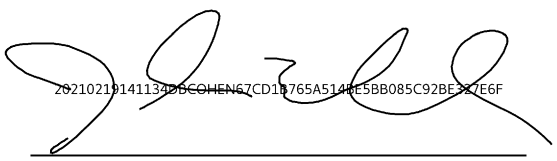
Accordingly, it is hereby:

ORDERED that the branch of the motion for summary judgment by defendant Consolidated Edison of New York, Inc. is granted and the complaint and all cross claims asserted against said defendant are dismissed; and it is further

ORDERED that the branch of the motion for summary judgment by defendant Safeway Construction Enterprises, Inc. is denied; and it is further

ORDERED that the claims and cross claims against defendant Consolidated Edison of New York, Inc. are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Consolidated Edison of New York, Inc. dismissing the claims and cross claims against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.




2/19/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |