

<b>Vente v City of New York</b>
2026 NY Slip Op 32000(U)
May 7, 2026
Supreme Court, New York County
Docket Number: Index No. 151644/2019
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

-----X

SUSAN VENTE,

Plaintiff,

- v -

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

Defendants.

-----X

INDEX NO. 151644/2019

MOTION DATE 04/18/2025

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability against defendants Consolidated Edison Company of New York, Inc. (Con Edison) and The Hallen Construction Co., Inc. (Hallen), contending that there are no material issues of fact and that defendants' negligence in creating and failing to remedy the roadway defect proximately caused plaintiff's injuries. Defendants oppose.

**I. BACKGROUND**

This action arises from a trip-and-fall incident that allegedly occurred on January 18, 2019, at the intersection of Beaver Street and Broadway in Manhattan (NYSCEF 94).

Plaintiff testified that while crossing the street at the intersection, her foot became caught in a depressed portion of the roadway, causing her to fall forward (NYSCEF 94). Plaintiff further testified that after the accident she observed a square patched section of roadway with a sunken area and broken surface where she fell (*id.*).

Prior to the accident, roadway excavation and gas utility work had been performed at or near the subject location on behalf of Con Edison (NYSCEF 98, 100). Hallen performed excavation and roadway restoration work for Con Edison pursuant to contract (NYSCEF 99). The contract submitted on the motion reflects that Hallen was retained to perform roadway work for Con Edison and provided that Hallen's performance would include, except as otherwise specifically stated, everything requisite and necessary to complete the work properly (NYSCEF 124). The agreement further contained provisions governing subcontracting and required Con Edison's written approval for subcontracted work (*id.*).

The record includes a street opening permit issued in connection with work at or near the subject location, identifying Con Edison as the permit holder (NYSCEF 98). Work records produced in discovery reflect roadway work performed by Hallen in the area before the accident (NYSCEF 99, 100).

Stephen Chase, Hallen's witness, testified that Hallen performed excavation work, backfilled the opening, and placed asphalt patch material following completion of the underground utility repair (NYSCEF 115). Chase further testified that Hallen commonly performed an initial temporary restoration and that permanent paving could later be completed by another crew or department (*id.*).

A photograph submitted in connection with the motion depicts a square roadway patch within the crosswalk area at the subject intersection (NYSCEF 103).

Plaintiff submitted the affidavit of Robert T. Fuchs, a licensed professional engineer, who reviewed the record evidence and photographs submitted in connection with the motion (NYSCEF 108). Fuchs opines that the roadway patch depicted in the photographs was depressed, uneven, and broken, with missing material at one corner, and that such condition

created a hazard to pedestrians traversing the crosswalk (*id.*). He further opines that the patch was temporary in nature, lacked edge sealant, contained insufficient asphalt thickness, and was susceptible to cracking, settlement, and deterioration under normal vehicular traffic (*id.*). Fuchs additionally states that the final roadway restoration was not completed prior to expiration of the permit and that the failure to properly maintain or permanently restore the patched area was a proximate cause of plaintiff's accident (*id.*).

Defendants submitted the affirmation of Martin R. Bruno, a construction safety expert retained by Hallen (NYSCEF 114). Bruno states that cold mix asphalt is commonly used for temporary repairs, is less durable than hot mix asphalt, and is not intended as a permanent paving solution (*id.*). Bruno additionally opines that there was no evidence Hallen's cold patch was incomplete, defective, or improperly executed (*id.*).

Con Edison witness John Cagney testified that Con Edison utilizes contractors to perform roadway openings and restorations in connection with utility work (NYSCEF 106). He further testified that supervisors may visit job sites depending on workload, but he could not state whether any Con Edison supervisor visited the subject location before the accident (*id.*).

## II. DISCUSSION

### A. Party Contentions

Plaintiff moves for partial summary judgment on the issue of liability. Plaintiff contends that defendants performed excavation and gas-line repair work at the subject intersection, opened the roadway within the crosswalk, and thereafter negligently restored the area with only a temporary cold patch rather than a proper permanent repair. Plaintiff argues that the temporary repair was inadequately constructed, lacked required supporting and sealing materials, was left in place after the permit period expired, and predictably deteriorated into a depressed hole within

the crosswalk. Plaintiff further contends that defendants created the dangerous condition, had actual and constructive notice of it, violated applicable roadway restoration rules and specifications, and that those failures proximately caused plaintiff's fall and injuries.

Defendants oppose the motion, arguing that Hallen's role was limited to a temporary repair and that another contractor was responsible for any final permanent restoration. They contend that the temporary patch was performed using accepted methods and materials and was left in a safe condition when the work was completed. They further argue that the alleged defect was minor, visible, and not inherently dangerous, and that plaintiff has not established that the condition caused her fall. Defendants also maintain that they did not create the condition complained of, did not owe plaintiff a duty under the circumstances, did not supervise any later permanent repair work, and lacked notice of the condition that existed on the date of the accident. Defendants additionally dispute plaintiff's reliance on the cited statutes, rules, and regulations.

In reply, plaintiff argues that defendants' opposition is unsupported by the record and fails to identify any other entity responsible for the condition. She contends that defendants' own submissions acknowledge that the temporary cold patch was unsuitable for the heavily trafficked location and that the repair was left unfinished. Plaintiff further argues that defendants remain responsible for whether Hallen was obligated to complete the permanent repair itself or whether another contractor should have been retained to do so. Plaintiff also disputes defendants' characterization of the defect as trivial or open and obvious and maintains that comparative fault does not preclude summary judgment on liability.

## B. Legal Standard

A party moving for summary judgment “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” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR 3212 [b]*). The movant’s “failure 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” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], *citing Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Once the movant satisfies its prima facie burden, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact requiring a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope, or unsupported assertions are insufficient to defeat summary judgment (*see Zuckerman*, 49 NY2d at 562).

## C. Analysis

### *Hallen’s Liability*

As a general matter, a contractor owes no duty to a third party outside the contract unless, among other things, it launches a force or instrument of harm by creating or exacerbating a dangerous condition through the negligent performance of its work (*Espinal v Melville Snow Contrs., Inc.*, 98 N.Y.2d 136, 140-142 [2002]; *Church v Callanan Indus., Inc.*, 99 N.Y.2d 104, 111 [2002]). Thus, a contractor may be held liable where its affirmative negligence creates a

dangerous condition upon a public street or sidewalk (*Cohen v Schachter*, 51 AD3d 847, 848 [2d Dept 2008]; *Kleeberg v City of New York*, 305 AD2d 549, 550 [2d Dept 2003]; see also *Brown v Welsbach Corp.*, 301 NY 202 [1950]).

Here, plaintiff established that Hallen performed the excavation and roadway restoration work at the subject location. The record includes testimony from Hallen supervisor Chase that, after the trench work was completed, Hallen placed only a limited amount of asphalt in the opening rather than performing a full-depth permanent restoration. Plaintiff also submitted Fuchs's testimony that such a patch was not an appropriate or durable repair for a heavily trafficked intersection such as Beaver Street and Broadway, and that the use of cold patch or partial asphalt fill at that location departed from accepted roadway restoration practice. She further relies on contractual provisions requiring Hallen to restore the roadway in accordance with applicable specifications and to complete the work necessitated by its excavation. Plaintiff also demonstrated that the defect alleged to have caused her fall developed within the same roadway patch area Hallen had excavated and restored approximately 30 days before the accident.

In opposition, Hallen failed to raise a material factual dispute. Although Hallen asserts that its work was merely temporary and performed in accordance with standard practice, it submitted no competent evidence demonstrating that the restoration at this location complied with applicable specifications or was properly executed so as to leave the roadway flush, stable, and safe after completion. Nor did Hallen rebut plaintiff's proof that only a limited amount of asphalt was placed in the excavation and that such repair was inadequate for a heavily trafficked Manhattan intersection. Hallen's reliance on generalized testimony that cold patch was

customarily used for temporary repairs is insufficient where the evidence shows the defect later developed in the very area Hallen opened and refilled.

Defendants likewise failed to support their claim that another contractor bore responsibility for permanent restoration. Although Hallen's witness testified in general terms that permanent paving was handled by a different entity, he could not identify the contractor, state whether any such contractor performed work at the subject location before plaintiff's accident, or produce any permit, work order, paving record, or other documentary proof showing that responsibility had actually been transferred and undertaken. On this record, Hallen's suggestion that an unidentified third party may have been responsible is speculative and insufficient to defeat plaintiff's showing (*cf. Miller v City of New York*, 100 AD3d 561 [1st Dept 2012]).

Defendants' remaining arguments concerning the open and obvious nature of the condition, trivial defect, and plaintiff's comparative negligence do not preclude summary judgment on liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]). Defendants' contention that the condition was open and obvious bears only on plaintiff's comparative negligence and does not negate a defendant's duty to maintain the premises in a reasonably safe condition (*see Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 92 [1st Dept 2011] [open and obvious condition relevant only to comparative fault]). Although defendants argue that the incident occurred during daylight hours and in clear weather conditions, plaintiff testified that she was crossing the street within a crowd of pedestrians. Whether the condition could reasonably have been observed and avoided under those surrounding circumstances likewise goes to comparative negligence and does not preclude summary judgment.

Furthermore, defendants' contention that the alleged defect was trivial likewise does not preclude summary judgment. A finding of triviality cannot be based on size alone, and defendants' conclusory characterization of the condition as physically insignificant is insufficient absent competent evidence establishing the dimensions or nature of the defect and the surrounding circumstances of the accident (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]; *Snyder v AFCO Avports Mgt., LLC*, 232 AD3d 209, 215 [2d Dept 2024] [defendant moving for summary judgment without objective measurements "often fails to demonstrate triviality as a matter of law"]). Here, defendants submitted no objective measurements or other competent evidence supporting that the alleged defect was trivial under the circumstances presented.

Accordingly, plaintiff is granted summary judgment on the issue of liability as against Hallen.

*Con Edison's Liability*

A contractor or permit holder is not liable merely by virtue of its contractual relationship or permit status, but may be held liable where it affirmatively created the dangerous condition or had actual or constructive notice of the condition and failed to remedy it (*Espinal*, 98 NY2d at 140; *Brown*, 301 NY at 205). Likewise, where the record does not establish that a defendant performed the work that created the defect, liability may not be imposed based on speculation (*Kleeberg*, 305 AD2d at 550; *Cohen*, 51 AD3d at 848).

Here, plaintiff has not established as a matter of law that Con Edison created the roadway defect or had notice of the condition that existed on the date of the accident. The evidence reflects that Hallen, not Con Edison, performed the excavation, gas utility repair, backfilling, and placement of the cold patch at the subject location. Con Edison's witness testified that Con

Edison did not physically perform the restoration work, and the record contains no evidence that Con Edison inspected Hallen's completed roadway patch before the accident.

Nor has plaintiff demonstrated that Con Edison had actual or constructive notice that the temporary restoration had deteriorated into the depression alleged to have caused plaintiff's fall. Although the record reflects that Con Edison supervisors may visit job sites depending on workload, there is no evidence that any Con Edison representative visited this location after Hallen completed its work, observed a defective condition, or otherwise became aware of the alleged depression before the accident. General testimony concerning supervisory practices is insufficient to establish notice as a matter of law.

Plaintiff further relies on Con Edison's status as the permit holder and its contract with Hallen. Those facts, standing alone, do not establish liability on this motion. While a permit holder may be liable where it caused or contributed to the dangerous condition, Con Edison's permit status alone is insufficient to establish that it created the defect or breached a duty to plaintiff (*Bagley v 1122 E. 180th St. Corp.*, 203 AD3d 502, 503 [1st Dept 2022]).

At most, the submissions present factual questions as to the extent of Con Edison's responsibility for roadway restoration following Hallen's temporary repair, whether it retained any continuing duty to inspect or maintain the site, and whether it had notice of the condition existing on the date of the accident.

Accordingly, that branch of plaintiff's motion seeking summary judgment on the issue of liability as against Con Edison is denied.

The court has also considered the parties' remaining arguments concerning the cited provisions of the Administrative Code of the City of New York and the Rules of the City of New York governing street openings and roadway restoration. To the extent applicable, such

provisions may be considered as evidence bearing on the standard of care, but do not alter the court’s determination, which rests on the record evidence establishing Hallen’s creation of the condition and the absence of a sufficient showing as to Con Edison’s creation of, or notice of, the defect (see Elliott v City of New York, 95 NY2d 730, 734 [2001] [violations of provisions of New York City Administrative Code enacted as local laws constitute only some evidence of negligence, rather than negligence per se]).

III. CONCLUSION

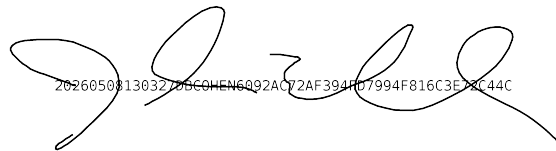
Accordingly, it is hereby

ORDERED that plaintiff’s motion, pursuant to CPLR 3212, for partial summary judgment on the issue of liability is granted as against defendant The Hallen Construction Co., Inc.; and it is further

ORDERED that the branch of plaintiff’s motion seeking partial summary judgment on the issue of liability as against defendant Consolidated Edison Company of New York, Inc. is denied; and it is further

ORDERED that the issue of damages, together with all remaining issues as against the remaining defendants, shall proceed to trial.

5/7/2026  
DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE