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| <b>Cortez v Mia</b>  |
| 2012 NY Slip Op 33578(U)   |
| June 29, 2012  |
| Supreme Court, Bronx County  |
| Docket Number: 0303426/2009  |
| Judge: Julia I. Rodriguez  |
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PART 27

|                     |                          |
|---------------------|--------------------------|
| Case Disposed       | <input type="checkbox"/> |
| Settle Order        | <input type="checkbox"/> |
| Schedule Appearance | <input type="checkbox"/> |

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

-----X  
**CORTEZ,LUCIO**

Index No. **0303426/2009**

-against-

Hon. **JULIA RODRIGUEZ**

**MIA,KHONDOKAR B.**

Justice.

-----X

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**  
 Noticed on **February 22 2012** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

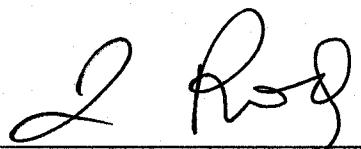
|  | PAPERS NUMBERED |  |
|--|-----------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed |                 |  |
| Answering Affidavit and Exhibits   |                 |  |
| Replying Affidavit and Exhibits  |                 |  |
| _____ Affidavits and Exhibits  |                 |  |
| Pleadings - Exhibit  |                 |  |
| Stipulation(s) - Referee's Report - Minutes                              |                 |  |
| Filed Papers   |                 |  |
| Memoranda of Law   |                 |  |

Upon the foregoing papers this

*Defendants' motion and cross-motion granted as fully set forth in Decision and Order annexed hereto.*

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

Dated: 6/29/2012

Hon.   
**JULIA RODRIGUEZ, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 27

-----X

LUCIO CORTEZ,  
Plaintiff,  
-against-

**Index No. 304614/2009**

**DECISION and ORDER**

KHONDAK B. MIA and CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC.,  
Defendants.

Present:  
Hon. Julia I. Rodriguez  
Acting Supreme Justice

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK  
INC.,  
Third-Party Plaintiff,  
-against-

Third Party Action

**Index 83739/2010**

FELIX ASSOCIATES, LLC.,  
Third-Party Defendant.

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Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendants' motion and cross-motion for summary judgment and related relief:

| <u>Papers Submitted</u>                                     | <u>Numbered</u> |
|---|-----------------|
| Motion by FELIX ASSOCIATES, Affirmation & Exhibits          | 1               |
| Cross-motion by CON ED, Affirmation & Exhibits              | 2               |
| Affirmation in Opposition by MIA                            | 3               |
| Reply Affirmation by FELIX                                  | 4               |
| Plaintiff's Affirmation, Affidavit & Exhibits in Opposition | 5               |

Plaintiff commenced this action alleging he sustained injuries on January 15, 2009 while walking the street at East 77<sup>th</sup> Street in Manhattan between York and First Avenues. Paragraph 45 of the Amended Verified Complaint alleges that:

while plaintiff was . . . proceeding over, along and upon the subject sidewalk and there being an obstruction on said sidewalk caused by defendant FELIX, the plaintiff was forced to walk in the roadway, causing him to be struck by a motor vehicle and sustain severe and grievous personal injuries. . .

It is undisputed that the motor vehicle was operated by Defendant **Hondokar B. Mia** ("Mia").

After discovery, Defendant/Third Party Defendant **FELIX ASSOCIATES, LLC** (“**Felix**”), and Third Party Plaintiff **CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.** (“**Con Ed**”), move and cross-move for summary judgment dismissing the complaint, all third-party claims and cross-claims against them as follows, alleging as an initial matter, that this action is a pedestrian knockdown involving solely Plaintiff and Mia. Movants submit that neither created a defective and/or dangerous condition which prevented plaintiff from crossing at the crosswalk, and that plaintiff admits in his deposition that he did not cross at the crosswalk because of snow.

Felix further submits that

(1) it had engaged in permissible excavation of the street at the intersection of First Avenue and 77<sup>th</sup> Street and along 77<sup>th</sup> Street between First and York Avenue referred to the “York Project;”

(2) the York Project consisted of installing electrical conduits requiring Felix to excavate the roadway, install duct, backfill the excavation and ultimately pave the excavation;

(3) at the end of each work day Felix placed the requisite steel construction plates over the excavations and removed all construction equipment from the site;

(4) during the course of Felix’s work at the premises Felix did not place or leave any construction equipment, cones or barricades at the relevant crosswalks or on the sidewalk in a manner that prevented the flow of pedestrian traffic through the crosswalks or the sidewalk;

(5) all steel construction plates used at the premises were in compliance with section 2-11 of New York City Highway Rules and all plates had a skid-resistant surface;

(6) Felix’s last work at the site was on January 14, 2009, a day before Plaintiff’s accident, and on that day Felix left the crosswalks and sidewalks on East 77<sup>th</sup> Street free and clear for pedestrian traffic.

Con Ed further submits that it had a contractual relationship with Felix at the time of the accident, that Felix named Con Ed as an additional insured under its policy, and that the only work performed on behalf of Con Ed at the premises was the work performed by Felix.

The proponent of a motion for summary judgment must tender sufficient evidence in admissible form to show the absence of any material issue of fact and the right to

judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851(1985). In this case, defendant must submit evidence that it maintained the street and sidewalk in a reasonably safe condition as a matter of law, that it neither created the allegedly dangerous condition nor had actual or constructive notice thereof. *Bodie v. Town Hall Foundation*, 5 A.D.3d 210 (1st Dept. 2004) and *Schmidt v. Barstow Associates*, 276 A.D.2d 784 (2d Dept. 2000).

The deposition testimony of Frank Caso [Ex.4], Donald Venturino [Ex. 6] and the affidavit by John Breslin [Ex. 5] describe defendants' involvement in the York Project at East 77<sup>th</sup> Street and First Avenue until the morning of January 15, 2009, when a "Stop Work" Order was issued to all contractors working for Con Ed at the site. After consideration of the Defendants' submissions, the Court finds that moving Defendants met their burden of proof in the first instance that they did not create a dangerous condition and further, that the proximate cause of plaintiff's accident was not related to a condition or instrumentality under Defendant's control. Felix's witness, Frank Caso, testified that at the end of the work day on January 14, 2009, all excavation work was covered with steel construction plates and that the street and sidewalk were cleared of construction horses, construction equipment, cones or barricades. Defendants' affidavit establish that Defendants adhered to all rules and regulations required of them, that their excavation of the street and placement of the steel plates on the street was in accordance with industry practice and standards, and that the plates had a skid-resistant surface in accordance with NYC Highway Rules.

Defendants' claim that they did not leave any equipment on the street, sidewalk or crosswalk which would have prevented or encumbered pedestrian flow is corroborated by Plaintiff, who stated that neither 76<sup>th</sup> or 77<sup>th</sup> Street was closed to vehicular traffic [Pgs. 44 & 45 of Transcript of 6/14/2011], and the lack of encumbrance or obstruction permitted plaintiff to elect to cross the street at the crosswalk, which was clearly delineated with orange cones, or to proceed on the sidewalk and cross the street at any site of his choosing.

Plaintiff's counsel's arguments that the Plaintiff was confused as to where to cross

at the northeast corner of 77<sup>th</sup> Street and First Avenue is belied by plaintiff's own familiarity with the location, as he had traversed the same streets going to and from work for at least four days before his accident [Pg. 79, L.12], and plaintiff's voluntary choice to avoid the cross walk because "it was ugly," later explained as "snow on the ground," and not because the crosswalk was encumbered, obstructed or preventing pedestrian movement. Consider, at his deposition Plaintiff testified that on the day of the accident "it was snowing, it was cold" and there was snow on the ground [Pg. 31]. Plaintiff had made a delivery at 520 York Avenue [79<sup>th</sup> & York] and at some point reached the corner of First Avenue and 77<sup>th</sup> Street [Pgs. 63 - 65], whereupon he did not take notice of the traffic signal light, and proceeded to cross 77<sup>th</sup> Street from one side to another but did not cross at the pedestrian crosswalk, :

Pg. 45, L. 7: Q. Sir, when you were crossing 77<sup>th</sup> Street . . . did you cross at the corner, or did you cross partway down the block or something else?

A. I searched well, I wasn't that close to the corner, because there was snow, and I was looking for a space through which I could pass.

Pg. 45, L.16: Q. Sir, do you know what a pedestrian crosswalk is?

A. Yes.

Q. Was there a pedestrian crosswalk, at the place where you crossed the street, just yes or no?

A. No, but people were passing there.

Q. So, just <sup>yes</sup> or no, was there a pedestrian crosswalk, where you crossed the street?

Pg. 46: A. Yes, there was.

Q. And did you see the crosswalk?

A. Yes, I pass through there.

Q. And so, you told me before there was snow on the ground, how did you see the crosswalk?

A. But I didn't pass too close to it. I didn't pass through the middle, because it was very ugly. I passed on the side.

Pg. 47, L.20: Q. Before you started <sup>to</sup> cross, were you walking on the street; just yes or no?

A. I was coming from the sidewalk.

Q. Okay.

A. The accident happened in the middle of the street.

Pg. 48, L.4: Q. You said you were coming from the sidewalk, at some point, did you step off the sidewalk and onto the roadway, just yes or no?

.....

L.22: A. I have to cross, but I don't see any cars coming, and it was snowing, and the car didn't see me.

Pg. 49, L.17: Q. Were you in the pedestrian crosswalk, when you were crossing the street?

A. No.

L.22: Q. Now was the crosswalk to your right, or to your left, or something else?

A. To the right.

Pg. 50 Q. And how far was that crosswalk to your right; and you can tell me in either feet, or car lengths, or meters or any other way that it's comfortable for you to tell me?

Pg. 50, L.5: A. About ten meters.

L. 7: Q. Now sir, the place that you were crossing, was there a walk/don't walk sign in front of you?

A. Yes, there was.

*[Lines 18 through 24: Sign was six cars to plaintiff's right.]*

Pg. 51, L.2: Q. Now sir, the intersection of 77<sup>th</sup> Street and First Avenue, is there a traffic light there?

A. Yes, there is.

Q. And was that traffic light overhanging the intersection, or is it on poles, on the corner or something else?

A. It hangs.

Q. And did you look at that traffic light before you started to

cross the street?

A. Yes.

Q. And when you looked at that traffic light before you crossed the street, what color did you see?

A. I saw that, but what I mainly noticed was that there were no cars, and that there was nothing.

Pg.89, L.15: Q. Was there snow in the crosswalk of 77<sup>th</sup> Street?

A. Yes.

Q. You testified earlier that you did not pass through the crosswalk, because it was ugly. What did you mean by that?

A. Because there was snow there. I was looking for the cleanest place to get by.

Q. It that why you walked left down 77<sup>th</sup> Street?

A. Yes.

Pg.90: Q. You testified earlier that you looked at the traffic control device, on 77<sup>th</sup> Street. What color was the traffic control device for the traffic traveling along 77<sup>th</sup> Street?

A. I didn't get a good look, but first I checked to see if there were any cars

Q. And you didn't see any cars?

A. No.

Q. Did you check to see if the pedestrian cross device had that man, that was illuminating in white lights, or if there was a red hand?

A. No, I didn't see.

In opposing summary judgment, Plaintiff submits the affidavit of **Kathleen Hopkins**, a Certified Site Safety Manager, who opines that there exist issues of fact and credibility, *including but not limited to*, whether moving Defendants complied with Chapter 33 of the NYC Building Code regarding signs warning and directing pedestrians, and whether Defendants complied with Part VI of the MUTCD (Manual on Uniform Traffic Control Devices) regarding providing pedestrians with safe and accessible paths for pedestrian



movement. However, these arguments are not applicable to the facts herein because the proximate cause of plaintiff's injury is that "the car hit me on 77<sup>th</sup> Street" [Pg. 33, L.12], raising issues of fact and credibility, *including but not limited to*, whether Plaintiff looked right and left before stepping into the street and/or did not look carefully, whether Defendant Mia failed to maintain a proper lookout for events and/or conditions existing in front of his vehicle, and whether Defendant Mia was traveling at a reasonable rate of speed taking into consideration the weather and other conditions at the site.

Plaintiff's submission contends that the metal plates used at the site to cover the excavation may not have been skid-resistant, but no evidence is submitted to rebut the Defendants' claim that the plates were skid-resistant in accordance with industry standards. By Plaintiff's own account of the accident, he first looked at the metal plates after he came out of the hospital on the day of his accident and not before his accident [Pg. 39 & 40], he did not see the metal plate before he ran while in the middle of the street [Pg. 85, L.16] and then slipped in the middle of the street "because the car was braking and I was trying to go this way and that way" [Pg. 53, L.12], and he fell at a location where there was snow on the ground [Pg. 87, L.16].<sup>1</sup>

Pg. 56, L.23: Q: Did you slip before the car hit you?

A. Yes, there was iron there.

Pg. 57, L.4: Q. And was the iron covered with snow?

A. Yes.

Pg.57, L.11: Q. Now, sir, when you slipped on the metal plate, on the iron, did you fall to the ground?

A. No, then the car arrived.

Q. Did you start to fall to the ground?

A. No, I did not fall, my feet started to skate.

A. When did the car come and contact your body?

Q. When I was in the middle of the street.

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<sup>1</sup> Plaintiff testified that it had started snowing around 9 a.m. and his accident occurred at 1:30 p.m. Although neither side raised it, the "snow in progress" doctrine is implicated.

A. No.

Q. Before the car contacted you, did you hear the sound of a horn.

A. No.

Q. Did you hear the sound of screeching tires or brakes?

A. The brakes from the tires, yes.

P.58, L.21: Q. Did the car contact your back, and your head, and your leg or just one of those parts or something else?

A. It sent me far away. It threw me about a half of block away.

P. 59, L.2: Q. And did you fall to the ground after that?

A. Yes.

For the foregoing reasons, the Court finds that Plaintiff did not meet his burden of rebuttal to defeat summary judgment, and accordingly, motion and cross-motion seeking summary judgment are **granted**. The contact between Plaintiff and Mia' vehicle became the superseding cause of plaintiff's injury. Consequently, Plaintiff's additional arguments claiming Public Nuisance, Instrument of Harm and breaches of the Labor Law are either inapplicable and/or unpersuasive to the distinct fact pattern herein. Finally, it is noteworthy that Con Ed was working on First Avenue around the corner and away from the site of plaintiff's accident; at his deposition Plaintiff stated he was aware of Con Ed working in the area, had passed the Con Ed work site for at least four days while walking in the area, and did not raise an issue that the sidewalk was not passable or otherwise made unsafe for pedestrians. Therefore, it is

ORDERED that the Complaint is dismissed in its entirety as against Defendant & Third Party Defendant **Felix Associates, LLC** and Third Party Plaintiff **Consolidated Edison Company of New York, Inc.**; and it is further

ORDERED that all third-party claims and cross-claims against Defendant/Third Party Defendant **Felix Associates, LLC** and Third Party Plaintiff **Consolidated Edison Company of New York, Inc.** are also dismissed.

**Felix is directed to serve a copy of this Order with Notice of Entry upon all parties forthwith.**

Dated: 6/29/2012

  
Hon. Julia I. Rodriguez