Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Maria Samaklis,

Plaintiff,

- against -

City of New York, Consolidated Edison Company of New York, Inc., and MECC Contracting, Inc.,

Defendants.

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Index Number: 33031/09

Motion Date: 3/6/12

Motion Cal. Number: 30

Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion by defendant, MECC Contracting Inc., for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Affirmation in Partial Support & Partial Opposition	8-9
Reply-Exhibits	10-12

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by MECC for summary judgment dismissing the complaint and all cross-claims and counterclaims against it is denied.

Plaintiff allegedly sustained injuries as a result of stepping on rocks/gravel and falling in the crosswalk of Newtown Avenue and 31st Street in Queens County on June 15, 2009. Plaintiff testified in her deposition that there was construction being done at that location, and saw a bulldozer close to where she fell. She testified that she was not paying attention to the construction as she crossed within the crosswalk but looked straight ahead as she stepped off the curb to cross Newtown Avenue. However, she noticed that the area was "full of rocks". She stated that she stepped on rocks, with her right foot and her left which caused her to fall, striking both knees and her head on the ground. She also stated that she fell "in the ditch". She further indicated that from the force of the impact, rocks were imbedded in her body which had to be cleaned out. She testified that she did not see any tape or

barricades around the construction.

Jose Hernandez, construction foreman for MECC, testified in his deposition that MECC was hired by Con Edison to install electrical duct at the subject location linking manholes or service boxes and that its work entailed digging trenches, laying the duct in the trenches and refilling the trenches. Its work did not include permanent restoration but only temporary restoration of the road surface. He testified that two trenches were dug across the crosswalks at the intersection of 31st Street and Newtown Avenue and, on June 12, 2009, were "binded to the top", meaning that they were filled with temporary asphalt, and such was the condition of the subject location on June 15, 2009. He also testified that there were no barriers or barricades in the crosswalk area at or near the trench but rather on the sidewalk. He also witnessed plaintiff fall as he was working approximately 15 feet away. He stated that she fell at the subject location of the trench that had been backfilled. He stated that she fell on her knee, "Like you walking and see something and twist the foot and then lay right on her knee."

Thus, his observation that it looked like she twisted her foot on something which caused her to fall to her knee, and that she fell at the trench area that had been backfilled, as well as his explanation that the backfilling was with temporary asphalt material, corroborates plaintiff's testimony as to where and how she fell.

The photographs annexed to the moving papers as Exhibit "K" also show the trench in question, which is in the crosswalk and which is clearly filled with loose temporary asphalt and strewn with what appear to be pieces of rock or gravel.

MECC moves for summary judgment upon the following grounds: (1) that plaintiff "is unable to establish that MECC had actual or constructive notice of a dangerous condition"; (2) that "the alleged condition was open, obvious and readily observable by Plaintiff"; and (3), that "the nature of the condition, if there be any, was trivial in nature."

It was the initial burden of MECC, as the movant for summary judgment, to establish the lack of actual or constructive notice of the alleged dangerous condition (see Sagges v. Long Island Railroad, 259 AD 2d 537 2nd Dept 1999]). MECC has failed to meet its burden. Although MECC submits evidence that Hernandez received no complaints about the condition and that MECC was not directed to correct any condition, such does not establish that it did not have actual notice of the condition. Indeed, the evidence presented

raises a question of fact as to whether MECC, by digging up the trench and backfilling it with temporary asphalt, leaving the area littered with loose gravel and not otherwise placing barriers around it, created the condition, and thus had actual notice of it (see Lewis v Metropolitan Transportation Authority, 99 AD 2d 246 [1st Dept 1984]). Indeed, MECC does not seek dismissal upon the ground that it did not create the condition. Therefore, since there is a triable issue of fact as to whether MECC created a dangerous condition through an affirmative act of negligence that immediately resulted in the condition of the crosswalk, and thus, that it had actual notice of the condition, MECC has failed to demonstrate that it did not have actual notice of the condition.

For the same reason, MECC has failed to establish its freedom from liability as a matter of law by reason of its claimed lack of constructive notice. Even were the defense of lack of constructive notice applicable, it was incumbent upon MECC to establish its lack of constructive notice by showing that the alleged dangerous condition was not open and obvious for a sufficient period of time to have reasonably allowed it, in the exercise of reasonable care, to remedy the condition (see Park v. Caesar Chemists, Inc., 245 AD 2d 425 [2nd Dept 1997]; Scala v. Port Jefferson Free Library, 255 AD 2d 574 [2nd Dept 1998]; see also Danielson v. Jameco Operating Corp., 20 AD 3d 446 [2nd Dept 2005]). MECC has failed to do so.

The testimony of Hernandez that the area was "regular" and "clean" and that he did not know what caused plaintiff to fall does not establish that MECC lacked constructive notice of the condition of the area. Plaintiff's testimony as to the condition of the area, Hernandez' testimony which corroborates plaintiff's description of the location of her fall and her account of how she fell, including his testimony that the trench had been backfilled with temporary asphalt as of June 12, 2009, and the photographic evidence which clearly shows the location as containing a condition conforming to that described by plaintiff at the very least raises an issue of fact as to whether the condition was open and obvious and existed for a sufficient length of time to have allowed MECC to have remedied it. Indeed, it is the contention of MECC's counsel that the condition was open and obvious. Moreover, the Court notes that no evidence was proffered to contradict plaintiff's testimony that there were no barricades at the crosswalk so as to have prevented her from crossing at that location. Additionally, since there is an issue of fact as to whether MECC created the condition, it has failed to establish prima facie that it lacked constructive notice.

Without merit is counsel's additional argument that even if MECC had notice of the condition it still would not be liable because the condition was open and obvious. The question of whether

a condition is open and obvious merely goes to the issue of comparative negligence (see Cupo v Karfunkel, 1 AD 3d 48 [2nd Dept 2003]). A defendant would be entitled to summary judgment upon the ground that the condition was open and obvious only if it were also established that the condition was not inherently dangerous as a matter of law (see id.; Rivas-Chirino v Wildlife Conservation Soc., 64 AD 3d 556 [2nd Dept 2009]; Sclafani v Washington Mut., 36 AD 3d 682 [2nd Dept 2007]). This Court cannot conclude, based upon the record on this motion, that a backfilled trench located within a marked crosswalk and running the length thereof, littered with loose, ankle-turning, pieces of gravel, at precisely the location where pedestrians are required to cross is not an inherently dangerous condition as a matter of law. "Whether an asserted hazard is open and obvious is fact-specific, and usually a question of fact for a jury to resolve ... Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances" (Gutman v Todt Hill Plaza, LLC, 81 AD 3d 892, 892-893 [2nd Dept 2011] [citations omitted]).

Unlike the cases cited by MECC where the condition at issue was in a wooded location or large unpaved area and the trip hazards therein were such as could be naturally expected to exist in such areas, ground strewn with ankle-turning asphalt gravel rocks is not necessarily a normal condition of a crosswalk at an intersection of a city street, even where there has been recent excavation and road work. Although plaintiff admittedly saw the rock or gravel-strewn condition of the crosswalk, she also testified that she did not take notice of the construction but merely looked ahead of her as she stepped off the curb to cross. The Court cannot conclude, as a matter of law, that a reasonable person of common sense would not have attempted to cross at that intersection or would have taken greater precautions to avoid stumbling.

Therefore, under the facts of this case, whether the condition that allegedly caused plaintiff to stumble and fall was open and obvious only serves to raise a question of fact for the jury in apportioning fault.

As to MECC's contention that the condition was too trivial to be actionable, the court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to the defendant(see Hymanson v. A.L.L. Assocs., 300 AD 2d 358, 358 [2nd Dept 2002]). The determination of whether a condition is trivial must be made upon an examination of all of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (Trincere v. County of Suffolk, 90 NY 2d 976, 976 [1997]). The deposition testimony and

demonstrative evidence presented do not establish that the condition at issue was trivial. Moreover, MECC cannot be heard to argue that the condition was both trivial and at the same time open and obvious.

Finally, MECC's contentions that the absence of prior similar accidents at the subject location indicates that the condition was not dangerous and that its safety and maintenance procedures at the construction site were reasonable are questions of fact for the jury to decide, not issues of law for the court to determine on summary judgment.

Accordingly, the motion is denied.

Dated: March 20, 2012

KEVIN J. KERRIGAN, J.S.C.