

**Reed v Consolidated Edison**

2012 NY Slip Op 32952(U)

December 7, 2012

Sup Ct, New York County

Docket Number: 113401-2008

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 10

Index Number : 113401/2008  
REED, BIANCA  
vs.  
CONSOLIDATED EDISON  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for See Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1-3, 4-7  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 8  
Replying Affidavits \_\_\_\_\_ No(s) 9

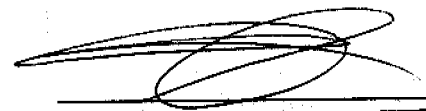
Upon the foregoing papers, it is ordered that this motion is denied

See attached Decision/Order dated Dec. 7, 2012

**FILED**  
DEC 17 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Dec 11, 2012

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS 10

-----X  
BIANCA REED,

Plaintiff,

-against-

CONSOLIDATED EDISON,

Defendant.

-----  
HON. KATHRYN E. FREED:

**FILED**  
**DEC 17 2012**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

DECISION/ORDER  
Index No.: 113401-2008  
Seq. No.: 001

PRESENT:  
Hon. Kathryn E. Freed  
J.S.C.

Recitation, as required by CPLR §2219[a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
NOTICE OF MOTION, AFFIDAVITS AND EXHIBITS ANNEXED.....	.....1-3, 4-7..
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	..... 8.....
REPLYING AFFIDAVITS.....	.....9.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant moves for an Order granting summary judgment pursuant to CPLR§ 3212 and an Order dismissing “all direct, cross-claims or any other claims of any nature.” Plaintiff opposes. After a review of the papers presented, all relevant statutes and caselaw, the Court denies the motion.

The instant matter concerns injuries allegedly sustained by plaintiff on July 6, 2007. As she was crossing 146<sup>th</sup> Street, a vehicle crossed over an unsecured iron roadway plate, causing it to become air born, ultimately landing on her right foot. As a result, plaintiff sustained a fractured ankle.

The action was subsequently commenced by Summons and Verified Complaint on

September 24, 2008. Defendant interposed its Verified Answer and Cross-Complaint on October 22, 2008.

Positions of the parties:

Defendant argues that plaintiff has failed to present any evidence or testimony that shows that it or its contractors “owned the roadway plate alleged to have caused plaintiff’s accident.” It asserts that a review of its records indicates that neither it nor its contractors performed any excavation or construction activity in the roadway in front of 479 West 146<sup>th</sup> Street. Nor, did it own or use a metal roadway plate alleged to be the proximate cause of plaintiff’s injury.

In an effort to undermine plaintiff’s claim, defendant refers to a portion of the deposition testimony of its record searcher, Mr. Patrick Keogh, who testified that defendant’s records revealed no excavations performed by defendant in the roadway wherein plaintiff’s accident is alleged to have occurred. In fact, Mr. Keogh also testified that said records actually demonstrate post--accident work on the sidewalk in front of 474 West 146<sup>th</sup> Street., wherein the “cut” was opened and backfilled on July 10, 2007. He maintained that no roadway plates were utilized during this procedure.

Defendant also proffers a portion of its construction management inspector, Massimiliano Morinello’s deposition testimony. Mr. Morinello testified that his duties include inspection of final restorations of roadways, sidewalks and checking violations issued by the City. He also testified that defendant’s work that took place in front of 474 West 146<sup>th</sup> Street was actually performed on the sidewalk, and did not involve any roadway plates. When shown some photographs depicting the subject roadway plate, Mr. Morinello testified that road plates used for sidewalks are smaller and thinner than the subject one. He also testified that such plates utilized by defendant can be identified

RESTORATION-MANHATTAN,” which indicates that “New York Paving Inc.,” was apparently retained to restore the location of “474 W 146 ST. FROM: AMSTERDAM AV TO: CONVENT AV.” The date of said restoration appears to be July 19, 2007. Plaintiff emphasizes the fact that on the bottom right hand portion of this document, there is a handwritten note stating “Con Ed plates and barricade on location called in 8-22-07.” This note is followed by what appears to be the initials “MM.”

Plaintiff also argues that defendant’s claim that Mr. Morinello testified that a Con Ed plates can be identified by the letter “C” embossed on them was misstated. She incorporates the actual excerpt of said testimony to her opposition papers, wherein Mr. Marinello concedes that he has not seen all Con Ed plates and that he had identified the subject plate as a Con Ed plate.

Plaintiff argues that the evidence it has presented creates material issues of fact which necessitates the denial of the instant motion. Defendant responds that said evidence is “speculative and unsupported by any testimony of any witness in the instant action.”

#### Conclusions of law:

The drastic remedy of summary judgment should be granted only where there are no triable issues of fact ( Chemical Bank v. West 195<sup>th</sup> Street Development Corp., 161 A.D.2d 218 [1<sup>st</sup> Dept. 1990]; Pearson v. Dix McBride, LLC, 63 A.D.3d 895 [2d Dept. 2009] ), or where the issue is even debatable ( Stone v. Goodson, 8 N.Y.2d [1960] ). In order to prevail on a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact ( Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986] ). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing ( Bethlehem Steel Corp. v. Solow, 51 N.Y.2d 870,

872 [1989] ). In opposing such a motion, the party must lay bare its evidentiary proof. "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" ( Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1995]; Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1986] ).

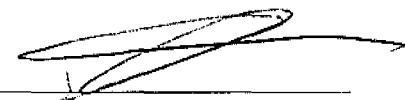
In the case at bar, the Court finds that evidence has been presented which clearly creates material issues of fact that can only be properly addressed by the trier of fact.

In accordance with the aforementioned, it is hereby

ORDERED that defendant's motion for summary judgment and dismissal of all direct and cross-claims is denied and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: December 7, 2012



Hon. Kathryn E. Freed  
J.S.C.

**FILED**  
DEC 17 2012  
NEW YORK  
COUNTY CLERK'S OFFICE