

<b>Lynch v Consolidated Edison Co. of N.Y., Inc.</b>
2008 NY Slip Op 33759(U)
August 11, 2008
Supreme Court, New York County
Docket Number: 110409/06
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_ PART \_\_\_\_\_  
*Justice*

Index Number : 110409/2006

LYNCH, SHARON

vs

CONSOLIDATED EDISON

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

**FILED**

AUG 13 2008

NEW YORK  
COUNTY CLERK'S OFFICE

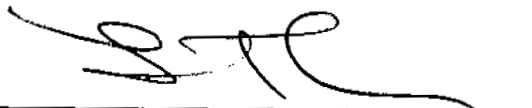
Upon the foregoing papers, It is ordered that this motion

AUG 13 2008

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8-11-08

  
EILEEN A. RAKOWER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X

SHARON LYNCH,

Plaintiff,

Index No.  
110409/06

- against -

Seq No.: 003&004  
Decision and Order

CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., EMPIRE CITY SUBWAY COMPANY  
(LIMITED), NICO ASPHALT PAVING, INC. and  
THE CITY OF NEW YORK,

Defendants.

-----X

EMPIRE CITY SUBWAY COMPANY(LIMITED),

Third-Party Plaintiff

Third-Party  
Index No.:  
591049/06

-against-

NICO ASPHALT PAVING, INC.,

Third-Party Defendant.

-----X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell in the roadway located “on the north side of 60<sup>th</sup> Street between First and Second Avenue in the County, City and State of New York and in front of the premises known as 303 East 60<sup>th</sup> Street” on November 25, 2005. Defendant/Third-party defendant Nico Asphalt Paving, Inc. (“NICO”) moves for summary judgment pursuant to CPLR 3212. Defendant Consolidated Edison Company of New York

("Con Ed") cross-moves for summary judgment. By separate motion, defendant Empire City Subway ("ECS") also moves for summary judgment. Plaintiff opposes all three motions. Defendant the City of New York ("City") does not submit papers.

Plaintiff's accident occurred after she saw her nephews to her sister's car on the South side of East 60<sup>th</sup> Street and then crossed East 60<sup>th</sup> Street to go back to her building which was located at 303 East 60<sup>th</sup> Street. Before she could get to the sidewalk, she stepped with her left foot into an "uneven part of the road . . . approximately two by four feet." Plaintiff describes the defect as being located "somewhere between two to four feet" from the curb and "a little bit east" of where the entrance gate of her apartment building was. The defect was located in a bus stop area. Con Ed and ECS are alleged to have contracted to perform work in the subject area. ECS sub-contracted with Nico to do paving work in the area.

Nico, in support of its motion submits the following: (1) the pleadings; (2) an order by the Honorable Eileen A. Rakower dated June 13, 2007; (3) plaintiff's note of issue dated January 28, 2008; (4) plaintiff's bill of particulars; (5) the deposition transcript of plaintiff; (6) four color photocopies of a photograph of the alleged defect; (7) the deposition transcript of Mario E. Smith, Senior Coordinator for Con Ed; (8) six Con Ed "Report(s) of Street and/or Sidewalk Openings;" (9) the deposition transcript of Jon Denegall, employee of Nico who conducted a record search; (10) the deposition transcript of Michael Zimmerman, Senior Specialist for Con Ed; (11) the deposition transcript of Leonard Ferguson, Specialist for ECS; (12) a "Preliminary Engineers Report" prepared by Joseph C. Cannizzo, P.E.; and (13) two ECS job orders and related documents. The only exhibit submitted by ECS, not duplicative of Nico's submissions is an affidavit by Mr. Ferguson. Con Ed adopts Nico's exhibits and plaintiff submits an affidavit by Sol Cohen, Professional Engineer.

Nico argues that none of the work performed by it on behalf of Con Ed or ECS was in the specific area of plaintiff's accident. Mr. Cannizzo, Nico's expert, performed a site evaluation on February 5, 2008 and took "measurements and photographs of pertinent locations along East 60<sup>th</sup> Street between First and Second Avenues." Mr. Cannizzo states that he found two pavement defects in the roadway within the immediate vicinity of the area that plaintiff fell. However, Mr. Cannizzo, after taking measurements, states that the defect that caused plaintiff's fall was not in the area where a street opening was made. He goes on to opine that the "deep depression nearest the location of the incident . . . is consistent with a condition created by heavy vehicles when decelerating, turning and accelerating on flexible

pavements, and is unrelated to restoration of pavement work preformed by NICO.”

Plaintiff, in opposition, submits the affidavit of her expert witness, Mr. Cohen. Mr. Cohen was the partner of Norman Wesler who is now deceased. His testimony is based on a review of the records and of data collected during an on-site inspection conducted by Mr. Wesler before his death. Mr. Cohen did not visit the site himself. Mr. Cohen opines that defendants were negligent in “the failure to properly compact the earth during backfill operations” which resulted in the roadway collapsing under the weight of heavy vehicles.

By way of reply, NICO argues that Mr. Cohen is not qualified to give his opinion on roadway excavations because he is an Electrical Engineer. Further, NICO argues that Mr. Cohen’s opinion should not be considered by the court because it was based on the findings of his partner, not on his own observations.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Several street opening permits/restoration tickets were issued for the area of 60<sup>th</sup> Street between 1<sup>st</sup> and 2<sup>nd</sup> Avenues, on the north side of the street, as evidenced by NICO’s submissions. Most relevant to NICO’s motion is Permit #PS398134. This particular permit/ticket indicates a “lamp pole” adjacent to proposed cut number one. Significantly, plaintiff testifies in her deposition, and the photographs submitted here show, that the subject defect is located in front of and to the side of a lamp pole. The ticket indicates that the restoration job was cancelled by Con Ed due to the existence of a “bus hummace” which is an area of asphalt that is pushed up by buses moving over it, creating a small mound. Plaintiff points to the testimony of Mr. Smith to show that NICO did in fact restore cut number one. Mr. Smith speculates that because NICO was paid by Con Ed, then it must have restored the area. Mr. Zimmerman, a specialist



for Con Ed, states otherwise. Mr. Zimmerman testifies at his deposition that he personally cancelled the restoration job after visiting the site due to the existence of a bus hummace and that he initialed the ticket himself. Mr. Zimmerman goes on to state that NICO was never paid for the job because no paving was ever done at the site. Mr. Denegall corroborates Mr. Zimmerman's testimony when he testifies that no work was performed in connection with ticket #PS398134. Mr. Zimmerman actually visited the scene and personally cancelled the job. Mr. Smith, who only did a search for records, and did not produce proof of actual payment for the work above, provides testimony that is merely speculative and does not create a question of fact.

In an attempt to show a connection between nearby work and plaintiff's accident, plaintiff provides the affidavit of her expert, Mr. Cohen. Mr. Cohen states that the defect plaintiff tripped on was located "adjacent to street opening work performed by Con Ed, Empire City Subway, and Nico Asphalt Paving, Inc." Mr. Cohen goes on to state:

Empire City Subway, Con Edison, and Nico Asphalt Paving, Inc. were major players in the break-up of the roadway that lead to the created defective condition that caused the subject accident. It is my opinion that these entities were negligent in the failure to properly compact the soil or ensure that the soil was properly compacted before proceeding with restoration work.

NICO has shown that it did not perform work at the precise location where plaintiff alleges she tripped. The only work ticket produced for that exact location shows that the work was cancelled and the only evidence plaintiff submits in opposition is an affidavit of her expert stating that the defect was "adjacent" to work performed in the area. It is well settled that merely showing that a defendant performed work in a general area is not enough to defeat a motion for summary judgment. Upon NICO's showing that it did not perform work at the location of plaintiff's accident, the burden shifts to plaintiff to produce some evidence connecting work permits issued for the area to the "situs of plaintiff's injury." (*Robinson v. City of New York*, 18 AD3d 255[1st Dept. 2005]) (*see also: Flores v. City of New York*, 29 AD3d 356[1st Dept. 2006]). Plaintiff has failed to meet her burden here, and NICO is entitled to summary judgment.

Using the same line of reasoning, ECS has shown that it is also entitled to summary judgment. The only work performed by Empire in the two years before and

including the date of the accident, was the digging of a trench that ran north and south across 60<sup>th</sup> Street five feet west of the alleged defect. Mr. Ferguson, an ECS specialist identified the trench in the photographs and determined that it was over five feet away from the site of plaintiff's accident. Mr. Cannizzo also opines that the ECS trench was "(5) feet west of the lamppost base." Plaintiff argues that Mr. Cannizzo's measurements are inaccurate because the inspection was performed over three years after the accident and a subsequent repair was made between the time of plaintiff's accident and the inspection. Indeed, Mr. Cannizzo's inspection, done three years after the accident and after the defect was allegedly repaired, does little to establish precisely where the defect was located. However, the lamp post base, which served as a reference point for plaintiff when asked to circle the defect on a photograph, and as marked on the opening permits, shows that the restored ECS trench was five feet west of the lamp post base and a distance from the offending defect plaintiff identified.

Con Ed, like NICO and ECS, has shown as a matter of law that it did not create the defect that caused plaintiff's accident. The subject opening ticket is stamped "NO OPENINGS MADE DATES FOR MACHINE PURPOSES ONLY," Mr. Zimmerman testifies that the Department of Transportation ("DOT") put in a request for Con Ed to pave the subject location because the City was preparing for the Republican National Convention. However, the job was cancelled at the location because NICO reported the existence of a bus hummace. Mr. Zimmerman visited the site himself and testifies that no openings were ever made and no restoration was performed because of the hummace. Mr. Cannizzo, in his affidavit, explains that a hummace is caused by buses accelerating and decelerating at the curb, causing "lateral displacement or heaving due to the bearing capacity of the asphalt being exceeded." He goes on to state that this condition does not begin suddenly but rather it develops over a period of years. Mr. Cannizzo places responsibility for the hummaces with the DOT, which he states was responsible for maintenance of roadways and the location of bus stops. He further states that the DOT "became aware that bus stop asphalt surfaces were undulating and heaving due to creeping of the flexible asphalt pavement surface cross-section perpendicular to the direction of travel."

Con Ed has submitted evidence showing that it did not perform work at the subject location. Indeed, it has shown that openings which were scheduled to be made were cancelled due to the existence of a bus hummace. Plaintiff has not submitted

evidence to contradict this finding. Instead, plaintiff's expert makes the conclusory statement that the moving defendants "were major players in the break-up of the roadway" and that "the type of roadway done by these parties, not done properly, also affects the structural integrity of adjacent roadway surfaces and creates defective roadway surfaces." (Cohen Affidavit). Conclusory expert affidavits are insufficient to raise a triable issue of fact. (*Murphy v. Conner*, 84 NY2d 969[1994]).

Wherefore it is hereby

ORDERED that the motions and the cross-motion are granted and the complaint is hereby severed and dismissed as against defendants Nico Asphalt Paving, Inc., Empire City Subway Company of New York and Consolidated Edison Company of New York, and the clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the Third Party complaint is dismissed; and it is further

ORDERED that the remainder of the action shall continue.

DATED: August 11, 2008

  
EILEEN A. RAKOWER, J.S.C