# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
*Justice*

ELLEN TEIXEIRA,
Plaintiff(s),

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION , CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NICO ASPHALT, INC., FELIX EQUITIES, INC. and FELIX INDUSTRIES, INC.,
Defendant(s) .

INDEX NO. 116021/02
MOTION DATE 11-09-2011
MOTION SEQ. NO. 007
MOTION CAL. NO.



CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Third-Party Plaintiff(s),

- v -

NICO ASPHALT, INC.,
Third-Party Defendant(s).

The following papers, numbered 1 to 15 were read on these motion and cross-motions to/ for Summary Judgment :

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1- 2, 3-4, 5-6, 7-8 |
| Answering Affidavits — Exhibits ____cross motion ____ | 9, 10, 11 |
| Replying Affidavits ____ | 12, 13, 14, 15 |

**Cross-Motion: X Yes No**

Upon a reading of the foregoing cited papers, it is Ordered that defendants, FELIX EQUITIES INC. AND FELIX INDUSTRIES INC.'s (herein after referred to as "FELIX"), motion for summary judgment, is denied. Defendant, NICO ASPHALT, INC.'s (hereinafter referred to as "NICO"), cross-motion for summary judgment, is denied. Defendant, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'s (hereinafter referred to as "Con. Ed.") cross-motion for summary judgment, is denied. Plaintiff's cross-motion for summary judgment, is denied.

Plaintiff brought this personal injury action claiming that on April 22, 2001, she while rollerblading she tripped and fell on a defective condition in the roadway north of the crosswalk on the south side of the intersection of Fifth Avenue and 72nd Street, New York, New York.

The City of New York and New York City Department of Transportation are no longer parties to this action, pursuant to the Decision/Order of Hon. Cynthia S.

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

Kern dated May 20, 2011, granting them summary judgment. The May 20, 2011 Decision/Order denied plaintiff's cross-motion for summary judgment against defendant Con. Ed., on the issue of liability.

FELIX seeks an Order pursuant to CPLR §3212, granting them summary judgment claiming that it did not perform any work in the area where plaintiff claims the accident occurred. FELIX also claims they did not owe a duty to the plaintiff and because their work was only performed below ground or as part of the back fill which did not involve paving or resealing the roadway. FELIX states that plaintiff assumed the risk and they are not liable.

NICO's cross-motion pursuant to CPLR §3212, seeks summary judgment claiming that it did not perform any work in the area where plaintiff claims the accident occurred and it was only responsible for the one inch top covering of asphalt. NICO claims the subsurface contractor was responsible for installation and compaction of the back fill and base.

Con. Ed.'s cross-motion pursuant to CPLR §3212, seeks summary judgment and relies on the co-defendant's motions. Con. Ed. claims that plaintiff has not presented evidence that the work performed near the alleged accident location created the alleged defective condition in the roadway.

Plaintiff opposes the defendants motions and cross-moves pursuant to CPLR §3212, seeking summary judgment against FELIX, NICO and Con. Ed.. Plaintiff seeks a determination that the location she identified as where she fell because of a defect in the roadway, was the situs of the work performed by the remaining defendants. Plaintiff also seeks a determination on her claims that FELIX, NICO and Con. Ed. violated the Department of Transportation and Bureau of Highways standards and rules regarding roadway restoration work.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Kaufman v. Silver, 90 N.Y. 2d 204, 659 N.Y.S. 2d 250 [1997], Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]). Summary judgment is a drastic remedy that should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and Epstein v. Scally 99 A.D. 2d 713, 472 N.Y.S. 2d 318 [N.Y.A.D. 1st Dept. 1984]).

Defendants, seeking summary judgment in a case involving a defect in pavement or a pothole, have the burden of proving that they did not create the

defective condition (Field v. City of New York, 302 A.D. 2d 223, 753 N.Y.S. 2d 719 [N.Y.A.D. 1st Dept., 2003]). Proof that repair work was performed at another location and not the situs of plaintiff's accident is sufficient for the defendants to meet their prima facie burden (Robinson v. City of New York, 18 A.D. 3d 255, 836 N.Y.S. 2d 610 [N.Y.A.D. 1st Dept., 2005]). The burden shifts to the plaintiff to establish the existence of facts and conditions based on the defendants' negligence and the inference of causation of the accident (Flores v. City of New York, 29 A.D. 3d 356, 815 N.Y.S. 2d 48 [N.Y.A.D. 1st Dept., 2006]). Proof submitted by plaintiff must be sufficient to permit a finding of proximate cause and not be based upon speculation (Robinson v. City of New York, 18 A.D. 3d 255, supra citing to Schneider v. Kings Highway Hosp. Ctr, 67 N.Y. 2d 743, 490 N.E. 2d 1221, 500 N.Y.S. 2d 95 [1986] ).

Plaintiff testified at her deposition (Mot. Exh. F) that the accident occurred on April 22, 2001, as she exited Central Park at 72nd Street and Fifth Avenue on the south side of the intersection but north of the cross-walk, as she rollerbladed across her left foot fell into a big hole causing her to fall (Mot. Exh. F, pp. 6-11).

The deposition transcript of John Dengall , NICO's superintendent, responsible for overseeing all of NICO's asphalt pavement work, which began in March of 2001 (Mot. Exh. J, pp. 6-8) is annexed to the motion papers. Mr. Dengall testified that NICO's work was performed in front of 15 East 72nd Street at Fifth Avenue per the Con. Ed. Report # PS 137432 (Mot. Exh. E) and not at the intersection where plaintiff claims she fell (Mot. Exh. J, p. 13). Mr. Dengall also testified that cuts numbered 4, 5, 6 on 72nd Street, ten feet north of the south curb line of 72nd Street were made by another contractor (FELIX)(Mot. Exh. J, p. 15). Cut 4 was located eighty feet east of Fifth Avenue, cut 5 was five feet east of Fifth Avenue and cut six began three feet east of Fifth Avenue ending twenty-one feet east of Fifth Avenue (Mot. Exh. J, pp. 35).

The deposition transcript of Kerry Watts, a construction representative for Con. Ed. is annexed to the motion papers. He states that he was present at the 72nd Street and Fifth Avenue construction and made sure the contractors adhered to the City's DOT specifications (Mot. Exh. H, pp. 12-14). Although no reports were prepared, he was present and performed a visual inspection of the backfill at the time it occurred, and approved it (Mot. Exh. H., pp. 14, 32-33, 44-48).

The affidavit of Nicholas Bellizzi, P.E., an engineering expert, retained on behalf of NICO (Mot. Exh. L) is based on a physical examination of the situs, reviewed reports, deposition testimony and photographs of the scene. Mr. Bellizi states that there were no photographs that illustrated the depth of the defect, however those that were available establish the defect is not within a restored pavement cut area (Mot. Exhs. L & O). He claims that the photographs establish that the restored cut has a rectangular shape, different tone of black asphalt pavement and dark black hot liquid asphalt sealant (Mot. Exh. O). The defective

area was irregular in shape, had characteristics of a repaired pothole instead of a utility cut and was adjacent to the repaired area.

Defendants NICO and Con. Ed. rely on the deposition testimony and report of Mr. Bellizzi to support their claims that they did not perform any work in the area where plaintiff claims the accident occurred and are not liable.

Plaintiff in support of its cross-motion provides multiple affidavits of Jacques P. Wolfner, P.E.. Mr. Wolfner, physically examined the location on July 22, 2001 and prepared a report in 2004. He also relied on reports, deposition testimony and photographs of the area. He determined that the defect in the area where plaintiff fell was not a pothole caused by wear and tear over time, but was the result of an immediate collapse resulting from improper backfill and pavement restoration work in the adjoining area. Mr. Wolfner annexes copies of work orders to his affidavit and states that there were two repairs made on behalf of Con. Ed. by its contractors that were adjacent to the defect, to alter a manhole and to repair a gas line, within four to seven weeks of the defect occurring. He claims that the defect occurred as a result of faulty repair work and that NICO did not complete its restoration of the roadway for seven days after the accident so there is no proof that the defect occurred long after the repair work was complete.

Upon a review of all the papers submitted to this Court, the defendants have met their prima facie burden of proof establishing that repair work was performed at another location and not the situs of plaintiff's accident. Plaintiff has raised a triable issue of fact concerning whether the defendants were negligent caused the accident based on improper backfill and pavement restoration work in the area adjoining where the plaintiff fell.

Multiple summary judgment motions are to be discouraged in the absence of newly discovered evidence or sufficient cause (National Enterprises Corp. v. Dechert Price & Rhoads, 246 A.D. 2d 481, 667 N.Y.S. 2d 745 [N.Y.A.D. 1st Dept., 1998] and Forte v. Weiner, 214 A.D. 2d 397, 624 N.Y.S .2d 596 [N.Y.A.D. 1st Dept., 1995], lv. dismissed 86 N.Y. 2d 885, 659 N.E. 2d 773, 635 N.Y.S. 2d 950, 659 N.E. 2d 773 [1995]).

Plaintiff previously sought summary judgment against Con. Ed. and that motion was denied because there remained issues of fact concerning whether she assumed the risk from the open and obvious conditions in the roadway. Plaintiff made no showing on the cross-motion that there is newly discovered evidence, or that there was a sufficient cause to permit an additional motion for summary judgment. The plaintiff's cross-motion should be addressed solely as opposition to the defendants motion and cross-motions. There remains a triable issue of fact concerning whether the defendants were negligent and caused the accident based on improper backfill and pavement restoration work in the area adjoining where plaintiff fell.

Accordingly, it is ORDERED that defendants FELIX EQUITIES INC. AND FELIX INDUSTRIES INC.'s, motion pursuant to CPLR §3212, for summary judgment is denied, and it is further,

ORDERED that NICO ASPHALT, INC.'s cross-motion pursuant to CPLR §3212, for summary judgment is denied, and it is further,

ORDERED that CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'s cross-motion pursuant to CPLR §3212, for summary judgment is denied, and it is further,

ORDERED that plaintiff's cross-motion pursuant to CPLR §3212, for summary judgment is denied, and it is further,

ORDERED that the action shall continue to mediation and/or trial.

This constitutes the decision and order of this court.

Dated: December 16, 2011

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE