

**Jones v City of New York**

2013 NY Slip Op 33681(U)

January 9, 2013

Sup Ct, New York County

Docket Number: 113039/05

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/15/2013  
[\* 1]

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

LATISHA JONES,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT  
AUTHORITY, MANHATTAN & BRONX SURFACE TRANSIT  
OPERATING AUTHORITY, CONSOLIDATED EDISON  
COMPANY OF NEW YORK, INC., NICO ASPHALT, INC., and  
MEC CONSTRUCTION, CORP.,

Defendants.

INDEX NO. 113039/05

MOTION DATE 1/3/13

MOTION SEQ. NO. 007

**FILED**

(And a third-party action).

JAN 15 2013

NEW YORK

COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 12 were received by the County Clerk's Office for judgment and cross motion for summary judgment.

Notice of Motion—Affidavit of Service; Affirmation— Exhibits A-M	No(s).	<u>1-2; 3</u>
Notice of Cross Motion—Affirmation— Exhibits A-B—Affidavit of Service	No(s).	<u>4-6</u>
Affirmation in Partial Opposition to Cross Motion—Affidavit of Service;	No(s).	<u>7-8;</u>
Affirmation in Opposition— Exhibits A-B— Affidavit of Service;		<u>9-10</u>
Affirmation in Opposition— Affidavit of Service		<u>11-12</u>

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant MECC Contracting, Inc. (sued herein as MEC Construction Corp.) is granted, the complaint is severed and dismissed as against this defendant, and the Clerk is directed to enter judgment in favor of this defendant accordingly; and it is further

ORDERED that the cross claims by defendant/third-party defendant MEC Construction Corp. are dismissed; and it is further

ORDERED that the third cause of action against third-party defendant MEC Construction Corp. in the third-party complaint is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by defendant Consolidated Edison Company of New York is denied.

(Continued . . .)

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

In this action, plaintiff alleges that she was injured when, while disembarking from a bus, she stepped into a hole in the roadway immediately surrounding a maintenance hole cover, which is stamped "Con Edison." (See *Stagias Affirm.*, Ex H.) By decision dated May 22, 2012, the Appellate Division, First Department, reversed a decision of this Court and granted the motion of defendant/third-party defendant Nico Asphalt Paving, Inc. (Nico). The decision states, in pertinent part:

"Nico, through the deposition of the Con Edison employees who supervised the project in question, made a prima facie showing of entitlement to judgment as a matter of law dismissing plaintiff's complaint as against it. The testimony of the construction inspector established that the trench that extended towards the maintenance hole in question stopped short of the cover. . . .

In opposition to the motion, plaintiff failed to offer any evidence sufficient to raise a triable issue of fact. Significantly, she did not dispute the testimony that the trench did not extend to the maintenance hole cover and that only the areas where the trench existed would have been paved."

(*Jones v Consolidated Edison Co. of N.Y.*, 95 AD3d 659, 660-661.)

MEC Construction Corp. now moves for summary judgment dismissing the action and third-party action as against it, on the ground that none of the trenches that MEC dug along 145<sup>th</sup> Street extended to manhole covers. It is undisputed that MEC Construction Corp. dug the trench mentioned in the deposition testimony in the Appellate Division's decision. MEC Construction Corp. relies upon not only the Appellate Division's decision, but also includes, among others, the deposition testimony of the construction inspector employed by Consolidated Edison Company of New York, Inc. (ConEd).

Only ConEd opposes this motion, and it cross-moves for summary judgment dismissing the action as against it. ConEd asserts that, if MEC Construction Corp. is dismissed from the action, then ConEd should be dismissed as well. ConEd argues that the fate of ConEd and MEC Construction Corp. are "inextricably bound" due to indemnification provisions contained in MEC Construction Corp.'s contract with ConEd.

(Continued . . .)

MEC Construction Corp.'s motion for summary judgment is granted. MEC Construction Corp. essentially maintains that it could not have created the defect around the manhole cover because it did not perform any work around the manhole cover. The Appellate Division cited the unrebutted testimony of ConEd construction inspector that "the trench that extended towards the maintenance hole in question stopped short of the cover." (*Jones*, 95 AD3d at 660.) Here, ConEd does not submit any testimony contradicting the construction inspector's testimony, and it is undisputed that MEC Construction Corp. dug that the trench mentioned in the Appellate Division's decision.

Because the complaint is dismissed as against MEC Construction Corp., Construction Corp.'s cross claims against its co-defendants for common-law indemnification are also dismissed. Because MEC Construction Corp. may not be held liable for plaintiff's injuries, ConEd cannot prevail on its cause of action against MEC Construction Corp. for common-law indemnification and/or contribution. Therefore, the third cause of action against third-party defendant MEC Construction Corp. in the third-party complaint is dismissed.

However, the other causes of action against MEC Construction Corp. in the third-party action are not dismissed. Dismissal of the complaint does not necessarily result in dismissal of these contract-based cross claims.

ConEd's cross motion for summary judgment is denied. Contrary to ConEd's argument, its fate is not "inextricably intertwined" with MEC Construction Corp. ConEd is the alleged owner of the manhole cover. Plaintiff and the City of New York point out that ConEd did not address whether ConEd could be liable for plaintiff's injuries based on a violation of 34 RCNY § 2-07 (b). 34 RCNY § 2-07 (b) states, in pertinent part:

"(1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware.  
(2) The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."

(Continued . . .)

Because ConEd did not address this issue on its cross motion, it did not meet its prima facie burden of summary judgment as a matter of law.

Dated: 1/9/13  
New York, New York

  
\_\_\_\_\_, J.S.C.

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:.....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

HON. MICHAEL U. STALLMAN

**FILED**  
JAN 15 2013  
NEW YORK  
COUNTY CLERK'S OFFICE