[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____ Justice

PART 5

JANET NICI, AND RICHARD NICI

-v-

CON EDISON, CITY OF N.Y., ET. AL

INDEX NO. 111347/07

MOTION DATE _____

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10-15-13

OCT 15 2013

_____, 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 5

----------X

JANET NICI and RICHARD NICI,

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TULLY CONSTRUCTION CO. INC., THE CITYOF NEW YORK, EMPIRE CITY SUBWAY COMPANY, LTD., VERIZON COMMUNICATIONS, INC., FLEET TRUCKING INC., and NICO ASPHALT PAVING INC.,

Defendants.

----------X

TULLY CONSTRUCTION CO., INC.,

Third Party Plaintiff,

-against-

FLEET TRUCKING, INC.,

Third Party Defendant

----------X

EMPIRE CITY SUBWAY COMPANY, LTD. and VERIZON COMMUNICATIONS, INC.,

Second Third Party Plaintiffs,

-against-

NICO ASPHALT PAVING, INC.,

Second Third Party Defendant.

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HON. KATHRYN E. FREED:

DECISION/ORDER
Index No. 111347/2007
Seq. No. 005

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-3
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	5 (Exhs. B-W)-6
REPLYING AFFIDAVITS	7-9
EXHIBITS	
OTHER (X-Motion)	4

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

Defendants Empire City Subway Company Ltd, ("ECS") and Verizon Communications, Inc., ("Verizon"), move for an Order pursuant to CPLR§ 3212, granting summary judgment dismissing plaintiff's complaint and all cross claims. They also move for an Order pursuant to CPLR§ 3212 for summary judgment on their cross claims against co-defendant City of New York ("the City"), sounding in common law indemnification; and/or pursuant to CPLR§ 3212 granting summary judgment on their cross claims against co-defendant Nico Asphalt Paving, Inc. ("Nico"), sounding in common law and contractual indemnification; and/or granting them reimbursement of attorney's fees for defending this action.

Nico cross-moves for an order pursuant to CPLR§ 3212 granting summary judgment in favor of defendant/second third-party defendant and dismissing the complaint and second third-party complaint as well as all counter and cross-claims against these cross movants, and also denying that part of the motion by ECS and Verizon for summary judgement against it. Plaintiff and defendant City oppose.

Factual and procedural background:

Plaintiff Janet Nici seeks monetary damages for personal injuries she allegedly sustained on April 26, 2007, when her foot came into contact with a pothole causing her to fall. Said pothole was

located in the southern crosswalk of 45th Street and 8th Avenue in New York County. Thereafter, plaintiff served a summons and complaint on defendants on or about August 13, 2007. She subsequently amended same on March 17, 2008, adding defendant Nico as an additional party, alleging that Nico was negligent in failing to completely fill the pothole.

A contract existing between ECS and Nico required Nico to indemnify and hold harmless, ECS, Verizon and its affiliates. The contract additionally required Nico to name Verizon and ECS as additional insureds under its general liability policies.

Plaintiff testified that on April 26, 2007, at approximately 10:45 pm, she was walking from the theatre to her car. She was crossing the southerly crosswalk of 8th Avenue and 45th Street from east to west. (Motion, Exh. D, p. 16,lines 8-22). As she was about two thirds of the way across the street, she fell in pothole (*id.* p. 18, lines 11-18). She described said pothole as being approximately a few inches deep, oval in shape and approximately one foot long and six to nine inches wide (*id.* p. 58, lines 22-22). Plaintiff also testified that she did not see the pothole until after the accident (*id.* p. 20, line 23).

Positions of the parties:

ECS argues that it is a well settled legal concept that a defendant is entitled to summary judgment where it is established that the alleged defect was neither created by defendant, its employees or agents. Additionally, it argues that proof that work was done close by or in the vicinity of the defect is insufficient to impute liability on the entity performing the work. ECS argues that all the evidence presented indicates that the two repairs to the street were independent and separate, and that plaintiff's accident cannot be attributable to either it or its contractor, Nico. It also argues that several pieces of evidence confirm that the repair to the roadway done by Nico in 2006, was not

where plaintiff fell, in that in her supplemental affidavit, plaintiff stated that she fell in the crosswalk. (Plaintiff's Opp., Exh. I). She also stated that there was a yellow ECS stamp "[w]ithin a foot or two of the pothole" *(id.* 4, ¶ 3). ECS argues that this is adequate proof that any repair performed by Nico was not related to the subject pothole.

ECS also argues that Verizon is entitled to summary judgment because it is merely a holding company that has absolutely no duty or responsibility to maintain or repair the roadway. Additionally, ECS argues that no evidence exists to prove that Verizon performed any work near the subject pothole, nor did it repair or maintain the roadway wherein the pothole is situated. ECS refers to and relies on an affidavit of Jane Schapker, annexed as Exh. N, as support for this position. In her affidavit, Ms. Schapker, a corporate secretary employed by Verizon, confirms that Verizon is indeed a holding company which does not own, operate, maintain or control any roadways or facilities within the roadways of New York and "has never excavated or made any repairs in any of the roadways in the State of New York" *(id.* ¶¶ 3-4). ECS argues that said affidavit is substantive proof that since Verizon had nothing to do with the defective condition causing plaintiff's accident, it is unequivocally entitled to summary judgment.

In order to meet its prima facie burden, ECS submits the testimony and/or affidavit(s) of Marc Soto, John Denegal, Anthony Fasulo, Steven Keply and Calvin Gordon. Marc Soto, an Area Operations Manager with ECS, testified that ECS is a franchise holder within Manhattan and the Bronx for telecommunication facilities underground, and is a wholly owned subsidiary of Verizon New York. (Plaintiff's Aff. in Opp., Exh. N, p. 7). Mr. Soto testified that a search of ECS's entire database as well as hard copy files in reference to the subject location was conducted, going back two years prior to the date of the accident, and extending one block in each direction from this

particular intersection. Said search encompassed construction documents, paving documents as well as all work related types of documents gathered during the normal course of business. Mr. Soto also testified that in 2007, Nico was the paver who put in the binder and surface, with ECS filling the trench to a certain level, and Nico then finishing the paving.

During his testimony, Mr. Soto reviewed the photographs taken of the scene. He confirmed that the stamp on one area of repair states "ECS06," and that said designation means that Nico did paving on behalf of ECS in 2006. (Exh. F, p. 29, lines 13-16). Mr. Soto also confirmed that a yellow paint mark depicted in the photograph was placed in the roadway by Nico (id. 40, lines 14-24). Mr. Soto stated that these post-accident photographs taken by a Con Edison investigator indicate two unique and different repair jobs *(id.* p. 41, lines 20-42). Additionally, the paving that covered the subject pothole was done subsequent to the job performed by Nico.

Mr. Anthony Fasulo testified on April 9, 2010. (Exh. L). He is employed by the City of New York, Department of Transportation, Bureau of Highways, as a highway repairer. At the time of the accident, Mr. Fasulo was working with the "Jet Team," Jolt Emergency Team Response. The Jet Team responds to emergency situations like oil spills, water main breaks, and potholes. He explained that there are essentially two methods utilized in fixing a pothole, the use of cold or hot asphalt (*id.* p.10, lines 8-10). The use of cold asphalt is merely a temporary fix, in that the asphalt would sink, hence, it would necessitate further repair (*id.* p. 10, line 21; p. 11, line 5).

Mr. Fasulo also testified that there are three different types of potholes. The subject pothole was classified as a "C" pothole, one that is approximately 4 feet by 4 feet (*id.* 37, line 23). He also testified that according to the records he reviewed, a C sized pothole was made temporarily safe on April 15, 2007, subsequent to the use of a cold patch. (Exh. M). Mr. Fasulo also testified that when

a repairer receives a complaint that is unclear, the stated procedure is to survey the entire intersection or block, and fix all existing potholes, even after the initial pothole is located. (Exh. L, p. 28, line 8, p. 29, line 3). Mr. Fasulo further testified that only one pothole was repaired at the intersection on April 15, 2007. Like Mr. Denegal, Mr. Fasulo confirmed that the DOT does not stamp its work when it repairs a pothole (*id.* p. 29, line 18). More importantly, when reviewing a photograph of the subject defect, Mr. Fasulo opined that the photo, while showing an ECS paving stamp, still did not indicate any evidence of improper backfilling (*id.* p. 40, line 14).

Steven Kepley, also a pothole repairman, testified on behalf of the DOT. (Exh. J). He explained that the DOT operating procedure is to take a complaint, proceed to the location wherein the pothole is situated, locate it and fill it with either cold patch or hot asphalt (*id.* at pp. 18-20). If a defect is found and it happens to be the one that is specified to be repaired, Mr. Kepley testified that he would, nevertheless, still survey the entire intersection for evidence of other existing potholes (*id.* p. 33, line 14).

Mr. Kepley was the supervisor of a crew that repaired a pothole at the subject intersection on April 15, 2007, nine days prior to plaintiff's accident (*id.*17, line 2). The complaint emanated from the public, probably via a 311 call, on April 14, 2007. Said pothole was repaired with cold patch, a filler composed of loose material which is stamped and made flush with the pavement. Said cold patch is deemed a temporary solution in that it is used when the weather tends to be cold and windy (*id.* p. 26, line 22). When Mr. Kepley reviewed the aforementioned photographs, he noticed that depicted two pavement restorations. One was stamped and the other was not. (Exh. J, p. 35, lines 3-25). He opined that the unstamped one was a C sized pothole and the fact that it remained unstamped indicated that it could have been DOT who performed the restoration (*id.* p. 18, lines 3-

25).

Mr. Gordon is employed by ECS as a "Specialist," whose duties include the researching of and searching for company records including facilities location, permits, and construction. In his affidavit annexed as Exh. T, he states that on March 7, 2012, he personally searched for any Corrective Action Requests ("CARS") issued by ECS in 2006. He found two CARS ("that were issued by the City on May 24, 2006, which relate to the same defect, which is described as "79" and relates to "broken asphalt." Mr. Gordon also states that said CARS do not reference any permit numbers which is why they were not discovered during ECS's initial search.

Upon receiving the CARS, Mr. Gordon further investigated to ascertain the job(s) that the CARS related to and to determine if any work was done to remedy them. His investigation revealed that the CARS related to a job which included the excavation of a trench that ran east to west in the southern crosswalk of 45th Street and 8th Avenue, from an ECS manhole on the southeast corner to an ECS manhole in the southwest corner. The job number was 087268RT and the job was completed in 2000. Mr. Gordon also states that on March 22, 2000, Nico did the paving and final restoration of the trench connecting the aforementioned manholes. Additionally, Mr. Gordon's search further revealed that the 2006 CARS were sent to Nico, who then restored and paved a 3 foot wide by 2 foot long by 2 inch deep section of roadway in the southern crosswalk of 45th Street and 8th Avenue on October 10, 2006.

Mr. Gordon also stated that he did not find any CARS, NOVs (Notices of Violations), summons or complaints for the intersection of 45th Street and 8th Avenue, including the southern crosswalk between October 10, 2006, and the accident date of April 26, 2007. Upon reviewing the post-accident photographs taken on September 18, 2007, Mr. Gordon conducted a search to

determine whether ECS or its paver Nico performed any work or paving between April 26, 2007 and September 18, 2007, at the intersection of 45th Street and 8th Avenue near the southern crosswalk. He did not find any such records. Moreover, he searched for any request, invoices or bills by the DOT requesting that ECS reimburse them for work performed at said location between the aforementioned dates. Again, he did not find any such records.

Mr. Gordon concludes that Nico finally restored the trench running east to west in the southern crosswalk of 45th Street and 8th Avenue in 2000, and then later returned on October 19, 2006, to address a CARS associated with that trench. He also concludes that ECS did not receive any complaints or additional CARS, Summonses or NOVs between October 10, 2006 and plaintiff's accident. Mr. Gordon finally concludes that the subsequent repair to the roadway as depicted in the post-accident photographs was not performed by either ECS or Nico.

Plaintiff submits the affidavit of William Marletta, a self employed safety consultant, who personally inspected the accident site on October 31, 2007. Mr. Marletta formulates his opinion based, *inter alia*, on his inspection, photographs taken of the location of the subject accident before and after the roadway was prepared, and 2 CARS issued to ECS on May 24, pertaining to the location of the subject accident. Mr. Marletta opines that based upon the photographs taken shortly after plaintiff's accident, and prior to the repair of the roadway, his inspection of the site indicated that the defect which caused plaintiff's accident was located in the roadway above an ECS trench. Additionally, he states that above said trench, the asphalt was broken, depressed and sagging in an area encompassing the subject pothole.

Mr. Marletta also opines that the roadway was broken, depressed and sagging in a line from one ECS manhole to the other, based on the fact that the trench built between the 2 ECS manholes

were improperly backfilled prior to the asphalt being laid on top. Furthermore, the attempt to repair the hole with an asphalt patch failed because it was improperly completed, resulting in a significant depression at least two inches deep. The absence of any sealant, particularly at the edge of the pothole, further contributed to its erosion.

Nico responds that there is no evidence that it performed any work where plaintiff's accident occurred. Therefore, Nico informs the Court that to this end, it adopts and incorporates the factual evidence and legal arguments promulgated by ECS and Verizon. ECS and Verizon refer to and rely upon the deposition testimony of John Denegall, Nico's Superintendent. Mr. Denegal testified that Nico handles the final restoration jobs for ECS via a contract. (Exh. H, p.7, lines 10-13). He also testified that Nico handles asphalt restoration between 4 and 18 inches (*id.* p. 23, lines 5-7).

Mr. Denegal conducted a two year search for work records and paving orders for the subject intersection and found that none existed. He also did not find any CARS relating to work performed in the subject intersection (*id.* p.44, line 11, p. 45, line 15). Mr. Denegal explained that generally Nico applies two layers of asphalt during the restoration process, followed by the application of a sealant. After the paving is completed, Nico then applies a color code stamp to the work. If the work affects the crosswalk lines, Nico repaints them (*id.* p. 72, lines 22-24). Mr. Denegal also testified that if a defect is found in Nico's work, ECS has the right to recall Nico to the site to fix the defect. Moreover, Nico warrants its work for one year after completion and will return to repair a defect at any time. Mr. Denegal testified that since plaintiff described the pothole as being a few inches deep, and Nico is responsible for defects 2 inches or less, Nico cannot be held liable (*id.* p. 31, lines 7-10).

Lastly and most importantly, Mr. Denegal reviewed the post-accident photographs taken by Con Ed's investigator (*id.* 71, line 13). He testified that the photographs depict two separate and

distinct areas of repair: the left patch is older and the right patch was created after the left patch. (Exh. H, p. 71). Nico argues that its involvement with this location is solely a result of its relationship with ECS. Thus, if ECS is found to be entitled to summary judgment, so would Nico as well. Nico also argues that with regard to the portion of the ECS and Verizon's motions for summary judgment against Nico on claims of contractual/common law indemnification and failure to purchase insurance, the court should deny those requests in their entirety. It argues that the indemnification provision found in the agreement between it and Bell Atlantic (formerly Verizon), is invalid because it violates General Obligations Law§ 5-322.1. Nico argues that said provision omits the phrase "to the fullest extent permitted by law," which contemplates partial indemnification and limits the indemnitors' (ECS and Verizon) contractual indemnity obligation to its own negligence.

Moreover, Nico undermines the relevance of Mr. Marletta's determination, claiming that his affidavit contains conclusory opinions, which fail to establish any foundation. Nico argues that in comparison to ECS's experts, Mr. Marletta fails to state various specific details to buttress his conclusion that the defect resulted from the work performed by ECS or Nico.

Verizon argues that no evidence has been proffered by any party connecting it to the pothole. It argues that in its opposition, plaintiff refers to Verizon and VCI interchangeably, however VCI is a separate legal corporate entity and Verizon is a trade name. In the instant case, plaintiff sued VCI and ECS only. Verizon also argues that despite numerous requests, plaintiff has failed to provide it with any permits issued to "Verizon Communications Inc." Even Dr. Marletta, plaintiff's expert, does not impute liability to Verizon.

Verizon further argues that given the fact that it is entitled to summary judgment, it is also entitled to contractual indemnification from Nico, based on the broadly worded 2002 contract. Thus, if plaintiff's claims against Verizon are dismissed, then Nico will still owe it contractual indemnification, including reimbursement for attorneys' fees. Verizon also argues that all the evidence presented indicates that the two repairs done to the street were independent and separate, and that plaintiff's accident was not caused by work done by ECS or its contractor Nico.

The City argues that ECS has not established with any degree of certainty, that it did not cause or create the alleged defect, since the pothole causing plaintiff's fall, was formed squarely within a trench in the roadway which was admittedly created and backfilled by ECS in 2000. The City also argues that there remains a question of fact regarding whether ECS caused and created the alleged defect by negligently backfilling the trench it created. It points out that this argument is particularly supported by the fact that multiple potholes formed the trench for which ECS was issued a CARS, and for which it sent its contractor, Nico Asphalt Paving, Inc., to repair as late as 2006. The City further argues that Nico completed a paving repair job in the trench on ECS's behalf just six months prior to plaintiff's accident.

The City also argues that although ECS argues that repair work done in 2006 and the pothole which caused plaintiff's accident are in "separate and unique area[s]," ECS admits that the stamp placed in the center of the 2006 repair job is a mere 18 inches away from the pothole. The City urges the Court to review the photographs annexed as Exh. M, which indicate that these two areas are immediately adjacent to each other, basically overlapping, and are both located in ECS's trench. The City further accuses ECS of attempting to "escape liability" by arguing that their statutory obligation to maintain and repair any excavation expired in March 2005, despite the fact that it

continued to have its contractor do paving work in the trench in 2006.

The City further argues that no admissible evidence of an "intervening or superceding cause of the pothole in question," exists. The City argues that there is no evidence to indicate that the C-sized pothole repaired with Road Rite/cold asphalt by the DOT crew on April 15, 2007, is the same pothole which caused plaintiff's accident. It also argues that there are facts to the contrary in Mr. Fasulo's testimony, wherein he testified that it is impossible, from the available records, to determine where in the intersection, the "C"-sized pothole the DOT crew filled in with Road/Rite cold asphalt on April 15, 2007, was located. (See Exh. L, p. 20).

With regard to Nico's involvement, the City argues that despite the fact that Nico relies on ECS's and Verizons's arguments that the repair work and pothole which caused plaintiff's accident are in separate and unique areas, ECS admits that the identifying stamp placed in the center of the repair work is merely 18 inches away from the subject pothole. The City points out that the aforementioned photographs indicate that these two allegedly "separate and unique" areas are actually immediately adjacent to each other, basically overlapping and are both located in ESC's trench. The City also points out that it is clear that the pothole formed within ECS's trench, underwent repair work performed by Nico six months prior to plaintiff's accident.

Plaintiff argues that defendants ECS, Verizon and Nico failed to meet their prima facie burden in that it is well settled that a contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson*

v. Waisman, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "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 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

"A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]; see *Petersel v. Good Samaritan Hosp. of Suffern, N.Y.*, 99 A.D.3d 880, 880 [2d Dept. 2012]; *Willis v. Galileo Cortlandt, LLC*, 106 A.D.3d 630 [2d Dept. 2013]; *Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 320 [1st Dept. 2006], *affd* 8 N.Y.3d 931 [2007]). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff's opposition (see *Perez v. Rodriquez*, 25 A.D.3d 506 [1st Dept. 2006]).

In the case at bar, the Court first determines that Verizon is entitled to summary judgment as a matter of law. Indeed, the Court accepts as true, Ms. Schapker's assertion that no semblance of evidence has been presented which indicates that Verizon performed any work near the subject

pothole, nor did it repair or maintain the roadway where the pothole was situated. Based on this, the Court finds that no liability can be attributed to Verizon (see *Cunniff v. Gyrodyne Co. of Am., Inc.*, 36 Misc.3d 1220(A), 2012 N.Y. Slip Op. 51412(U)(Sup Ct Nassau County 2012)).

Moreover, the Court finds that ECS and Nico are not entitled to summary judgment at this juncture in that there remains questions of material fact as to whether they are individually or collectively responsible for the failure to adequately fix and maintain the pothole. Indeed, when presented with conflicting opinions and conclusions of experts on both sides, the Court finds that the wisest path to take is to present the opposing positions to the jury. As has often been stated, the Court's role is a summary judgment motion is issue finding, not issue determination (see *Esteve v. Abad*, 271 A.D. 1st Dept. 1947). Hence, any questions of fact as to who is responsible for the defect is more appropriately reserved for a jury's determination.

However, despite the Court's denial of ECS's and Verizon's collective motion for summary judgment, it still finds that these parties are entitled to contractual indemnification and the reimbursement of attorney fees from Nico (see *Di Perna v. American Broadcasting Cos.*, 200 A.D.2d 267 [1st Dept. 1994]). Common law indemnification is available to a party who has not committed a wrong, but is nevertheless still liable to the injured party based on some relationship with the actual wrongdoer or based on some obligation imposed by law (see *Pub. Adm'r of Kings County v. 8 B.W., LLC*, 40 A.D.3d 834, 835 [2d Dept. 2007]). Thus, under the terms of the subject contract, whether or not the complaint is dismissed as against ECS, indemnification is still viable and warranted because the claim arises out of Nico's alleged acts and/or omissions. *Id.* A review of Paragraph 22.1 of the contract specifically contemplates indemnification as a defense even if the claims were proven to be baseless.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants Empire City Subway Company LTD ("ECS") and Verizon Communications Inc.'s ("Verizon") motion for summary judgment dismissing plaintiff's complaint and all cross claims is denied; and it is further

ORDERED that defendants' ECS and Verizons' motion granting summary judgment on their cross claims against the City of New York sounding in common law indemnification is denied; and it is further

ORDERED that defendants' ECS and Verizons' motion granting them summary judgment on their cross-claims against co-defendant Nico Asphalt Paving, Inc. ("Nico"), sounding in common law and contractual indemnification is granted; and it is further

ORDERED that Nico is to reimburse defendants ECS and Verizons' cost of attorney's fees for defending the instant action; and it is further

ORDERED that the rest of the action is to continue; and it is further

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

DATED: October 15, 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT