

<b>Kovel v Glenwood Mgt. Corp.</b>
2021 NY Slip Op 31091(U)
March 30, 2021
Supreme Court, New York County
Docket Number: 159560/2017
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR, J.S.C. PART 5**

*Justice*

-----X

VIRGINIA KOVEL,

Plaintiff,

- v -

GLENWOOD MANAGEMENT CORP., DELBRO REALTY  
1920, LLC, CITY OF NEW YORK

Defendants.

-----X

**INDEX NO.** 159560/2017

**MOTION DATE** 06/26/2020,  
06/19/2020

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 69, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 66, 67, 70, 71, 97

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Virginia Kovel commenced this action seeking damages for personal injuries allegedly sustained in a January 14, 2017 trip and fall on a stone tree well guard on the sidewalk abutting the building located at 1930/1934 Broadway, New York, New York. In motion sequence 001, the City of New York (City) now moves pursuant to CPLR 3211 and CPLR 3212 for to dismiss the complaint and crossclaims. In motion sequence 002, defendants Glenwood Management Corp. and Delbro Realty 1920 LLC (collectively, Glenwood), the managing agent and owner of the subject property, respectively, move pursuant to CPLR 3212 for summary judgment on the complaint and crossclaims. Plaintiff opposes both motions and the City opposes Glenwood’s motion. For the foregoing reasons and after oral argument on March 30, 2021, the City’s motion is granted, and Glenwood’s motion is denied.

Plaintiff testified that she was walking on West 65th Street, on the East side of Broadway when she tripped on the corner of stone tree guard surrounding a tree. Plaintiff described the tree guard as “[s]ort of a dark green stone, . . . It’s very low to the ground and not very visible, it was snowing” (NYSCEF # 54, pla 50-h tr at 15:10-14). Photographs depicting the tree guard reveal that the subject tree guard is dark green and slightly raised above the sidewalk at an incline (NYSCEF # 38). It is undisputed that a snowstorm was underway at the time of plaintiff’s fall.

In support of its motion, the City argues: 1) that it did not own the property, including the tree well, where plaintiff’s accident occurred; 2) that the City did not have prior written notice of the alleged defective condition; and 3) that it did not install or maintain the tree guard plaintiff

claims she tripped on. Glenwood, in support of its motion, argues: 1) that it was not responsible to maintain the tree well; 2) that it is not liable for plaintiff's injuries because of the ongoing snowstorm at the time of plaintiff's accident; and 3) that the tree guard was "open and obvious."

## DISCUSSION

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

### 1. *Prior written notice*

In order to hold the City liable for injuries resulting from roadway and sidewalk defects, including an alleged tree well defect, a plaintiff must demonstrate that the City has received prior written notice of the subject condition (Administrative Code § 7-201 [c]; *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *Tucker v City of New York*, 84 AD3d 640, 643 [1st Dept 2011]). "[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City" (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). "Failure to 'plead and prove' such prior written notice requires dismissal of the complaint" (*Kales v City of New York*, 169 AD3d 585 [1st Dept 2019], quoting *Katz*, 87 NY2d at 243). Prior written notice provisions enacted by the legislature in derogation of common law are strictly construed (*see Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]).

To satisfy its burden on summary judgment, the City must establish that, "through an affidavit from an appropriate official, that a search of the Department of Transportation's records was conducted and that there was no prior written notice of the defective condition" (*Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166 [1st Dept 2003]). Here, the City meets its initial burden that it did not have prior written notice of the subject defect by submitting the affidavits of Ronny Guerrero, a paralegal assigned to search for records maintained by the NYC Department of Transportation, and Yelena Bogdanova, a paralegal employed by the NYC Department of Parks and Recreation (Parks), indicating that a search of its records for the two years prior to plaintiff's accident did not reveal prior written notice of the alleged defective condition. The City also submits the testimony of Parks' employees Nave Strauss and John Mueller, wherein they each stated that the City did not install the subject tree guard (NYSCEF # 42 at 47:2-13; 62 at ¶ 4).

In opposition, plaintiff fails to raise an issue of fact. Plaintiff's initial argument, that the Big Apple Map identifies the subject defect, is without merit, since the map identifies an "extended section of raised or uneven sidewalk" near the subject defect, and not the alleged defect here (*see Roldan v City of New York*, 36 AD3d 484 [1st Dept 2007]) ["The awareness of one defect in the area is insufficient to constitute notice of a different particular defect which

caused the accident”). Plaintiff’s next argument that the City should have searched for records prior to two years before the accident is also without merit. A search for records, including complaints, permits, repair order, violations, contracts concerning an alleged defective tree well has been found to be sufficient to demonstrate no prior written notice under Administrative Code § 7-201(c)(2) (*see Tucker v City of New York*, 84 AD3d 640 [1st Dept 2011]; *O’Donoghue v City of New York*, 100 AD3d 402 [1st Dept 2012]; *Donadio v City of New York*, 126 AD3d 851 [2d Dept 2015]).

Further, there is no evidence on the record otherwise demonstrating that the City had prior written notice of the alleged defect or that the City installed or maintained the subject tree guard. The February 4, 2016 permit application submitted by Glenwood to the New York City Parks Department to “remove girdling roots and decompact soil” is unrelated to the subject tree guard. Further, the work permits and plans submitted by plaintiff do not provide prior written notice to the City (*see DeSilva v City of New York*, 15 AD3d 252, 253 [1st Dept 2005] [“(t)he issuance of the work permits is insufficient to satisfy the prior written notice requirement of (§ 7-201[c][2])”). Moreover, a construction proposal dated August 25, 2004, suggests that another company, and not the City, was contracted to install the tree guard (NYSCEF # 89).

## **2. Duty to maintain**

Administrative Code of the City of New York § 7-210 (a) places the duty to maintain a sidewalk in a reasonably safe condition on the owner of the property abutting the sidewalk, and provides for civil liability for injuries proximately caused by the failure to so maintain the sidewalk. A tree well does not fall within the applicable Administrative Code definition of “sidewalk” and, thus, “section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells” (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]; *see* Administrative Code of City of NY § 7-210; *see also Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011]; *Vigil v City of New York*, 110 AD3d 986 [2d Dept 2013]). Thus, liability may be imposed on the abutting landowner in such instances only where that landowner affirmatively created the dangerous condition, negligently made repairs to the area, or caused the dangerous condition to occur through a special use of that area” (*Fernandez*, 85 AD3d at 540; *Kleckner v Meushar 34th St., LLC*, 80 AD3d 478, 479 [1st Dept 2011]).

In the matter at hand, Glenwood fails to demonstrate that it had did not install the subject tree guard or otherwise did not have a duty to maintain the city-owned tree well. Glenwood submits the deposition transcript of Freddy Argoti (Argoti), the superintendent of the building adjacent to the location of the alleged defect, wherein he testified that the rectangular stone tree perimeter was installed at when the building was built, and that he believed that the perimeter was installed by “one of the construction companies that were part of the construction of the building” (NYSCEF # 41 at (NYSCEF # 41 at 40:21-25). Argoti further testified that the building was responsible for keeping the tree well free from tripping hazards (*id.* at 37:24-38:4; 50:10-19). Accordingly, in light of Argoti’s testimony and the proof submitted by the City, an issue of fact exists as to whether Glenwood installed the subject tree guard and whether Glenwood was responsible to maintain and repair the guard (*see Kleckner v Meushar, 34th St., LLC*, 80 AD3d 478, 479 [1st Dept 2011], citing *Skinner v City of New York*, 2010 NY Slip Op 31068[U] [Sup Ct, NY County 2010] [“a property owner may still owe a duty relating to a tree

well if it creates a defective condition on it or uses it for a special purpose, such as when it installs an object on it, or varies its construction”).

### 3. *Storm in progress*

“[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended” (*Pippo v City of N.Y.*, 43 AD3d 303, 304 [1st Dept 2007]). Where a defendant establishes such a circumstance, it has no duty to remedy the storm-related snow and ice conditions alleged to have caused the plaintiffs injuries (see *Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541, 542 [1st Dept 2015]). Here, while it is undisputed that a snowstorm was underway at the time of plaintiff’s fall, the storm in progress doctrine is inapplicable, as plaintiff does not allege that she tripped on the alleged defect because of an icy condition. Glenwood does not cite to case law supporting its position that the storm in progress doctrine applies to the facts herein.

### 4. *Open and obvious*

“[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion” (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 [1st Dept 2004]). “To establish an open and obvious condition, a defendant must prove that the hazard ‘could not reasonably be overlooked by anyone in the area whose eyes were open’ ” (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014], quoting *Westbrook*, 5 AD3d at 72). Here, Glenwood fails to meet its burden of demonstrating that the alleged defect was an open and obvious condition, in light of plaintiff’s testimony that the tree guard was low to the ground and difficult to see, in part because the tree guard was partially covered in snow. Even if Glenwood met their initial burden, plaintiff submits the un rebutted affidavit of her expert, wherein the expert states that the section of the tree guard was 1.5 inches above the sidewalk, and gradually inclined to a height of 4.5 inches, constituting in a tripping hazard (NYSCEF # 73 at ¶¶ 9, 14-17, 21-24). The expert’s report, together with plaintiff’s testimony, raise an issue of fact as to whether the alleged defective condition was open and obvious.

Accordingly, it is hereby

ORDERED that the City’s motion pursuant to CPLR 3212 for summary dismissal of the complaint is granted, and the complaint is dismissed as against the City; it is further

ORDERED that Glenwood Management Corp. and Delbro Realty’s motion pursuant to CPLR 3212 for summary dismissal of the complaint is denied; and it is further

ORDERED that this matter be transferred to a non-City part, as the City is no longer a party in this action; and it is further

ORDERED that counsel for the City shall serve a copy of this order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the order of the Court.

3/30/2021

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE