

**Ackert v City of New York**

2023 NY Slip Op 32609(U)

July 28, 2023

Supreme Court, New York County

Docket Number: Index No. 160410/2020

Judge: J. Mabelle Sweeting

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

**PRESENT: HON. J. MACHELLE SWEETING PART 62**

*Justice*

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KIMBERLY ACKERT, CLAUDETTE BUELOW,  
  
Plaintiffs,

**INDEX NO.** 160410/2020

**MOTION DATE** 11/28/2022

**MOTION SEQ. NO.** 004

- v -

THE CITY OF NEW YORK, SILVERCUP SCAFFOLDING 1  
LLC, PANORAMA INTERNATIONAL CONTRACTING,  
INC., 310 EAST 55TH STREET TENANTS CORP., BABAD  
MANAGEMENT CO., LLC, OR OLAM THE EAST 55TH  
STREET SYNAGOGUE, CONGREGATION BNEI LEVI,  
CORE CLUB 55TH STREET LLC, EAST 55TH STREET  
JEWISH CENTER, CONGREGATION BNEI LEIVE,

**DECISION + ORDER ON  
MOTION**

Defendants.

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SILVERCUP SCAFFOLDING 1 LLC

Third-Party  
Index No. 595158/2022

Third-Party Plaintiff,

-against-

V. VASS ELECTRIC CORP.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

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

In the underlying action, plaintiff Kimberly Ackert claims that on September 16, 2019 at approximately 7 pm, she tripped and fell in a tree well. It is undisputed that the subject tree well was embedded in a portion of sidewalk that abutted two buildings: 308 East 55<sup>th</sup> Street and 310 East 55<sup>th</sup> Street. It is also undisputed that at the time plaintiff fell, the tree well was under a scaffold

that had been erected primarily on 310 East 55<sup>th</sup> Street, but a portion of the scaffold extended over the property line onto 308 East 55<sup>th</sup> Street.

Plaintiffs initially filed three separate actions, and defendant Silvercup Scaffolding 1 LLC filed a third-party action. All of these were consolidated by order of the undersigned (NYSCEF Doc. 39) into the instant action.

Now pending before the court is a motion filed by defendants Or Olam The East 55th Street Synagogue, Congregation Bnei Levi, East 55th Street Jewish Center, and Congregation Bnei Leive (collectively, the “Synagogue”),<sup>1</sup> seeking an order, pursuant to Civil Practice Law and Rules (“CPLR”) 3212, granting summary judgment as a matter of law and dismissing plaintiffs’ complaint and all cross-claims as against the Synagogue.

Oral arguments were heard before the undersigned on June 8, 2023.

The Synagogue argues that it is not liable because plaintiff tripped in a tree well and, pursuant to Administrative Code section 7-210, the Synagogue, as property owner of a building abutting the sidewalk containing the tree well, is not responsible for the tree well. In support of this argument, the Synagogue submitted a sworn Affidavit by Arlene Flohr (NYSCEF Doc. 59) that states, in part:

1. I am the Vice-President of the Or Olam The East 55th Street Synagogue, located at 308 East 55th Street, New York, N.Y., and I have been in this position for more than eight (8) years.

[...]

4. I was shown a photograph [*see NYSCEF Docs. 57-58*] that, I was told, was marked as an exhibit at plaintiff’s 50-h hearing. This photograph contains a blue “circle,” and I am told that plaintiff acknowledged that this red “circle” depicts the location of the accident.

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<sup>1</sup> In the Affirmation in Support [NYSCEF Doc. 52], counsel for the Synagogue states: “Although Or Olam The East 55th Street Synagogue, Congregation Bnei Levi, East 55th Street Jewish Center and Congregation Bnei Leive, are all named as separate parties, they all refer to the same Synagogue. The Synagogue was incorporated in 1921 under the name Congregation Bnei Leive; its name was changed in 1941 to East Street Jewish Center; its name was changed again in 2007 to the East 55th Street Conservative Synagogue; and again, its name was changed in 2013 to Or Olam The East 55th Street Synagogue (which is its current Name).”

5. To the best of my knowledge, the Synagogue did not at any time maintain or repair the tree well depicted in this photograph.

6. To the best of my knowledge, the Synagogue, did not install, maintain or repair any cobblestones within the tree well depicted in this photograph at any time, nor did it cause any condition to occur through any use of the tree well.

7. In addition, to the best of my knowledge the Synagogue did not employ anyone to maintain or repair the tree well, or any cobblestones within the tree well, at any time.

8. As the Vice-President of the Or Olam The East 55th Street Synagogue, during the period in question, I would be in aware if the Synagogue engaged in any maintenance or repair of the tree well on September 16, 2019, and I know that it did not.

9. The Synagogue had nothing to do with the daily maintenance of the subject tree well on September 16, 2019.

Opposition papers were filed by plaintiffs and by the 310 Building.

Plaintiffs do not dispute that the Synagogue owed no duty to plaintiffs concerning the condition of the tree well, but argue that the Synagogue's motion is premature because the Synagogue did not address plaintiffs' claims regarding the poor lighting condition under the scaffold at the time of the accident, and no discovery has been conducted thus far with respect to the presence of the scaffold or the lighting conditions under the scaffold. Plaintiffs argue that discovery is needed to ascertain whether there was an arrangement between the Synagogue and the 310 Building in which the Synagogue exercised some degree of joint control over the scaffold or had some say in its maintenance, such as the adequacy of the lighting.

The 310 Building argues that "Ms. Ackert's claim of inadequate lighting is fictionalized," as supported by a plethora of scientific evidence. The 310 Building argues:

7. Judicial notice can also be taken of the fact that: (a) it was light out when the accident happened; and (b) it does not get dark at sunset, or even shortly after sunset. Science proves that to be true.

8. For example, according to the authoritative Journal of Cosmology<sup>1</sup> (if that esteemed publication isn't authoritative, I don't know what is), it doesn't get dark outside at sunset. In fact, "for the 48 contiguous states in the US, it can take between 60 to 100 minutes to

get dark after sunset. And, as you travel north, the longer it takes to become truly dark after sunset.” This means that for New York City on 9/16/19, it was fully light out when Ms. Ackert’s accident happened at 7:00 pm. See the linked Journal of Cosmology publication in FN1 titled “How Long Does It Take to Get Dark After Sunset?”

9. That fact of truth is also proven by New York City weather data for 9/16/19. That data proves the following:

- Sunset was 7:05 pm, which was 5 minutes after the accident. In view of what plaintiffs’ counsel wrote in his papers about taking judicial notice that 7:05 pm was sunset, we assume that he got the sunset time from Weather Underground, just as the defendants did.

- Civil twilight was 7:32 pm.
- Nautical twilight was 8:05 pm.
- Astronomical twilight was 8:38 pm.

10. The same Journal of Cosmology publication linked above in FN1 defines sunset and each form of twilight:

- “Sunset” – The sun dips below the horizon.
- “Civil Twilight” – In the civil twilight phase, objects on the ground are visible, and you can see them without the need for any artificial light. “You can see all objects on the ground quite clearly without the need for any additional illumination. For instance, during this time, you can read a book easily.”
- “Nautical Twilight” – Most of the stars can be seen with the naked eye during nautical twilight (which means it’s dark enough to see the stars). “During this phase, the light is faded.”
- “Astronomical Twilight” – True night begins after this period. “During this time, it is completely dark.”
- “Night” – “Often, people cannot tell the difference between astronomical twilight and night. There are very slight differences between the two phases in terms of the brightness of the sky at the horizon, where the sun sets.”

11. Contrary to plaintiffs’ allegation and what she put in her affidavit, it was fully light out when her accident happened, and as a matter of law, lighting in and around the scaffold and sidewalk had nothing to do with her accident. Her allegation of inadequate lighting is fictionalized.

In Reply, the Synagogue argues that plaintiffs are making an “attempt to take this case out of the realm of a ‘tree well’ and attempts to refashion it as a ‘scaffolding’ case, or an ‘inadequate lighting case.’ The Synagogue argues that it did not install the scaffold, which was installed solely by the 310 Building; and that plaintiffs’ own photograph attached to its papers, (NYSCEF Doc. 68), clearly depicts working light fixtures attached to the scaffold, which illuminate the area. The

Synagogue argues that this motion is not premature, as further discovery is not necessary because the Synagogue had nothing to do with the scaffold, or its lighting on the day that plaintiff fell.

### Conclusions of Law

It is clear from this record that the lighting is a key part of plaintiff's theory of the case. This is evidenced by the Complaint against the Synagogue (NYSCEF Doc. 1 in index number 151976/2022), where plaintiffs allege, *inter alia*:

12. That the negligence of the Defendant [OR OLAM THE EAST 55" STREET SYNAGOGUE], its agents, servants and/or employees in the ownership, operation, maintenance and control of the public sidewalk as aforesaid consisted of [...] ***allowing and permitting a scaffold to be erected and maintained upon said public sidewalk whereby lighting was obscured by said structure and lighting from which was insufficient***; [...] in allowing and permitting lighting to be obscured then and thereat; [...] in failing to create a safe passageway for those then there lawfully upon premises and this Plaintiff particularly [...]

27. That the negligence of the Defendant BNEI [CONGREGATION BNEI LEIVE], its agents, servants and/or employees in the ownership, operation, maintenance and control of the public sidewalk as aforesaid consisted of [...] ***allowing and permitting a scaffold to be erected and maintained upon said public sidewalk whereby lighting was obscured by said structure and lighting from which was insufficient***; [...] in allowing and permitting lighting to be obscured then and thereat; [...] in failing to create a safe passageway for those then there lawfully upon premises and this Plaintiff particularly [...]

57. That the negligence of the Defendant JEWISH CENTER [EAST 55th STREET JEWISH CENTER], its agents, servants and/or employees in the ownership, operation, maintenance and control of the public sidewalk as aforesaid consisted of [...] ***allowing and permitting a scaffold to be erected and maintained upon said public sidewalk whereby lighting was obscured by said structure and lighting from which was insufficient***; [...] in allowing and permitting lighting to be obscured then and thereat; [...] in failing to create a safe passageway for those then there lawfully upon premises and this Plaintiff particularly [...]

[emphasis added]

It is also evidenced in the Bill of Particulars (NYSCEF Doc. 55), where plaintiffs wrote, *inter alia*:

3. CONGREGATION BNEI LEIVE, their agents, servants and/or employees in the maintenance and control of the public sidewalk as aforesaid consisted of [...] ***allowing and permitting a scaffold to be erected and maintained upon said public sidewalk lighting***

*from which was inadequate and natural light was obscured by said structure*; in negligently and carelessly erecting said scaffolding; in allowing and permitting a dangerous, hazardous and unsafe condition to be, become and remain upon the said public sidewalk including, but not limited to *a darkened and insufficiently illuminated public walkway*; [...] in *failing to properly illuminate the sidewalk*; in failing to apprise, advise or demand the adjacent/abutting land owner inspect, maintain and/or repair the *illumination of said sidewalk*; in failing to *properly illuminate said sidewalk*; in *improperly illuminating said sidewalk*; in *failing to properly illuminate said tree well*; in *improperly illuminating said tree well*; in *failing to properly inspect said illumination*; in *improperly inspecting said illumination*; in *failing to properly maintain said illumination*; in *improperly maintaining said illumination*; in *failing to provide appropriate and/or adequate lighting* then and thereat; in *allowing and permitting lighting to be obscured then and thereat*; in failing to create a safe passage way for those then and there lawfully upon the premises and this Plaintiff particularly [...] [emphasis added]

Further, the third-party complaint filed by Silvercup Scaffolding 1 LLC against V. Vass Electric Corp., (NYSCEF Doc. 30), alleges that the third-party defendant is liable because it:

3. [...] entered into an agreement [...] in] which V. Vass agreed to *service, maintain, replace and repair the lighting and/or lighting parts under a sidewalk bridge* in conjunction with V. Vass's performance of certain work, labor and services in connection with the work being performed at the premises located at 308-310 East 55th Street, New York, New York.

Here, there remain questions of fact on who is responsible for the lighting under the scaffold and whether the lighting was adequate.

Although the Synagogue addresses the issue of lighting for the first time in its reply, it is evident on this record that the Synagogue had neither responsibility nor control over the scaffold or the lighting conditions.<sup>2</sup>


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<sup>2</sup>At oral argument before this court on June 8, 2023, 310 Building did not concede full responsibility for the scaffold or the lighting but represented that the Synagogue was not involved. The Synagogue also adopted the arguments made by 310 Building in its objection to plaintiff's claims concerning the lighting conditions.

Conclusion

Accordingly, it is hereby:

**ORDERED** that the Synagogue’s motion for summary judgment is **GRANTED**.

<u>7/28/2023</u> DATE		 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE