

**Goon v Grand Cent. Partnership, Inc.**

2023 NY Slip Op 33928(U)

November 2, 2023

Supreme Court, New York County

Docket Number: Index No. 161492/2017

Judge: Judy H. Kim

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

**PRESENT:** HON. JUDY H. KIM **PART** **05RCP**

*Justice*

-----X

LOUISA Y. GOON AND THOMAS W. GOON,

Plaintiffs,

- v -

GRAND CENTRAL PARTNERSHIP, INC., GRAND  
CENTRAL DISTRICT MANAGEMENT ASSOCIATION, INC.,  
BERNHARD & LEVENSON, INC., and CITY OF NEW  
YORK,

Defendants.

-----X

**INDEX NO.** 161492/2017

**MOTION DATE** 01/03/2023

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223

were read on this motion for JUDGMENT - SUMMARY.

Plaintiffs' complaint alleges that on February 28, 2017, Louisa Y. Goon was walking by 10 East 39th Street, New York, New York (the "Building") when she tripped and fell over a raised granite border around a tree well in front of the Building, sustaining injuries. Plaintiffs assert claims against all defendants for both "premises liability based on defective and dangerous condition" and loss of consortium.

Louisa Y. Goon testified at her examination before trial ("EBT") that she was walking on 39th Street toward Madison Avenue at approximately 6:45 pm, with her daughter on her right, when she tripped (NYSCEF Doc. No. 115 [Goon EBT at pp. 16, 29-30, 35]). While it was raining and the lighting conditions were dim, she could see more than twenty feet in front of her (*Id.* at pp.

28, 30, 35). She further testified that she noticed the subject tree well's black metal loop fence when she was about ten seconds away from the tree well but did not see the raised granite border of the tree well because it was the same light gray color as the sidewalk (Id. at pp. 31-32, 45).

The Building's superintendent, Carlos Roman, testified at an EBT that the tree well and its granite border were not the property of the Building and the Building did not make any repairs to it or otherwise maintain it (NYSCEF Doc. No. 117 [Roman EBT at p. 61]). He did not know who installed the granite border in the tree well but had never received any complaints about the tree well or made any complaints to anyone else about it (Id. at pp. 39-40, 58]).

Marc Wurzel, General Counsel of defendants Grand Central Partnership, Inc. and Grand Central District Management Association, Inc. (collectively, "GCP") testified that Grand Central District Management Association, Inc. is the sponsor of the Grand Central Business Improvement District (NYSCEF Doc. No. 116 [Wurzel EBT at p. 48]). The City of New York collects a special assessment that it pays to Grand Central District Management Association, Inc., which in turn, has a contract with Grand Central Partnership, Inc. to deliver services funded by this special assessment (Id.).

Wurzel further testified that GCP has installed approximately 240 tree wells within the Grand Central Business Improvement District between 1999 and 2005 and continues to maintain them (Id. at p. 54). A tree well was initially installed at the subject location in 1996 but was replaced in 2003 (Id. at pp. 72, 122-123). The first tree well contained a border of cobblestones inlaid within it (Id. at p. 71). However, as pedestrians regularly tripped over these cobblestones, the redesigned tree well replaced these cobblestones with raised pink granite borders with metal hoop fencing installed within that granite border (Id. at pp. 72-76). Wurzel testified that GCP exclusively maintains all of these tree wells, through a contractor, and that neither the owner of

the Building, Bernhard & Levenson, Inc. (“B&L”), nor the City play any role in this maintenance (Id. at pp. 88, 146-147). GCP has never received any complaints about these tree wells reported through the City (Id. at p. 148).

Plaintiffs now moves for summary judgment as to liability on plaintiffs’ negligence claim against GCP and B&L, asserting that the raised granite border around the tree well violated multiple statutes, the City’s design standards, and good and accepted design practices. Plaintiffs further argue that the visibility of the tree well and granite border was reduced by the fact that there was no tree in the tree well, the color of the granite border was similar in color to the surrounding concrete sidewalk, and the lighting in the area was dim.

In support of its motion, plaintiffs submit the affidavit of Vincent Pici, Professional Engineer. Pici attests, in relevant part, that:

The sidewalk tree well at this location was improperly maintained, was unsafe for its intended use, and that the conditions created were the result of the improper installation of the granite border / sidewalk appurtenance installed at this location, thus violating New York City Administrative Code Sections 7-210(a) and 19-152 (a) et. seq. (19- 152(a)(4), 19-152(a)(6)(i), and 19-152(a)(8)).

The sidewalk appurtenance at this location was not constructed in accordance with New York City, Department of Transportation Highway Rules Sections 2-09(f)(1) and 2-09(f)(4)(xx)(B) which required the soil level in the completed tree pits, including any paved surface, shall be flush with the sidewalk area.

The sidewalk appurtenance at this location was not maintained in accordance with the General Sidewalk requirements contained in New York City, Department of Transportation Highway Rules, Title 34, Chapter 2, Sections 19-152 (a)(8) and 2-09(f)(5)(viii).

The sidewalk appurtenance at this location was not constructed in accordance with the General Sidewalk requirements contained in New York City, Department of Transportation Highway Rules, Title 34, Chapter 2, and as a result failed to comply with the requirements in Administrative Code Section 19-152(a)(8) Non-compliance with DOT specifications for sidewalk construction; and Section 2-09(f)(5)(viii) of the NYC Highway Rules, which states a substantial defect and a trip hazard, exists where there is non-compliance with Department specifications for sidewalk construction; and Section 2-09(f)(5)(vi), which states hardware

defects, which shall mean (i) hardware or other appurtenances not flush within 1/2” of the sidewalk surface.

Based upon my review of the photographs, and the testimony, and Exhibits, it is my opinion, within a reasonable degree of engineering certainty, that the sidewalk tree well appurtenance illustrated failed to comply with the provisions of the above listed subsections of Section 19-152 of the Administrative Code and Section 2-09(f) of the NYC Highway Rules and constituted a dangerous tripping hazard at this location.

Generally, codes limit vertical changes in level to reduce the risk of a tripping hazard. Changes in elevation greater than ½ inch create a tripping hazard because of the increased likelihood that a toe of a shoe could catch the vertical edge, which is exactly the circumstance described by Ms. Goon in her testimony.

In addition, the placement of the low metal fence 8” to 10” inches back from the exposed edge of the granite curb creates an optical confusion, and does not accurately define the actual boundary of the sidewalk and tree well for pedestrians. According to NYC Parks Department guidelines, annexed hereto as Exhibit “E”, (see pages 2-5), a tree guard installed within the tree well, as is the case in this matter, should be placed 1-3” from the edge of the tree well. While the fence itself is compliant with tree pits, the border is a sidewalk appurtenance. It nonetheless created a hazard when installed with the border. Further, it is my professional opinion that the fence marks the actual outer edge of the tree well.

It is my opinion with a reasonable degree of engineering certainty that the statutory violations, especially the amount of vertical height differential at the accident location shown in the photographs were caused and created by the reconstruction of the tree well and addition of the sidewalk appurtenance by the Grand Central Partners BID as described by Mr. Wurzel. In addition, I find that the prior lawsuit referenced above also gave the Defendant GCP actual notice of the defective and dangerous nature of their granite border installations

Furthermore, it is my opinion with a reasonable degree of engineering certainty that based upon my review of the documents, and the applicable codes requirements, together with my background, training, and experience that the absence of an actual tree at this location made it much more difficult for a pedestrian to identify the presence of a tree well. Combined with the relatively narrow width of the sidewalk immediately adjacent to the tree well, which was reduced by the advertising display panel placed directly opposite the tree well. A pedestrian traversing this area was exposed to the tripping hazard of the exposed edge of the granite border. See below for a photo of the location of the accident, which was attached to the Plaintiff’s Notice of Claim

It also my opinion with a reasonable degree of engineering certainty that sidewalk

condition as it existed on the date of Ms. Goon's accident, and the owner's failure to correct the substantial defect, did not comply with requirements outlined in Sections 7-210, and 19-152 the New York City Administrative Code, as well as New York City, Department of Transportation Highway Rules, Title 34, Chapter 2, including Section 2-09, and the NYC Department of Parks and Recreation Tree Planting Guidelines, the NYCDOT Standard Details of Construction, as they relate to required sidewalk and tree well construction and maintenance.

(NYSCEF Doc. No. 119 [Pici Aff. at ¶¶29-36, 41, 45]).

GCP and B&L each oppose plaintiffs' motion and cross-move for summary judgment dismissing this action as against them.

GCP argues that the New York City Administrative Code and New York City Department of Transportation Highway Rules cited by Pici are inapplicable and that, even if these provisions did apply, violations of such ordinances do not establish negligence per se such that summary judgment for plaintiff would be warranted. GCP also argues that plaintiffs' expert fails to establish his expertise to opine as to the violation of these provisions or any "optical confusion" created by the placement of the metal loop fence within the tree well.

GCP submits an affidavit from its own expert, Rudi O. Sherbansky, P.E, stating:

The plaintiffs claim that the cause of the accident was that the tree guard, which was built about 10" inches in height above the sidewalk, exceeds the ½" an inch maximum height differential between sidewalk flags and therefore constitutes a sidewalk "tripping hazard" by Code in violation of the City's Administrative Code §§7-210, 19-152 and DOT Highway Rules §2-09. The plaintiffs' expert's interpretation of the purported sidewalk design rules of the City is misplaced because the expert is obfuscating or confusing the terms and the difference between defects in "sidewalk flags" and the design of sidewalk "furnishing" such as the subject tree guard. The granite tree guard and metal fence/rail that the plaintiff tripped on is defined as a sidewalk "furnishing" that is designed to sit or to stand (protrude) above the sidewalk, similar to a planter box or a planting enclosure or a bench that sits on the sidewalk. The subject stone tree guard is not a sidewalk "hardware" or "appurtenance" such as a metal hatch door or a manhole cover that are designed by definition to be installed even (or flush) within ½" an inch of the surface of concrete sidewalk flags.

...

The plaintiffs' claim that the defendants failed to maintain sufficient walking space at or near the subject tree well ... The plaintiffs' inspection photos show that the width of the concrete sidewalk between the building's front wall and the location of the previously existing tree pit was measured to be about 6' feet in width, which allowed an adequate 6' feet passage or clearance width for pedestrians such as plaintiff and her daughter to pass between the building's front wall and the previously existing tree pit. By comparison of the 6' foot sidewalk clearance width to the City's sidewalk design reference manual, modern strip sidewalk design in the City permits a minimum of 5' feet sidewalk width (see attached sidewalk design manual example).

...

Section 1.(A).(m.) of the 2008 tree pit design standards by the NYC Parks Department requires that: "Minimum distance from the edge of the pit to any opposite obstruction (building wall, stoop, railing, etc.) is from 4' to 6', depending upon local conditions and the amount of sidewalk traffic." By comparison, the existing sidewalk width adjacent to the subject tree pit was at least six (6') feet in width as shown in plaintiffs inspection photos. Additionally, the subject 6-ft wide sidewalk adjacent to the subject tree pit exceeds the minimum accessible sidewalk width of five (5') feet required by the more modern 2009 NYC DOT Street Design Manual.

...

The installation of granite and metal tree guards or borders around tree pits and street planting areas in the City is permitted by the guidelines of the NYC Parks Department as illustrated in the attached copies of web-pages from the NYC Department of Park's public website and as provided in section 7(B) of the 2008 NYC Tree Planting Standards ... As shown in the NYC street design manual, planting area border treatments and fencing such as the subject are permitted by design for planting areas and there is no rule that requires a tree to be planted in the planting area. The plaintiffs' claim that GCP failed to remove the granite border when the tree was taken down is not based on any requirements or design provisions.

...

Plaintiff claims that the original design and construction of the subject tree pit with granite curb treatment is in violation of §§2-09(f)(4)(xx)(A) and 2-09(f)(4)(xx)(B) of the NYC DOT Highway Rules pertaining to sidewalk tree pits which limit the size of tree pit opening to 5' feet by 5' feet and require the soil in the tree pit to be at the same level as the sidewalk surface. This claim is wrong and inapplicable to the subject place of occurrence and not connected to the purported cause the incident for the following reasons:

First, the plaintiff identified the tripping location to be along the side of the tree pit that is only four (4') feet in length (including the granite treatment), which is less than the 5' feet size limit of tree pit opening specified in the purported §2-09(f)(4)(xx)(B) and therefore the side of the tree guard that the plaintiff actually tripped on did not exceed and did not violate same ...

The 5' ft by 5' ft. limit of the tree pit opening specifies the width and length of the excavated soil opening of the tree pit in the concrete sidewalk in itself and does not apply to the size of granite curb treatment at the perimeter of the tree pit. Based on review of plaintiffs inspection photos and review of the granite treatment design shop drawings in Exhibit 3, the soil/mulch opening of the subject tree pit contained an open soil area of 2.67' feet wide by 4.67' long and therefore did not exceed the 5' fit. by 5' ft. tree pit opening specified by the above code.

...

The portion of §2-09(f)(4)(xx)(B) of the NYC DOT Highway Rules pertaining to the height of the soil inside the tree pit is unrelated to the cause of this accident because plaintiff claims she tripped over the outer granite treatment and/or the metal guard and therefore the soil level inside the pit area had nothing to do with what caused the plaintiff to purportedly trip and fall. The plaintiffs expert is obfuscating the term "granite pavers" that are paved flush with the sidewalk with the subject granite frame or tree guard design to protrude above the sidewalk to claim violation of same. Additionally, the plaintiffs' inspection photographs show a top layer of mulch covering the soil inside this tree well and since the actual soil level underneath the mulch is not visible, the claim that GCP violated this subsection of the Code is speculative at best.

§§2-09(f)(4)(xx)(A) and 2-09(f)(4)(xx)(B) of the Highway Rules apply to installation of new tree pits, whereas the subject tree pit was pre-existing in the same place by the City before the granite curb treatment was installed by Grand Central Partnership and therefore the granite treatment work did not require permitting or affect the existing size of the tree pit opening in the sidewalk.

...

The plaintiff claims that the color of the granite border and the concrete sidewalk flags were similar and contributed to causing the accident. The orange colored granite stone treatment is adequately contrasting in color and shape from the adjacent gray colored concrete sidewalk, not concealed and does not have any conditions that create a trap or a camouflage. Similarly, the black metal guard above the granite as well as the brown mulch interior surface covering of the tree pit are adequately contrasting in

color and shape from the adjacent gray colored sidewalk, not concealed and does not have any conditions that create a trap or a camouflage.

(NYSCEF Doc. No. 199 [Sherbansky Aff.])

B&L argues, in turn, that it bears no liability here because its undisputed evidence demonstrates that it did not install or maintain the subject tree well, have actual or constructive notice of any dangerous condition created by this tree well, or make special use of the tree well. In support of the foregoing, B&L submits the affidavit of Michael C. Simon, Professional Engineer, attesting:

Within a reasonable degree of engineering certainty, a tree pit is defined by the limits of the sidewalk and not the location of the tree guard fence. If the tree guard fence was removed, the tree pit remains the same size. In the subject tree pit, the granite curb border is set inside the tree pit and if the granite curb is removed, the tree pit remains the same size. The granite curb was not installed on top of the sidewalk.

This is clear from the Google Street View Photographs annexed to the plaintiff's motion for summary judgment as Exhibit "F" clearly shows that the granite curb was built within the footprint of the existing tree well. The photograph dated May 2009 shows the existing tree well prior to the installation of the granite curb. The Google Earth photograph of the same area dated June 2011 shows the tree pit was the same size and shape with the granite curbs installed. The granite curb was installed in the inside edges of the tree pit, therefore reinforcing the fact that the tree pit is defined by the edge of the sidewalk.

The tree pit detail prepared for GCP, annexed to the plaintiff's motion as Exhibit "E", clearly identified the size of the tree pit to include the granite curb installed inside of the tree pit. The granite curb was installed such that the soil in the tree pit would be flush with the granite curb

...

From a construction perspective, within a reasonable degree of engineering certainty ... the sidewalk abutting the subject premises is not in a defective state and the edges of the sidewalk are flush and do not cause a tripping hazard. The granite curb is inside the tree pit and, thus, is not part of the sidewalk. Thus, Section 7-210 implicated and hazard on the sidewalk for the abutting landowner, Bernhard & Levenson, Inc., to mitigate. Section 19-152(a)(4) was also not violated because the vertical change is to be measured within the sidewalk only and does not implicate the tree well.

The granite curb inside of the tree pit is not a “appurtenance” or “frame” surrounding the tree pit in violation of New York City Administrative Code Section 19(a)(6)(i) as alleged by plaintiff. Hardware and appurtenances referred to in that section are expected to be walked over, and, thus, must be flush and not present a tripping hazard. The granite curb, like the tree guard, was installed within the inside edges of the tree pit. A tree pit is not deigned to have pedestrian traffic over the tree roots system, and, thus, is not required to be flush pursuant to this section. The NYCDPR specifically does not want people or animals to walk in tree pits because walking over tree roots compacts the soil.

New York City Department of Transportation Highway Rules, Title 34, Chapter 2, Sections 2-09(f)(1), (4) and (5) are not violated by the granite curb inside of the tree pit as it is not part of the sidewalk. The granite curb and tree guards are within the edges of the tree pit and do not trigger any obligation or duty to fix the sidewalk due to the presence of the granite curb and the rest of the tree pit. Additionally, the sidewalk itself is of the same composition as the surrounding sidewalk and the thickness of the sidewalk was not a contributing factor as to the occurrence of the alleged accident.

Plaintiff’s expert opined that the granite curb created optical confusion. This opinion is not supported by violation of a specific code relative to the sidewalk. An optical confusion is created when the same material is used in areas of differing elevation, creating a difference in level that may not be readily observable. A red granite curb, outlined by a black steel fence filled with red mulch, set adjacent to grey concrete does not create a difference in elevating levels and instead creates a very visible area that open and obvious and does not create optical confusion.

(NYSCEF Doc. No. 138 [Simon Aff. at ¶¶4-6, 10-13] [emphasis added])

The City opposes B&L’s cross-motion and cross-moves<sup>1</sup> for summary judgment dismissing the complaint against it, arguing that it did not receive prior written notice of the allegedly dangerous condition required under Administrative Code §7-201 and did not cause and create this condition. The City submits: (i) the affidavit of Naomi Clarke, attesting to her search of New York City Department of Transportation (“DOT”) records relating to the location of East 39th Street between Madison Avenue and 5th Avenue (side of 10 East 39th Street) for a period of

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<sup>1</sup> Although denominated as a cross-motion to B&L’s cross-motion, the City is, in sum and substance, moving for summary judgment dismissing plaintiff’s complaint. The Court excuses any procedural irregularity, however, as plaintiff has addressed the motion on its merits and, therefore, no prejudice inheres.

two years prior to and including the date of incident, February 28, 2017 (NYSCEF Doc. No. 151 [Clarke Aff.]); (ii) the records produced by this search (NYSCEF Doc. No. 150); (iii) the affidavit of Yelena Bogdanova attesting to her search of New York City Department of Parks and Recreation (the “Parks Department”) records relating to location of 10 East 39th Street for a period of two years prior to and including the date of incident, February 28, 2017 and the records produced by this search (NYSCEF Doc. No. 152). Finally, the City submits the affidavit of Parks Department employee Nave Strauss, Director of Street Tree Planting, attesting that the City prepared the tree bed at the subject tree well and planted the tree there but did not install the marble border or metal tree guard and does not maintain them (NYSCEF Doc. No. 153).

In reply, plaintiff submits a supplemental affidavit from Pici, reiterating his assertions in first affidavit and asserting, for the first time, that the granite borders at issue here violate ASTM F1637-10, Standard Practice for Safe Walking Surfaces (NYSCEF Doc. No. 203 [Pici Supplemental Aff.]).

### **DISCUSSION**

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

*Plaintiffs' Motion for Partial Summary Judgment*

Plaintiffs' motion for partial summary judgment is denied. The assertion of plaintiffs' expert, based on his review of site photos, that the granite border at issue is a sidewalk "appurtenance" regulated by Administrative Code §7-210 and 19-152, is unavailing. GCP has established, through Wurzel's undisputed testimony that the granite border at issue was installed within the footprint of the tree well as a replacement for the cobblestones formerly set into the perimeter of the tree pit. Such cobblestones are, as a matter of law, part of the tree well (See Yucetovic v Epsom Downs, Inc., 45 AD3d 28 [1st Dept 2007], aff'd 10 NY3d 517 [2008]). It follows, then, that the granite curb at issue, which falls within the footprint of the tree well, must also be part of the tree well rather than a sidewalk appurtenance. Accordingly, Administrative Code sections 7-210 and 19-152, relied upon by Pici, are inapplicable, as they regulate sidewalk flags and appurtenances.

Pici's reference to New York City Department of Transportation Highway Rules §2-09(f) is also misplaced. That rule requires that "[t]he soil level in the completed tree pits, including any paved surface, shall be flush with the sidewalk area" while "the maximum dimensions of the tree pit" shall be five feet by five feet (34 RCNY §2-09[f][4][xx][B]). However, the granite curb at issue here is not a "paved surface" under this provision. Moreover, to the extent that the expert's dispute whether the dimensions of the tree well at issue conformed to DOT rules, any non-conformity would not be relevant to the raised condition that plaintiff alleges caused her accident. Finally, Pici's bald assertion of optical confusion, without any further detail, does not establish plaintiffs' entitlement to summary judgment as to liability.

*City of New York's Motion for Summary Judgment*

The City's motion for summary judgment is granted. "To impose liability on defendant City for a defective condition of a tree well, plaintiff must show that the municipality either received prior written notice of the alleged defect or caused or created the defective condition through an affirmative act of negligence" (Rosario v City of New York, 113 AD3d 492, 493 [1st Dept 2014] [internal citations omitted]). Here plaintiffs make "no claim that the City had prior written notice of the claimed defect" (Id.). Rather, plaintiffs argue that the City's removal of a tree from the tree well raises an issue of fact as to whether they caused or created the dangerous condition. This argument is unavailing—there is nothing in the record to suggest that the presence of a tree in the tree well would have alerted plaintiff to the granite border when her awareness of the metal hoop fence beyond the granite border did not do so (See Rosario at 494 ["[t]here is no view of this evidence to support a conclusion that the City, by cutting down a dead tree and leaving a tree stump, created a dangerous condition by obscuring the visibility of the tree well" where photograph of tree well, taken from some distance away, clearly depicted tree well and that tree stump was above sidewalk level and visible]; but see Carney v The City of New York, 2023 NY Slip Op 33277[U] [Sup Ct, NY County 2023]).

*Bernard & Levenson, Inc.*

B&L's motion for summary judgment is also granted. B&L has no obligation under Administrative Code §7-210 to maintain the subject tree well (Vucetovic v Epsom Downs, Inc., 10 NY3d 517 [2008]) and it has established, through Roman's EBT testimony, that it did not install or maintain the tree well or have actual or constructive notice of any dangerous condition therein (See e.g., Cellucci v Kmart Corp., 2009 NY Slip Op 32130[U] [Sup Ct, Suffolk County 2009]).

Plaintiffs' argument that summary judgment is inappropriate because B&L made special use of the tree well's granite border—insofar as the custom tree wells installed by GCP beautified the neighborhood—is without merit. A special use exists where an appurtenance or modification has been installed in the sidewalk by or for a property owner which creates a specific, tangible benefit unique to that property owner (See e.g., Montalvo v Heege, 301 AD2d 427, 427 [1st Dept 2003]). In this case, “[t]he inescapable fact is that the beautification afforded by the presence of the planted tree benefits all [and it is] ... beyond peradventure that the tree and tree well [have] not been created ‘exclusively’ for [B&L’s] benefit” (Morelli v Starbucks Corp., 2012 WL 8843199 [Sup Ct, Westchester County 2012] [internal citations omitted] affd, 2013 NY Slip Op 04786 [2d Dept 2013]).

*GCP’s Motion for Summary Judgment*

Finally, GCP’s motion for summary judgment is also granted. GCP has established that the granite border on which plaintiff tripped was not inherently dangerous as a matter of law. The undisputed evidence that the granite border itself was in good condition, taken together the undisputed testimony of the B&L’s witness that he was not aware of any instances of individuals tripping on the subject tree well, and the record search by the City’s Department of Transportation revealing that there were no violations concerning the subject tree well or its granite border in the two years preceding the accident is sufficient to establish, prima facie, that the tree well border did not constitute an inherently dangerous condition (See Kovel v Glenwood Mgt. Corp., 200 AD3d 460, 461 [1st Dept 2021]).

Plaintiffs’ submissions are, for the reasons outlined in the Court’s denial of their motion for partial summary judgment, insufficient to create a triable issue of fact. The Court adds only that, to the extent plaintiffs maintain that the granite curb was an inherently dangerous condition

based on optical confusion, Louisa Goon's testimony that the granite curb was the same color as the sidewalk is belied by the photographs submitted by plaintiffs which document that the granite curb was pink granite, in contrast to the sidewalk's gray cement (See Namm v Levy, 172 AD3d 507, 507-08 [1st Dept 2019]; see also Franchini v Am. Legion Post, 107 AD3d 432, 432 [1st Dept 2013]; Hall for Stephenson v New Way Remodeling, Inc., 168 AD3d 620, 620-21 [1st Dept 2019]). Plaintiff's expert affidavit is, as discussed above, inadequate to create an issue of fact as it asserts that inapplicable statutory provisions have been violated.

Accordingly, it is

**ORDERED** that plaintiff's motion for partial summary judgment is denied; and it is further

**ORDERED** that Grand Central Partnership, Inc. and Grand Central District Management Association, Inc.'s cross-motion for summary judgment is granted and this action is hereby dismissed as against it; and it is further

**ORDERED** that Bernhard & Levenson, Inc.'s cross-motion for summary judgment is granted and this action is hereby dismissed as against it; and it is further

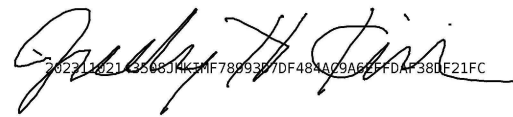
**ORDERED** that the City of New York's cross-motion for summary judgment is granted and this action is hereby dismissed as against it; and it is further

**ORDERED** that, in light of the foregoing, this action is dismissed in its entirety; and it is further

**ORDERED** that, within ten days of the date of this decision and order, counsel for the City of New York shall serve a copy of this order with notice of entry, on plaintiff as well as on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119), who are directed to enter judgment accordingly; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in *the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “Efiling” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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11/2/2023

DATE

HON. JUDY H. KIM, 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