

**Lugo v 4960 Broadway, LLC**

2025 NY Slip Op 32740(U)

August 5, 2025

Supreme Court, New York County

Docket Number: 152691/2020

Judge: John J. Kelley

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

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

-----X

MARIA B. LUGO,

Plaintiff,

- v -

4960 BROADWAY, LLC, VERIZON NEW YORK, INC., and  
NETWORK INFRASTRUCTURE, INC.,

Defendants.

-----X

**INDEX NO.** 152691/2020

**MOTION DATE** 07/23/2025  
07/23/2025

**MOTION SEQ. NO.** 001, 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 93, 95, 96, 97, 98, 108, 113, 116, 118, 120

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 99, 100, 101, 102, 103, 104, 105, 109, 110, 111, 114, 117, 119, 121

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

In this action to recover damages for personal injuries arising from a trip-and-fall accident, the defendant 4960 Broadway, LLC (4960 Broadway), moves pursuant to CPLR 3212 for summary judgment dismissing the second amended complaint insofar as asserted against it (MOT SEQ 001). The defendants Verizon New York, Inc. (Verizon), and Network Infrastructure, Inc. (Network) (together the Verizon defendants), move pursuant to CPLR 3212 for summary judgment dismissing the second amended complaint insofar as asserted against them, and all cross claims asserted against them by 4960 Broadway (MOT SEQ 002). The plaintiff opposes both motions, and 4960 Broadway opposes that branch of the Verizon defendants' motion addressed to its cross claims. The motions are granted, all defendants are awarded summary judgment dismissing the second amended complaint, and the Verizon defendants are awarded summary judgment dismissing 4960 Broadway's cross claim.

On August 28, 2018, the plaintiff left her home, located at 5000 Broadway, New York, New York, and started walking downtown on the easterly sidewalk of Broadway, with the roadway to her right and buildings to her left. After walking approximately one tenth of a mile, she arrived in front of 4960 Broadway (the premises), where she tripped and fell on the sidewalk. According to the plaintiff, one sidewalk flag was higher than the adjacent flag and was cracked, thus causing her to trip and fall.

On March 12, 2020, the plaintiff commenced this action against 4960 Broadway, LLC. On June 3, 2020, 4960 Broadway served and filed its answer. On July 23, 2020, 4960 Broadway commenced a third-party action against Verizon, which served an answer to the third-party complaint on September 25, 2020. On September 30, 2020, the plaintiff served an amended summons and first amended complaint, directly naming Verizon as a party defendant in the main action. On October 1, 2020, both 4960 Broadway and Verizon served an answer to the first amended complaint. On April 6, 2021, the plaintiff served a supplemental summons and second amended complaint upon Network, and also served the second amended complaint upon 4960 Broadway and Verizon. Verizon and Network served answers to the amended complaint on April 23, 2021 and May 25, 2021, respectively. On June 15, 2021, 4960 Broadway served its answer to the second amended complaint, which included cross claims against the Verizon defendants.

In her second amended complaint and bill of particulars, the plaintiff alleged that, on or before August 28, 2018, 4960 Broadway owned, controlled, maintained, and managed the premises, and maintained the adjacent sidewalk upon which she allegedly tripped and fell. Her bill of particulars further alleged that 4960 Broadway was negligent in causing and/or creating a dangerous, defective, and hazardous condition, allowing the dangerous condition to remain defective, and failing to give notice or warning of the dangers created by those conditions. The plaintiff further alleged that all of the defendants had both actual and constructive notice of the defective condition. Additionally, the plaintiff alleged that, on or before August 28, 2018, all the

defendants had entered into a contract with each other, pursuant to which the Verizon defendants agreed to perform construction, repair, and/or maintenance work at the premises.

In support of its motion, 4960 Broadway submitted a statement of allegedly undisputed facts, the plaintiff's bill of particulars, color photos of the sidewalk, the deposition transcripts of the plaintiff and Lorik Fejza, who was 4960 Broadway's live-in superintendent, and the expert affidavit of consulting engineer Anthony Mellusi. In support of its motion, the Verizon defendants submitted the pleadings, the stipulation discontinuing all cross-claims asserted by Verizon and Network against each other, a copy of the note of issue, the deposition transcript of the plaintiff, and those of Philip Vassalo, who was Verizon's senior network engineer, and Kevin McEvaddy, who was Network's claim manager and training and development coordinator, along with a photograph of the premises, and a contract between Verizon and Network, dated December 16, 2015, for the installation of fiber cable pathways. In opposition, the plaintiff submitted a counterstatement of material facts, her bill of particulars, her deposition transcript and Fejka's deposition transcript, and the photographs of the premises.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see CPLR 3212*). The facts must be viewed in the light most favorable to the non-moving party (*see Flanders v Goodfellow*, \_\_\_\_\_ NY3d \_\_\_\_\_, 2025 NY Slip Op 02261, \*1 [Apr. 17, 2025]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden,

it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

Liability for failing to maintain premises in a safe condition must be based on occupancy, ownership, control, special use, statutory obligation, or contractual obligation (see *Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 60 [1st Dept 2006]; *Gibbs v Port of Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). It is undisputed that 4960 Broadway owned the subject premises and, thus, owed a general duty to the public to maintain it in a safe condition. Moreover, Administrative Code of the City of New York § 7-210 “unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure” (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171 [2019], quoting *Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 797 [2016]).

A private landowner moving for summary judgment in a trip-and-fall action has the initial burden of showing that it did not create the alleged hazardous condition and lacked actual or constructive notice of its existence (see *Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept

2020]). “A defendant establishes that it lacked actual notice when it produces a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell” (*id.*; see *Frederick v New York City Hous. Auth.*, 172 AD3d 545, 545 [1st Dept 2019]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted]). “A defendant demonstrates lack of constructive notice by producing evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011] [citations omitted]).

4960 Broadway established its prima facie entitlement to judgment as a matter of law in connection with whether it lacked actual or constructive notice of the allegedly dangerous condition on which the plaintiff allegedly tripped. 4960 Broadway adduced the deposition testimony of its live-in superintendent, Fejza, who testified that he swept the sidewalk every morning to make sure it was clean and there were no tripping hazards, and that he would report a broken or damaged sidewalk if there was one. Fejza also testified that, on the day of the accident, he inspected the sidewalk at 8:00 a.m., several hours before the plaintiff's accident, and did not observe any dangerous or defective condition that needed to be reported or repaired. Additionally, Fejza testified that in the nine years that he has worked as a superintendent at 4960 Broadway, the plaintiff's accident was the first incident he was aware of that occurred in front of the premises. Lastly, Fejza testified that he became aware of the plaintiff's accident on the day that it happened because he saw the plaintiff sitting on the sidewalk in front of the building next door, which was an Apple Bank. While Fejza did not observe the fall itself, he explained that he saw a woman trying to help the plaintiff up from the ground. Moreover, Fejza testified that he was not concerned because she was not in front of

his building. 4960 Broadway further established that it did not create the allegedly hazardous condition since it did not pour the cement constituting the subject flagstone.

In opposition to 4960 Broadway's prima facie showing, the plaintiff failed to raise a triable issue of fact as to whether 4960 Broadway created an allegedly uneven sidewalk or had actual or constructive notice of any such condition. The plaintiff herself testified that she was not aware of any complaints made about the sidewalk. She also testified that she herself did not make any complaints about the sidewalk prior to the accident and never saw a crack in it, despite walking over that sidewalk twice a day for more than 20 years. The plaintiff nonetheless argued that the superintendent's testimony regarding his daily inspection of the sidewalk, including on the morning of the accident, lacked credibility because, when shown photographs of the sidewalk, he testified that there was nothing wrong with it. This testimony, however, does not negate the evidence that 4960 Broadway did not create any alleged condition at issue or have actual or constructive notice of it.

While the plaintiff averred that the photographs clearly depicted a defective condition, she has submitted no proof, expert or otherwise, to demonstrate that the photographs do, in fact, depict a defect. Rather, the court concludes that the alleged defect, as shown in the submitted photographs, depicting what the plaintiff described as an uneven and cracked sidewalk, is "trivial" and, thus, nonactionable as a matter of law (*see Fayolle v E. W. Manhattan Portfolio L.P.*, 108 AD3d 476, 476 [1st Dept 2013]; *Budano v Gurdon*, 110 AD3d 543, 543 [1st Dept 2013] [finding that photographs showing a claimed defect actually depicted a condition that was too trivial to be actionable]; *Lopez-Ramos v New York City Hous. Auth.*, 136 AD3d 504, 505 [1st Dept 2016] [finding that evidence showing areas of worn paint near the metal nosing of staircase was not actionable despite plaintiff's contention that said condition caused him to slip and fall down the stairs]). Moreover, the plaintiff submitted no proof, such as measurements of the sidewalk flags in question, to demonstrate the height differential, if any, between those flags.

In addition, 4960 Broadway established that the plaintiff was unable to identify where she fell. 4960 Broadway submitted an expert affidavit from consulting engineer Mellusi, who reviewed the plaintiff's bill of particulars, the photographs exchanged during discovery and employed at the plaintiff's deposition, and the plaintiff's deposition testimony. The expert also visited the premises on January 11, 2024 for an inspection, and took photographs of his own. Mellusi's affidavit is solely focused on demonstrating that the plaintiff's deposition testimony is conflicting, in that she described and identified two different expansion joints as the specific location of her accident. Mellusi noted that the plaintiff testified that she tripped when she was walking southbound on Broadway from Isham Street in towards 207th Street, and that she was closer to Isham Street, which was only two feet behind her. He also noted that she testified that the roadway was about two feet to her right. Mellusi explained that, on the photograph that was marked as deposition exhibit D, the plaintiff placed an "x" marking upon an expansion joint that contained a triangular piece of errant cement at its northwest corner. Meanwhile, on the photograph marked as deposition exhibit H, the plaintiff placed an "x" marking upon an expansion joint that did not contain a similar triangular piece of errant cement at its corner. Mellusi explained that, on deposition exhibit H, there were two pieces of white silicon filler within the joints abutting the western edges of *both* the northern flag *and* the southern flag. He submitted photographs of his own, depicting an area of the subject flagstone, upon which he placed orange cones signifying the two locations that the plaintiff identified in the photographs used at the deposition, with the first cone corresponding with the location the plaintiff identified in exhibit D, and the second cone corresponding with the location identified in exhibit H. Mellusi concluded that the first cone was placed at a location that was 172 feet from Isham Street, and 16 feet from the curb, while the second cone was placed on a location that was 181 feet from Isham Street and 16 feet from the curb. Mellusi concluded that the "x" drawn on exhibit D was at a different location than the "x" drawn on exhibit H, and that the "x" drawn on exhibit H is in a different location than the plaintiff described during her deposition.

He further concluded that those locations were not close to Isham Street, and that that thoroughfare was not two feet behind the plaintiff when she fell, and that the roadway of Broadway was not two feet to the right of the plaintiff, as she testified.

“It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury” (*Siegel v City of NY*, 86 AD3d 452, 454 [1st Dept 2011]). The recognition of the approximate location of a fall, but not the recognition of the defect itself, amounts to the type of “rank speculation” that warrants summary dismissal (*id.* at 455). 4960 Broadway has established that the plaintiff did not identify and recognize the defect that caused her to trip and fall. While the plaintiff testified that she tripped on an uneven and cracked portion of the sidewalk, her identification of two different sidewalk flags, nine feet apart, amounts to rank speculation. The plaintiff failed to establish which flagstone was uneven and cracked, and, since she did not testify or allege that the entirety of the premises was defective, one would have to guess which location contained the defect that caused her to trip and fall. For this reason, as well as for the reasons explained above, summary judgment must be awarded to 4960 Broadway dismissing the second amended complaint insofar as asserted against it.

A contractor, such as the Verizon defendants, that performs work at a particular location may be held liable to a third party where, “in failing to exercise reasonable care in the performance of [its] duties, [it] ‘launches a force or instrument of harm’” (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002], quoting *H. R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). Hence, a contractor may be held liable to third persons if it negligently or improperly paves or patches a sidewalk or roadway, thus creating a hazardous condition (see generally *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 902 [2d Dept 2011] [no evidence to support plaintiff’s contentions that paving contractor “negligently create[d] or exacerbate[d] a dangerous condition” or “launched a force or instrument of harm” with regard to patching asphalt]). The Verizon/Network defendants established, prima facie, that they did not

create the alleged defect that the plaintiff claims caused her to trip and fall. Verizon's senior network engineer, Vassallo, testified that, when Verizon undertook a project regarding its conduit systems, such as construction or excavation, Verizon itself did not perform the work, but, rather, hired a contractor to do so. In this case, Verizon contracted with Network to perform excavation work to install new conduits. Network's claim manager and training and development coordinator, McEvaddy, testified that, while Network did in fact perform work on the sidewalk in front of the premises at issue, he was able to identify which flagstones Network worked on, based on the color of the flagstone. McEvaddy explained that the lighter colored flags were where the excavation work was done, since that color indicated that the concrete was newer. He also testified that Network finished the contracted work on May 14, 2018, which was a little more than three months before the plaintiff fell. Lastly, he noted that, at the plaintiff's deposition, she clearly marked the two conflicting accident locations as being on the darker portions of the sidewalk that was depicted in the relevant photographs.

In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff points to testimony by McEvaddy in which he conceded that, in general, a surrounding area could get damaged during an excavation project. McEvaddy, however, also testified that, in a case where the surrounding area was damaged, Network would fix the entire flag in which the damage occurred. McEvaddy did not testify that anything of that nature occurred at the premises. The plaintiff pointed to no other evidence that would establish that Network's excavation work on other sidewalk flags adjacent to or near the premises caused damage to the flagstone on which she purportedly tripped. Inasmuch as the conditions identified by the plaintiff were too trivial to be actionable and, in any event, she failed to raise a triable issue of fact as to whether the Verizon defendants negligently paved the subject flagstone or performed nearby work so as to create a tripping hazard, summary judgment must be awarded to the Verizon defendants dismissing the second amended complaint insofar as asserted against them.

Since the second amended complaint is being dismissed insofar as asserted against 4960 Broadway, its cross claims against the Verizon defendants must be dismissed as well (see *Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490, 494 [1st Dept 2010]).

In light of the foregoing, it is,

ORDERED that the motion of the defendant, 4960 Broadway, LLC, for summary judgment dismissing the second amended complaint insofar as asserted against it (MOT SEQ 001) is granted, and the second amended complaint is dismissed insofar as asserted against 4960 Broadway, LLC; and it is further,

ORDERED that the motion of the defendants Verizon New York, Inc., and Network Infrastructure, Inc., for summary judgment dismissing the second amended complaint and all cross claims insofar as asserted against them (MOT SEQ 002) is granted, and the second amended complaint and all cross claims are dismissed insofar as asserted against Verizon New York, Inc., and Network Infrastructure, Inc.; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the second amended complaint and all cross claims against all of the defendants.

This constitutes the Decision and Order of the court.

8/5/2025  
DATE

\_\_\_\_\_  
JOHN J. KELLEY, J.S.C.

MOTION 001:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE

MOTION 002:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE