

Aleksandrovich v City of New York

2025 NY Slip Op 32845(U)

August 5, 2025

Supreme Court, New York County

Docket Number: Index No. 161461/2018

Judge: Hasa A. Kingo

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

PRESENT: HON. HASA A. KINGO PART 05M

Justice

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ISAI ALEKSANDROVICH

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 161461/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 were read on this motion for SUMMARY JUDGMENT.

Defendant, the City of New York (the “City”), moves pursuant to CPLR § 3212 for summary judgment, and an ordering dismissing Plaintiff Isai Aleksandrovich’s (“Plaintiff”) complaint on the grounds that (1) the City did not receive prior written notice of the alleged sidewalk/tree well defect as required by New York City Administrative Code § 7-201(c)(2), and (2) the City neither caused nor created the condition alleged to have precipitated Plaintiff’s fall.

Plaintiff opposes the motion, conceding the absence of prior written notice but contending that this action falls within the “affirmative negligence” exception to the prior written notice rule.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff alleges that on the morning of September 12, 2017, he tripped and fell on a protruding decorative stone abutting a tree well outside the Consulate General of the Russian Federation at 9 East 91st Street in Manhattan. Plaintiff claims that he sustained serious injuries including post-concussion syndrome, chronic headaches, and orthopedic injuries.

Plaintiff served a timely notice of claim on December 8, 2017, commenced this action on January 2, 2019, and filed a note of issue on November 6, 2024.

The City now seeks summary judgment, asserting it lacked prior written notice and did not affirmatively create the condition.

ARGUMENTS

The City of New York moves for summary judgment on the grounds that it did not receive prior written notice of the alleged sidewalk or tree well defect, as required by Administrative Code § 7-201(c)(2). In support of its motion, the City submits that no municipal records exist indicating

it had knowledge of the defect or that it performed any work at the location that would constitute an affirmative act of negligence. The City also challenges the sufficiency of Plaintiff's notice of claim, arguing that Plaintiff's testimony is internally inconsistent regarding the precise location of the fall, thereby frustrating any effort to identify the condition at issue. The City further contends that Plaintiff has not presented any admissible evidence demonstrating that the City caused or created the condition through an immediate, affirmative act. In advancing its position, the City relies on well-established case law, including *Yarborough v. City of New York*, 10 NY3d 726 (2008), *Amabile v. City of Buffalo*, 93 NY2d 471 (1999), and *Oboler v. City of New York*, 8 NY3d 888 (2007), all of which reinforce that a municipality is not liable absent prior written notice or affirmative negligence that immediately results in a hazardous condition.

In opposition, Plaintiff acknowledges that the City did not receive prior written notice of the defect but invokes the "affirmative negligence" exception to the statutory requirement. Plaintiff contends that the City itself created the hazardous condition by installing the decorative stone border which extended beyond the tree well boundary, thereby creating a latent tripping hazard. To support this claim, Plaintiff highlights that the same decorative elements appear consistently along East 91st Street in front of multiple properties, suggesting that the installations were not the product of individual landowners but rather of coordinated municipal action. Plaintiff further notes that a Parks Department witness testified that a permit would be required for such work, yet no permits have been produced—an absence Plaintiff argues points to City involvement. Additionally, Plaintiff references a photograph he marked during his General Municipal Law § 50-h hearing, asserting that this image, along with his testimony, sufficiently identifies the defective condition and places the City on notice. Finally, Plaintiff argues that any inconsistencies in his deposition testimony must be considered in light of his traumatic brain injury, and that the credibility and weight of his testimony are matters reserved for the jury.

DISCUSSION

Section 7-201(c)(2) of the New York City Administrative Code was enacted to confront what the Court of Appeals once described as "the vexing problem of municipal street and sidewalk liability" (*Barry v. Niagara Frontier Tr. Sys.*, 35 NY2d 629, 633 [1974]). Acknowledging that municipalities cannot reasonably be expected to possess omniscient awareness of every hazard lurking along their vast network of streets and public walkways, the Legislature imposed a rational prerequisite: that the City receive written notice of any allegedly dangerous condition before it may be held liable for resulting injury or damage (*Poirier v. City of Schenectady*, 85 NY2d 310, 314 [1995]).

Unlike Section 7-210, which narrowly governs sidewalk liability in relation to abutting property owners, Section 7-201(c)(2) casts a wider net. It bars civil actions against the City for injuries or property damage arising from defective, unsafe, or obstructed conditions on a sidewalk—or any part thereof, including any "encumbrances thereon or attachments thereto"—unless written notice of such condition was previously furnished to the Commissioner of Transportation or a designated agent.

This sweeping language makes clear that the statute's reach extends beyond the sidewalk surface itself to encompass appurtenant features such as tree wells, planters, gratings, or other

attachments that may render the sidewalk hazardous. The focus is not on the nature of the maintenance activity required, but on whether the City had actual notice of the offending condition. Accordingly, where a plaintiff alleges a tree well defect—such as a depression in the soil below the level of the surrounding sidewalk in contravention of 34 RCNY § 2-09(f)(4)(xx)(B)—they must demonstrate that the City received timely, written notice of that precise defect before liability may attach. This interpretation has been repeatedly affirmed by courts addressing similar claims (*see Fuhrmann v. City of Binghamton*, 31 AD3d 1036 [3d Dept 2006]; *O'Reilly v. City of New York*, 2010 NY Slip Op 32240[U][Sup Ct Ny Cnty 2010]; *Beatty v. City of New York*, 2010 NY Slip Op 30608[U][Sup Ct Ny Cnty 2010]; *Shulman v. House of the Redeemer*, 2010 NY Slip Op 32038[U][Sup Ct Ny Cnty 2010]).

While the absence of prior written notice generally shields a municipal defendant from liability under the Administrative Code, that protection does not apply where the municipality affirmatively created the very condition that caused the plaintiff's injury. In such circumstances, the City may still be held liable notwithstanding the lack of notice (*Elstein v. City of New York*, 209 AD2d 186, 186–187 [1st Dept 1994]; *Bisulco v. City of New York*, 186 AD2d 85, 85 [1st Dept 1992]).

To prevail under this exception, however, a plaintiff must do more than merely allege municipal involvement. The plaintiff must affirmatively demonstrate that the condition in question arose from an act of negligent construction or installation—one that created a hazard not attributable to gradual deterioration or ordinary wear and tear. As the Court of Appeals has made clear, the claim must rest on proof that the work performed by the municipality was so deficient that it “immediately resulted in the existence of a dangerous condition” (*Yarborough v. City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v. City of New York*, 8 NY3d 888, 890 [2007]). Mere passage of time or the natural evolution of a condition will not suffice; the defect must be traceable to a specific, affirmative act of municipal negligence that gave rise to the hazard from the outset.

I. Prior Written Notice

Here, the City's submission includes detailed affirmations from Parks and DOT officials attesting to exhaustive record searches that yielded no evidence of complaints, work orders, or violations concerning the condition in question. No permit applications, inspections, or repair records from either the DOT or Parks Department point to the City's knowledge of or responsibility for the alleged protruding stone. The Big Apple map, inspections, and other documentation also do not indicate any notice.

Accordingly, the City has established prima facie entitlement to judgment on the issue of prior written notice under *Katz v. City of New York*, 87 NY2d 241 (1995), and *Poirier v. City of Schenectady*, 85 NY2d 310 (1995).

Plaintiff has conceded this point. Thus, the court grants summary judgment on the issue of notice.

II. Affirmative Negligence

Having established that it lacked prior written notice of the alleged defect pursuant to Administrative Code § 7-201(c)(2), the City has met its prima facie burden entitling it to summary judgment. Under *Yarborough v. City of New York*, 10 NY3d 726 (2008), once a municipality demonstrates that no prior written notice exists, the burden shifts to the plaintiff to raise a triable issue of fact by demonstrating that the municipality created the condition through an affirmative act of negligence—one that immediately resulted in the existence of the dangerous condition. In the absence of such a showing, the protections of the prior written notice law remain intact, and liability does not attach. Courts have repeatedly declined to extend liability where the alleged act of negligence is remote in time or based on omissions, delay, or passive inaction—none of which suffice to abrogate the notice requirement (*Carney v. City of New York*, 232 AD3d 535 [1st Dept 2024]; *Vega v. City of New York*, 88 AD3d 497, 498 [1st Dept 2011]; *Michela v. County of Nassau*, 176 AD2d 707 [2d Dept 1991]).

Here, Plaintiff provides no evidence—whether testimonial, photographic, documentary, or expert in nature—identifying who installed the stones or when they were installed. There is no indication in the record that the City performed any work proximate in time to the accident. Plaintiff's reliance on the Parks Department witness's acknowledgment that a permit would have been required does not strengthen their case; to the contrary, the absence of such a permit reinforces the City's position that it did not install or authorize the stonework.

By contrast, the City has submitted sworn deposition testimony and municipal records affirming that it neither performed nor authorized the installation of the stonework surrounding the subject tree well. The Parks Department representative testified without equivocation that raised stone enclosures are contrary to Parks policy and are generally disallowed. He further explained that any such work would have required a permit issued by the Department. A thorough search of City records revealed no such permits for the address in question, and a review of tree planting contracts confirmed that the only Parks-permitted work on East 91st Street occurred at a different location—1 East 91st Street—under contract MG-214M. Parks Director Nave Strauss affirmed that this was the only address on East 91st Street where work was performed under that contract. As such, the City has sufficiently demonstrated that no work was performed at or near the site of Plaintiff's accident that could have caused or created the alleged defect.

The Parks Department also confirmed that it generally does not permit raised walls or stone enclosures around tree wells, and any such installation would have required a permit—none of which exist. This testimony, coupled with the absence of relevant records, undermines Plaintiff's unsupported theory that the City was the source of the defect (*see Elstein v. City of New York*, 209 AD2d 186, 187 [1st Dept 1994])["City came forward with proof that it had not been given any prior written notice of the alleged defective condition and that no work construction or repair had been performed in the nearly two-year period preceding the date of the accident). Here, as in *Elstein*, the City's submission of records showing no work or repairs for two-years prior to the date of the accident rebuts Plaintiff's speculative claims to the contrary.

Rather than submitting admissible evidence to identify the party responsible for the installation of the decorative stonework, Plaintiff instead relies on speculation and conjecture. His assertion that the uniform appearance of the tree wells along East 91st Street implies City authorship is insufficient to defeat summary judgment. As courts have repeatedly held, "mere

conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient” to raise a triable issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *see also Villaret v. City of New York*, 236 AD2d 216 [1st Dept 1997]; *Smith v. City of New York*, 210 AD3d 53 [2d Dept 2022]).

This case is virtually indistinguishable from *Rabich v. City of New York*, 227 AD3d 484 (1st Dept 2024), where the Appellate Division, First Department, granted summary judgment in favor of the City upon a showing that the defect had been marked “closed” eight months prior to the incident and the plaintiff could not establish any causal link to the City’s conduct. Likewise, in *Smith v. City of New York*, 228 AD3d 472 (1st Dept 2024), the Appellate Division, First Department, held that evidence of general work in the area five months prior to the accident was insufficient to invoke the affirmative negligence exception.

Moreover, to the extent Plaintiff suggests that the City’s failure to inspect or remove the alleged hazard amounts to negligence, such allegations amount to nonfeasance, not affirmative acts. As the courts have long held, passive inaction or failure to act is not a basis for municipal liability under the “cause and create” exception (*Zizzo v. City of New York*, 176 AD2d 722 [2d Dept 1991]; *Monteleone v. Village of Floral Park*, 143 AD2d 647 [2d Dept 1988]; *Goldburt v. County of Nassau*, 307 AD2d 1019 [2d Dept 2003]).

Ultimately, Plaintiff has failed to offer any evidence—testimonial, photographic, documentary, or otherwise—that identifies who installed the stonework or when the installation occurred. The speculative nature of Plaintiff’s argument, unsupported by personal knowledge, expert opinion, or documentary corroboration, does not suffice to raise a triable issue of fact.

Plaintiff’s failure to pursue discovery focused on the history and origin of the installation, coupled with conclusory statements regarding uniformity and City responsibility, renders this case indistinguishable from those in which courts have rejected cause-and-create arguments as purely speculative (*see Smith v. City of New York*, 210 AD3d 53 [2d Dept 2022]; *Fuhrmann v. City of Binghamton*, 31 AD3d 1036 [3d Dept 2006]).

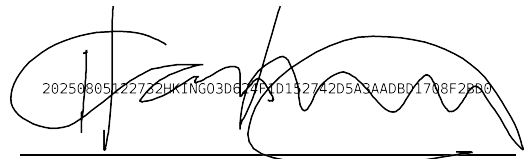
Accordingly, the court finds that Plaintiff has failed to raise any triable issue of fact regarding the City’s alleged creation of the hazardous condition. Plaintiff’s theory is grounded in speculation and lacks the evidentiary support required to defeat the City’s well-supported motion. The City has met its burden under CPLR § 3212, and summary judgment must be granted in its favor.

ORDERED that the motion of Defendant THE CITY OF NEW YORK for summary judgment is granted in its entirety; and it is further

ORDERED that the complaint is hereby dismissed in its entirety as against Defendant THE CITY OF NEW YORK; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

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HASA A. KINGO, J.S.C.

8/5/2025

DATE

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE