

Burke v 287 E. 10th LLC

2025 NY Slip Op 33508(U)

September 17, 2025

Supreme Court, New York County

Docket Number: Index No. 160808/2022

Judge: Hasa A. Kingo

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. HASA A. KINGO PART 05M

Justice

-----X

BRIAN BURKE,

Plaintiff,

- v -

287 EAST 10TH LLC, DENHAM, WOLF REAL ESTATE
SERVICES, INC., THE CITY OF NEW YORK, THE BOYS'
CLUB OF NEW YORK,

Defendant.

-----X

287 EAST 10TH LLC, DENHAM, WOLF REAL ESTATE
SERVICES, INC.

Plaintiff,

-against-

THE BOYS CLUB OF NEW YORK

Defendant.

-----X

INDEX NO. 160808/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595549/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to DISMISS.

Defendants 287 East 10th LLC (“287 East”) and Denham Wolf Real Estate Services, Inc. (“Wolf”) move pursuant to CPLR §§ 3211(a)(1) and (a)(7), or alternatively under CPLR § 3212, seeking dismissal of the complaint in its entirety or, at a minimum, dismissal as against them. Plaintiff, Brian Burke (“Plaintiff”), opposes the motion and cross-moves for summary judgment, urging the court to grant judgment in his favor against 287 East, or in the alternative against the City of New York (“City”), and further seeking a declaration that he is free from culpable conduct as a matter of law. The City opposes Plaintiff’s cross-motion in part, particularly insofar as it seeks judgment declaring Plaintiff free of comparative fault, while taking no position on the claims against 287 East and Wolf. In turn, Defendant The Boys’ Club of New York (“Boys and Girls Club”), named both directly and as a third-party defendant, cross-moves for summary judgment dismissing all claims and third-party claims asserted against it, contending that as a tenant, its obligations did not extend to structural sidewalk repair.

BACKGROUND AND ARGUMENTS

Plaintiff seeks to recover damages for injuries he allegedly sustained on November 8, 2021, when he “was caused to fall into a pit, missing flag and/or well” while traversing a sidewalk abutting 287 East 10th Street, New York, New York (NYSCEF Doc No. 25, amended complaint ¶¶ 14, 42). Plaintiff filed a notice of claim on January 27, 2022, and a hearing was held pursuant to General Municipal Law § 50-h on October 4, 2022 (*id.* ¶¶ 11–12).

On December 19, 2022, Plaintiff commenced this action by filing a summons and complaint asserting causes of action against defendants 287 East, Wolf, and City (NYSCEF Doc No. 1, summons and complaint). The City filed an answer on February 26, 2023, and 287 East and Wolf filed an answer on March 3, 2023 (NYSCEF Doc Nos. 8, 9). On June 15, 2023, 287 East and Wolf commenced a third-party action against the Boys and Girls Club (NYSCEF Doc No. 19). On June 20, 2023, Plaintiff filed a supplemental summons and amended complaint adding the Boys and Girls Club as a defendant (NYSCEF Doc Nos. 24, 25). The Boys and Girls Club filed answers to both the third-party complaint and the amended complaint (NYSCEF Doc Nos. 28, 29), and 287 East and Wolf filed an answer to the amended complaint (NYSCEF Doc No. 32).

On April 23, 2025, 287 East and Wolf filed the instant motion to dismiss pursuant to CPLR §§ 3211(a)(1) or (a)(7), or alternatively pursuant to CPLR § 3212, seeking dismissal of the complaint in its entirety or as against them (NYSCEF Doc No. 47, notice of motion). In support of their motion, 287 East and Wolf assert that Plaintiff testified at his deposition that his injuries were caused when he fell into a tree well, with which they have no connection (NYSCEF Doc No. 47, Smith *aff* in support ¶¶ 5–6). They further contend that it is well established that the Administrative Code does not impose civil liability on property owners for City-owned tree wells (*id.* ¶ 13). Finally, they argue that Wolf only provides consulting services to 287 East, is not the property owner, and therefore owes no duty to Plaintiff (*id.* ¶ 14).

Plaintiff opposes and cross-moves for summary judgment against 287 East or, in the alternative, against the City, as well as for summary judgment declaring that Plaintiff is free from culpable conduct (NYSCEF Doc No. 54). Plaintiff first argues that a motion to dismiss under CPLR § 3211(a)(1) or (7) cannot be based on testimony or affidavits as a matter of law (NYSCEF Doc No. 55, Schatz *aff* ¶ 30). Plaintiff further argues that 287 East and Wolf have provided no evidence that the subject area is a tree well, and asserts instead that it is simply a missing sidewalk flag (*id.* ¶¶ 8–9). As such, Plaintiff contends that 287 East is responsible for maintenance of the area (*id.* ¶ 8). Alternatively, Plaintiff argues that if 287 East can prove the area is a tree well, the court should enter summary judgment against the City (*id.* ¶ 8). Plaintiff points to another case in this court, *Papadopoulos v. 287 East 10th LLC*, Index No. 161269/2020, involving a trip and fall at the same property with a similar condition, where affidavit and deposition testimony were offered to demonstrate that the dirt patch was a missing sidewalk flag rather than a tree well (*id.* ¶ 24). Plaintiff also notes that the area has since been paved over and argues that if it were truly a tree well, the proper remediation would have been to plant a tree rather than pave the square (*id.* ¶ 45). Plaintiff thus argues that the court should grant summary judgment in his favor against 287 East for failure to maintain the property, or in the alternative, if the court concludes the area is a tree well, against the City. Under either circumstance, Plaintiff contends that the *Papadopoulos* case put both 287 East and the City on notice of the condition. Finally, Plaintiff argues that

summary judgment should be granted declaring him free from culpability with respect to his fall (*id.* ¶ 69). 287 East and Wolf oppose Plaintiff’s cross-motion.

The City opposes Plaintiff’s cross-motion insofar as it seeks a determination that Plaintiff was free from culpable conduct and takes no position regarding dismissal or summary judgment as to 287 East and Wolf (NYSCEF Doc No. 74). The City argues that the cross-motion should be denied because it improperly seeks relief against a non-moving party. The City appears to concede that the subject area is a tree well, or at least that Plaintiff is bound by this representation made in his notice of claim, and that the City had notice of the condition. However, it contends that issues of fact remain regarding whether the condition constituted a dangerous defect, as well as Plaintiff’s potential culpability and assumption of risk, which are for a jury to determine. The City notes that Plaintiff testified at his deposition that he had lived in the area for 35 years, walked past the location every one to two months, was listening to music with earphones at the time of the fall, and fell after stepping to the right to walk around other pedestrians. The City contends these factors raise questions of fact regarding culpability and assumption of risk. The City also argues that Plaintiff is not entitled to any further discovery in this action because documents or witnesses from the Department of Transportation and Department of Parks and Recreation are only relevant to the issue of notice, which the City has already conceded.

The Boys and Girls Club also cross-moves for summary judgment dismissing all claims and third-party claims against it (NYSCEF Doc No. 67). The Boys and Girls Club takes no position with respect to the potential liability of 287 East or the City, or whether the location is a tree well or missing sidewalk flag. Instead, it argues that as a tenant at the property, its duties with respect to the sidewalk extend only to keeping the sidewalks and adjoining areas “clear of refuse and debris and free of ice and snow . . . and [to] make any necessary nonstructural repairs thereto, whether interior or exterior” (NYSCEF Doc No. 68, Klauber aff ¶¶ 27, 41). The Boys and Girls Club further argues that the issue of comparative fault must be left for the trier of fact (*id.* ¶ 42). 287 East and Wolf oppose this cross-motion.

In reply to the City’s opposition, Plaintiff argues that an abandoned tree well should be treated as a substantial defect because it is substantially similar to a missing sidewalk flag. Alternatively, he argues that the condition constitutes a substantial defect because the height differential between the dirt and the sidewalk was greater than one-half inch. Plaintiff further contends that there is no question of fact that he is free from comparative fault because his actions were reasonable at all times.

DISCUSSION

I. Legal Standards

On a motion to dismiss under CPLR § 3211(a)(1), dismissal is warranted only where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]). To qualify as “documentary evidence,” the submission must be unambiguous, authentic, and undeniable, such as contracts, deeds, or official records; affidavits, deposition testimony, or self-serving statements do not suffice (*see Correa v. Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]; *Fontanetta v. John Doe*

1, 73 AD3d 78, 86 [2d Dept 2010]). Thus, where defendants rely principally on testimony or affidavits to establish their defense, the motion cannot properly be granted under CPLR § 3211(a)(1).

Similarly, CPLR § 3211(a)(7) requires only that the complaint plead a cognizable cause of action. In testing legal sufficiency, the court must afford the pleadings a liberal construction, accept the facts alleged as true, and accord Plaintiff the benefit of every favorable inference (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). Affidavits or testimony proffered by defendants cannot be used to “negate” essential allegations at this preliminary stage (*Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

The heavy burden of a summary judgment movant is well established: the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to eliminate any genuine material issue of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only if this burden is met does the obligation shift to the opposing party to demonstrate the existence of triable issues (*Winegrad v. N.Y.U. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment is a “drastic remedy” and should be granted only where the record is clear, unambiguous, and leaves no doubt as to the absence of triable issues (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]).

Administrative Code § 7-210 imposes a nondelegable duty on owners of real property abutting any sidewalk in the City of New York to maintain that sidewalk in a reasonably safe condition, and provides that such owners “shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.”

The statute has been construed broadly to impose liability on abutting owners for dangerous sidewalk conditions, including uneven or broken sidewalk flags (*Xiang Fu He v. Troon Mgmt., Inc.*, 34 NY3d 167, 172 [2019]; *Sangaray v. West Riv. Assoc., LLC*, 26 NY3d 793, 798 [2016]). However, the statute expressly excludes liability for “the negligent failure to remove snow and ice, dirt, or other material from a tree well.” The Court of Appeals has confirmed that tree wells are outside the ambit of § 7-210 (*Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]), and the Appellate Divisions consistently hold that liability for tree wells remains with the City, unless the abutting owner affirmatively created the defect (*see Cabral v. Triangle LLC*, 234 AD3d 518 [1st Dept 2025]).

Accordingly, the threshold issue—whether Plaintiff fell into a tree well, a missing sidewalk flag, or some other instrumentality—is dispositive of whether liability rests with the abutting owner (287 East) or the City.

II. Application to 287 East’s Motion

287 East argues that Plaintiff’s testimony—acknowledging that there “used to be a tree” in the subject location—conclusively establishes that the area was a tree well, and thus absolves it of statutory liability. Yet this reliance on testimony is procedurally misplaced on a CPLR § 3211

motion, where affidavits and testimony do not constitute “documentary evidence” capable of defeating the complaint as a matter of law (*Correa*, 84 AD3d at 651, *supra*).

Moreover, Plaintiff has offered evidence suggesting that the defect was instead a missing sidewalk flag. He points to photographic evidence, the similarity to conditions litigated in *Papadopoulos v. 287 East 10th LLC* (Index No. 161269/2020), and the fact that the area was later paved over—a remediation inconsistent with the preservation of a tree well. These submissions raise triable issues that cannot be resolved on the present record.

Thus, while Administrative Code § 7-210 exempts owners from tree well liability, the unresolved factual dispute as to the nature of the condition compels denial of 287 East’s motion, albeit with leave to renew following further discovery.

III. Wolf’s Application

Wolf, a real estate consultant, stands in a different position. It is not the owner of the abutting property and has demonstrated no contractual obligation or assumption of control with respect to the sidewalk. Section 7-210 imposes liability on abutting owners, not consultants or advisors (*see Brown v. 1133 E., LLC*, 236 AD3d 851 [2d Dept 2025]). In the absence of ownership, possession, control, or a contractual undertaking to repair, Wolf owed no duty to Plaintiff. Its application must therefore be granted, and all claims against it dismissed with prejudice.

IV. Plaintiff’s Cross-Motion

Plaintiff’s bid for summary judgment suffers from the same factual uncertainty that undermines 287 East’s dismissal motion. Whether the condition was a tree well or a missing sidewalk flag remains contested. If the latter, liability may fall upon 287 East under § 7-210; if the former, the City may bear responsibility. Because discovery from the Department of Transportation and Department of Parks and Recreation has not yet been exchanged, the record is insufficient to resolve this threshold question.

Plaintiff’s request for a declaration of freedom from comparative fault is also premature. His own testimony established that he had long familiarity with the area, was wearing headphones at the time, and shifted to the right to avoid oncoming pedestrians. Whether these actions contributed to his fall raises classic issues of fact for the jury (*see Thoma v. Ronai*, 82 NY2d 736 [1993]). It would be inappropriate to remove such questions from the trier of fact at this juncture.

Accordingly, Plaintiff’s cross-motion is denied, with leave to renew after discovery has clarified the nature of the defect and the issue of comparative fault.

V. Boys and Girls Club’s Cross-Motion

The Boys and Girls Club, a tenant at the premises, argues that its lease obligations did not extend to structural repairs of the sidewalk. The lease required only that it keep the sidewalks adjoining the premises “clear of refuse and debris and free of ice and snow” and to make necessary “nonstructural repairs.” New York law distinguishes structural from nonstructural obligations,

placing responsibility for sidewalk repair squarely with landlords unless explicitly transferred to the tenant (*see Cucinotta v. City of New York*, 68 AD3d 682 [1st Dept 2009]; *Berkowitz v. Dayton Constr.*, 2 AD3d 764 [2d Dept 2003]).

As sidewalk repair is inherently structural in nature, and there is no express lease provision shifting that burden to the Boys and Girls Club, it owed no duty of repair under § 7-210 or common law. Further, there is no evidence that the Boys and Girls Club created or exacerbated the condition. Its cross-motion for summary judgment must therefore be granted, dismissing all direct and third-party claims against it.

VI. Discovery and Compliance

Because resolution of the remaining motions turns on the factual determination of whether the location of Plaintiff's fall was a tree well, a missing sidewalk flag, or another instrumentality, the court directs the City of New York to disclose all information, records, and documents in its possession relevant to this issue. Such disclosures shall include, but are not limited to, Department of Transportation and Department of Parks and Recreation records reflecting the condition of the subject area, the existence or removal of a tree, and any maintenance or remediation undertaken.

These disclosures shall be completed within sixty (60) days of this decision and order, i.e., by November 15, 2025. All parties are directed to appear for a compliance conference thereafter. The court further notes that, should such disclosures or other documentary evidence provide any party with a colorable basis to renew its motion, the court will entertain such applications at that time.

Accordingly, it is hereby

ORDERED that the City of New York shall disclose all records and documents relevant to whether the subject area constituted a tree well, sidewalk flag, or other instrumentality, within sixty (60) days of September 16, 2025, i.e., by November 15, 2025; and it is further

ORDERED that the motion of defendant 287 East 10th LLC is denied, with leave to renew following receipt of the aforementioned discovery; and it is further

ORDERED that the motion of defendant Denham Wolf Real Estate Services, Inc. is granted, and all claims against it are dismissed with prejudice; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment is denied, with leave to renew following receipt of the aforementioned discovery; and it is further

ORDERED that the cross-motion of defendant The Boys' Club of New York is granted, and all claims and third-party claims against it are dismissed with prejudice; and it is further

ORDERED that all parties shall appear for a compliance conference at 80 Centre Street, Room 320, New York, New York (Part 5) on November 18, 2025 at 3:00 PM; and it is further

ORDERED that upon production of additional documentation that affords any party a colorable basis to renew its application, the court will entertain such motion practice at that time.

This constitutes the decision and order of the court.

9/17/2025
DATE

HASA A. KINGO, 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