

Gonzalez v Empire Blue Cross/Blue Shield
2025 NY Slip Op 35296(U)
May 12, 2025
Supreme Court, Queens County
Docket Number: Index No. 706624/2021
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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Index No.: 706624/2021

KEVIN GONZALEZ

Motion Date: 3/10/2025

Plaintiff,

Motion Cal. No.: **20** and **21**

-against-

Motion Sequence No.: **13** and **12**

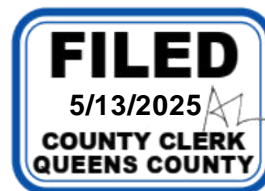
EMPIRE BLUE CROSS/ BLUE SHIELD, JACKSON
PROPERTIES DM, LLC, HEALTHPLUS HP, LLC
d/b/a EMPIRE BLUE CROSS BLUE SHIELD
HEALTHPLUS, JACKSON PROPERTIES JM, LLC,
JACKSON PROPERTIES LM, LLC, and JACKSON
PROPERTIES AM, LLC,

Defendants.

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HEALTH PLUS HP, LLC D/B/A EMPIRE BLUE
CROSS BLUESHIELD HEALTHPLUS I/S/H/A
EMPIRE BLUE CROSS/BLUE SHIELD,

Third-Party Plaintiff



-against-

THE CITY OF NEW YORK AND NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,

Third-Party Defendants

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JACKSON PROPERTIES DM, LLC, JACKSON
PROPERTIES JM, LLC, JACKSON PROPERTIES
LM, LLC and JACKSON PROPERTIES AM, LLC

Second Third-Party Plaintiff

-against-

THE CITY OF NEW YORK,

Second Third-Party Defendant

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The efile papers numbered EF 217-252 , 282-283, 285, 295-301, 303-305, 309, 313 and 315-316 submitted and considered on **motion sequence # 12** by JACKSON PROPERTIES DM, LLC, JACKSON PROPERTIES JM, LLC, JACKSON PROPERTIES LM, LLC and JACKSON PROPERTIES AM, LLC (collectively referred to as “Jackson Properties”); and the efile papers numbered EF 253-279, 284, 286-294, 302, 306-308,310-312, 314 and 317-318 on **motion sequence #13** by HEALTH PLUS HP, LLC, d/b/a EMPIRE BLUE CROSS/BLUE SHIELD HEALTH PLUS i/s/h/a EMPIRE BLUE CROSS/BLUE SHIELD (collectively referred to as “Health Plus”) all seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 for summary judgment dismissing plaintiff KEVIN GONZELEZ’s (hereinafter “Plaintiff”) verified complaint against them together with such other and further relief as this Court deems just and proper.

Both motions are **denied**.

Motion Sequence 12

Papers
Numbered

Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 217-252
Stipulations.....	EF 282-283, 285, 301 and 313
Cross-Motion/ Opposition-Affidavits-Exhibits.....	EF 295-300
Affirmation in Reply.....	EF 303-305
Affirmation in Reply.....	EF 309
Aff. In Reply to Cross.....	EF 315-316

Motion Sequence 13

Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 253-279
Stipulations.....	EF 284, 286, 302 and 314
Cross-Motion/ Opposition-Affidavits-Exhibits.....	EF 287- 294
Affirmation in Opp.....	EF 306-308
Affirmation in Reply.....	EF 310-312
Aff. In Reply to Cross.....	EF 317-318

Relevant Factual Background

This matter arises out of an alleged incident that occurred on August 25, 2022, involving Plaintiff, who claims he sustained serious physical injuries while traversing the sidewalk abutting 95-40 Roosevelt Avenue in Queens, New York on the portion of the sidewalk abutting the property on Warren Street (hereinafter referred to as the “Premises”). According to Plaintiff, the fall was caused by a defective condition present on the sidewalk. The evidence in the record indicates that the Premises was owned by Jackson Properties and leased by Health Plus at the relevant time.

Jackson Properties

In support of their motion, Jackson Properties provided the pleadings; deposition testimony from Plaintiff, their witness Mary Rahl, DOT witnesses Fulu Bhomwick and Abdekaziz Chaglou and witness from Health Plus Elise Rodriguez; various records provided by third-party defendants the City, Expert Affirmation from John Swanson; and the marked photos.

The three main arguments set forth by Jackson Properties are that they are not liable for the portion of the sidewalk where plaintiff fell pursuant to 34 RCNY § 2-07 (b)(1); they are not liable to Plaintiff under common law as an out of possession landlord; and under contract law they are not liable to Plaintiff as the lease placed the burden of maintaining the sidewalks on the tenant, who in this case was Health Plus.

As to their first argument, Jackson Properties relies upon the Affirmation of their expert John Swanson, practice lead in imaging sciences, who considered Google Street View Image data from November 2017, images provided by the Plaintiff and results from a Faro Focus 3D Terrestrial Laser Scanner on July 18, 2024 to conclude that the shortest distance between the access panel and the defective sidewalk condition that allegedly caused Plaintiff's fall is 9.9 inches and the furthest distance is 11.9 inches based upon the Google Image from 2017. Also, Swanson opined that the furthest distance between the access panel and the alleged defective condition is 11.0 inches and the closest distance is 9.9 inches based upon the image provided by Plaintiff. Thus, Swanson opined within a reasonable degree of professional certainty that all portions of the alleged defective condition are within 12 inches of the access panel. Thus, Jackson Properties argues they had no duty to maintain the alleged defective condition in accordance with 34 RCNY § 2-07 (b)(1).

As to their second and third arguments, the testimony from Fulu Bhomwick and Abdekaziz Chaglou indicate that Jackson Properties received notice of the alleged defective condition as early as 2016. Chaglou performed an inspection of the subject sidewalk abutting the Premises in June of 2016 and noted several defects along with the one that allegedly caused Plaintiff's fall. This inspection resulted in a Notice of Violation that was indisputably sent to Jackson Properties. Jackson Properties does not dispute that the alleged defect was not cured prior to Plaintiff's fall and this is confirmed by a subsequent failed inspection performed by the DOT on October 17, 2018, after the subject fall. Nonetheless, Jackson Properties contends that it was an out of possession landlord and cannot be held liable for Plaintiff's injuries. Jackson Properties argues the evidence indicates that they were not regularly present at the property, did not cause or create the condition and did not make special use of the portion of the sidewalk where Plaintiff's fall occurred. Jackson Properties conceded that it made repairs to the sidewalk following Plaintiff's fall in response to the Notice of Violation. Finally, Jackson properties points to the lease and alleges that it states that Health Plus was responsible for maintenance of the public portions of the property.

Health Plus

Health Plus adopts the arguments made by Jackson Properties regarding the applicability of 34 RCNY § 2.07(b)(1). In support of its motion, Health Plus also provided the subject lease.

Plaintiff's Cross-Motion

Plaintiff argues that both Jackson Properties and Health Plus are liable for spoliation for replacing the subject sidewalk prior to providing proper notice to Plaintiff. Thus, Plaintiff contends that both Jackson Properties and Health Plus should not benefit from destroyed evidence and should be precluded from relying on the Expert Affirmation of Swanson when they could have taken accurate measurements prior to replacing the subject sidewalk which occurred after commencement of this lawsuit.

Furthermore, Plaintiff argues that Swanson's method was flawed due to the nature of google images which are not suitable for high precision measurements. In support of this contention Plaintiff provided two articles. The first article is titled Accuracy Assessment of 3D models generated from Google Street View Imagery (*see* N. Bruno and R. Roncella, *Accuracy Assessment of 3D models generated from Google Street View Imagery*, Vol XLII-2/W9 The International Archives of the Photogrammetry, Remote Sensing and Spatial Information Sciences, 181-189 [Feb 2019]) (hereinafter "Article A"). The second article is titled Decoding Urban Landscapes: Google Street View and Measurement Sensitivity, Computers, Environment and Urban Systems (*see* Jae Hong Kim, Sugie Lee and John R. Hippo, *Decoding Urban Landscapes: Google Street View and Measurement Sensitivity*, Computers, Environment and Urban Systems, Vol 88 Computers, Environment and Urban Systems 101626 [July 2021]) (hereinafter "Article B").

According to Plaintiff, both articles clearly establish that Google Street View (hereinafter "GSV") is for navigational purposes. Article A states that GSV's use for photogrammetric purposes is limited due to insufficient resolution and inherent distortions associated with the panoramic stitching process (which involves the stitching together of several photographs to reproduce one continuous image of a scene). Article A further notes that GSV imagery is not intended for high precision measurements. According to Plaintiff, Article B illustrates how the accuracy of a measurement based upon GSV can be impacted by the method of capture and processing of the GSV images. Specifically, how variations in imaging parameters can lead to substantial measurement errors which are "particularly high for some measurement targets, including humans, objects and sidewalks". (*See* Article B at page 2).

Thus, Plaintiff argues that the movants have failed to establish the applicability of 34 RCNY § 2-07 (b)(1).

Plaintiff further argues that both Jackson Properties and Health Plus are liable pursuant to NYC Administrative Code § 7-210(a). Plaintiff argues that it is undisputed that the aforementioned Notice of Violation was served over one year prior the subject fall. As to Jackson Properties, Plaintiff contends it was not an out of possession landlord evidenced by their post-accident repair which establishes their maintenance and control of the premises. “Evidence of subsequent repairs and remedial measures is not discoverable or admissible in a negligence case unless there is an issue of maintenance or control” (*citing Cleland v 60-02 Woodside Corp.*, 221 AD2d 307, 308 [2d Dept 1995]). Furthermore, Plaintiff contends the copy of the lease that Jackson Properties attached in support of their motion is illegible and the deposition testimony fails to establish that the tenant was responsible for all repairs including to the sidewalk.

Plaintiff is correct in that the lease that was provided in support of Health Plus’ motion is illegible. Furthermore, both parties generally point to the lease and fail to recite specific sections within the lease that point to responsibility to maintain the structural portions of the Premises. In fact, both Elise Rodriguez and Mary Rahl’s testimony indicate that each of the movants performed sidewalk inspection.

Mary Rahl testified that the outside inspector for Jackson Properties’ property manager was Michael Allimonos, she testified that Michael visited the Premises on a regular basis but was unable to provide specific information regarding the frequency of his visits. Nonetheless, Mary testified as follow regarding Michael’s duties:

Q: What was the purpose of his average visits to your knowledge?

A: He would have to tell you that.

Q: But I am asking you.

A: He would check the properties for any repairs or any complaints. Make sure everybody was okay.

Q: Did he have duties involving checking the property including the condition of the sidewalk?

A: Yes. He was very good at something like that.

Q: And what does that mean, he was very good at something like that?

A: If there was something that needed to be repaired he would call the owners. We would get the permission to repair it immediately.

Q: Just describe what the procedures – well, first of all you said we. Would that also go through you?

A: He would talk to me and say that this sidewalk is coming up. I think we need a repair right away. He would talk to the owners, and they would okay it definitely, and we would get someone in to repair it.

(EF 244 pg 18-19 lines 24-25 and 2-24)

Mary later testified as follows regarding the sidewalk:

Q: Okay. Just let me know what your understanding is.

A: The tenant has to take care of the property, the sidewalks and all of the front.
(EF 244 pg 58 lines 13-16)

Elise Rodriguez testified as follows regarding her duties related to the sidewalk:

Q: Back in August of 2017, did any employee of Empire Blue Cross Blue Shield have the job duty to clean the sidewalks outside of the storefront?

A: No, but I—I, personally, in the morning, because there are food carts, food vendors outside in the front and around the corner, that they're there when we close the office, so in the morning I used to come to clean their garbage. Because I have pregnant women, women with strollers coming in and out of the office. I used to make sure the sidewalk was clean and around the corner up to the fire door.
(EF 251 pg 33-34 lines 10-24 and 2-4)

She further testified that she would only report to Mark Lane (facility manager) a defective condition on the sidewalk if she received a complaint, if somebody tripped or if she personally tripped. (EF 251 pg 64-65).

Discussion

"[T]he 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" (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Rev 5, LLC v Congregation Beth Elohim*, 229 AD3d 820 [2d Dept 2024]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*see Id* at 310, 316; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]; *see also Laffey Fine Homes of New York, LLC v 7 Cowpath, LLC*, 210 AD3d 974, 975 [2d Dept 2022]). On defendant's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Monroy v Lexington Operating Partners, LLC*, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]; *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]). "A finding of negligence may be based only upon the breach of a duty. If, in connection with the acts complained of, the defendant owes no duty, the action must fail" (*see Darby v Compagnie Nat'l. Air France*, 96 NY2d 343, 347 [2001]; *see also Lexington Vil. Condominium v Scottsdale Ins. Co.*, 136 AD3d 645, 649 [2d Dept 2016]).

“An out-of-possession landlord and its agent are not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing duty to repair on the landlord, or a course of conduct by the landlord giving rise to a duty” (see *Muller v City of New York*, 185 AD3d 834, 834 [2d Dept 2020] quoting *Irizarry v Felice Realty Corp.*, 157 AD3d 874,874 [2d Dept 2018]; see *Rivera v Nelson Realty, LLC*, 7 NY3d 530 [2006]; *Hope v Our Holy Redeemer Roman Catholic Church*, 219 AD3d 595 [2d Dept 2023]; *Tardif v Hauppauge Off. Park Assoc, LLC*, 184 AD3d 887 [2d Dept 2020]; *Michaele v Steph-Leigh Assocs., LLC*, 178 AD3d 820 [2d Dept 2019]; *Robbins v 237 Avenue X, LLC*, 177 AD3d 799 [2d Dept 2019]).

“In 2003, the New York City Council enacted Administrative Code of the City of New York § 7–210, the Sidewalk Law, to shift tort liability for injuries resulting from a defective sidewalk from the City to abutting property owners” (see *Brown v City of New York*, 162 AD3d 731, 732 [2d Dept 2018]; citing *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]; *Gelstein v City of New York*, 153 AD3d 604, 605 [2d Dept 2017]; *Johnson v Manley*, 150 AD3d 1210, 1211 [2d Dept 2017]). However, this provision does not apply to “one-, two- or three-family residential real property that are (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes” (Administrative Code of City of NY § 7–210[b]). “The exemption was provided in recognition that it was inappropriate to expose small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair.” (See *Brown v City of New York*, 162 AD3d 731, 732 [2d Dept 2018]; *Coogan v City of New York*, 73 AD3d 613, 614 [1st Dept 2010].) “Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use” (see *Missirlakis 735* [2d Dept 2014]; *Crawford v City of New York*, 98 AD3d 935 [2d Dept 2012]; *Romano v Leger*, 72 AD3d 1059, 1059 [2d Dept 2010]; *Farrell v City of New York*, 67 AD3d 859, 860 [2d Dept 2009]).

34 RCNY § 2.07 (b)(1) titled Underground Street Access Covers, Transformer Vault Covers and Gratings states:

(b) *Maintenance Requirements*

(1) The owners of covers or grating on a street are responsible for monitoring the condition of the covers, gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover, grating or concrete pad, if such pad is installed.

34 RCNY § 2.01 titled Definitions states (emphasis added):

Street. The term “street” means a public street, avenue road, alley, lane highway, boulevard, concourse, parkway, driveway, culvert, **sidewalk**, crosswalk, boardwalk, viaduct, square or place, except marginal streets.

Preclusion

In support of his contention that the movants should be precluded from utilizing Swanson's expert affirmation, Plaintiff points to *Jerrick Associates, Inc. v Phoenix Owners Corp. et al.* (191 AD3d 472, 472 [1st Dept 2021]) where the plaintiff moved for sanctions against the defendant for a spoliation charge where the defendant partially replaced the portion of the sidewalk that was the subject of the litigation after its consultant inspected the sidewalk but without providing the plaintiff with notice that the replacement was to commence or an opportunity to inspect prior to the replacement. The First Department found that the trial court "providently exercised its discretion in sanctioning the defendant for spoliation of evidence" (*id*). The court pointed to New York Law which holds sanctions "appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence... before the adversary has an opportunity to inspect them" (*id* [citation and quotations omitted]).

In opposition, both Jackson Properties and Health Plus argue that the condition existed for a sufficient length of time after Plaintiff's fall for Plaintiff to inspect the same. In fact, the movants argue that Plaintiff took pictures that were subsequently exchanged during the discovery process before the repairs. Thus, movants contend they should not be penalized for Plaintiff's failure to take the appropriate measurements when he returned to take photographs.

For the first time in Reply, Plaintiff contends he was unaware that those measurements were necessary as 34 RCNY §2.07 (b)(1) was never asserted by movants as an affirmative defense and thus Plaintiff lacked notice of the defense.

CPLR 3018 (b) states:

(b) Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, discharge in bankruptcy facts showing illegality either by statute or common law, fraud, infancy, or other disability of the party defending payment, release, res judicata, statute of frauds or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

A review of the Answer indicates that Jackson Properties alleged: comparative negligence, CPLR 4545, and CPLR Article 16 as affirmative defenses. The Answer is silent as to any dispute related to duty to maintain the subject portion of the sidewalk. Mary Rahl, testified as follows:

Q: Now if there was damage to a sidewalk immediately surrounding a utility grate is that a repair that Jackson would make, or would you report that to the City of New York or something else?

MS. PASCARELLA: Note my objection . You can answer.

A: I would refer it to the City.

Q: Are you aware whose responsibility repairs to a sidewalk are immediately touching a grate?

A: Legally I don't know, but my assumption would be the City.
(EF 244 pg 91-92 lines 17-25 and 2-5)

Upon being shown photographs of the alleged defect, Mary Rahl testified as follows:

Q: Right behind that if you continue to look at the base of that, it appears that there is some type of square in the pavement that might be some type of square in the pavement that might be some type of metal electrical cover of some sort. Do you see where I am looking?

A: Yes.

Q: Okay. And then right around that area the sidewalk is clearly unlevel, do you see that?

A: Yes.

Q: Do you remember seeing that condition at any time?

A: No.

Q: If you saw that condition at any time during any of your visits to the premises what if anything would you have done about it?

A: I would have reported it.

Q: To who?

A: To the owners. For them to investigate.
(EF 244 pg 70-71 lines 12-25 and 2-6).

This testimony would not provide notice to the Plaintiff that Jackson Properties intended to assert the affirmative defense of 34 RCNY § 2-07(b)(1). Despite Rahl's assertion that defective conditions "immediately surrounding" a City grate should be referred to the City, with regard to the specific defect that allegedly caused Plaintiff's fall she represented that she would have reported the same to Jackson Properties. (*see Shin v New York Transit Authority*, 210 AD3d 717, 718 [2d Dept])

A review of Health Plus' Answer reveals that Health Plus does dispute the right to control and control under the Second Affirmative Defense. However, the language of the Second Affirmative Defense alleges lack of control of "intervening and/or interceding acts of superseding negligence, liability, statutory liability, strict liability on the part of the parties" which is not necessarily a dispute as to control of the subject portion of the sidewalk. Furthermore, the testimony of Rodriguez fails to provide any notice of an intent to allege lack of a duty to maintain the relevant portion of the sidewalk.

It is apparent that this Court lacks sufficient knowledge regarding arguments surrounding prior notice of the movants' intent to argue 34 RCNY § 2-07 (b)(1) in accordance with CPLR 3018 (b) because Plaintiff has raised this argument for the first time in his reply papers. If true, it appears that there can only be two resolutions either Plaintiff receives an opportunity to obtain discovery relevant to this argument or Jackson Properties and Health Plus must be precluded from asserting such an argument at the time of trial. This issue is not ripe for summary judgment.

Common Law and Contract Law

Jackson Properties has failed to establish that it is an out of possession landlord as they failed to point to or provide the provisions in the relevant Lease that speak to control and maintenance of the Premises. Furthermore, the copy of the Lease provided by Health Plus was illegible.

Additionally, the testimony fails to establish that Jackson Properties is an out of possession landlord. The deposition testimony suggests that the property manager for the owner would present to the Premises and inspect the sidewalk for defects.

Likewise, Health Plus has failed to establish that they had no duty to control or maintain the Premises as the lease they provided was illegible and their witness lacked knowledge as to the contents of the Lease.

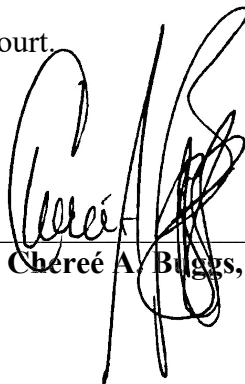
As noted above, it is undisputed that Jackson Properties had notice of the alleged defect prior to the alleged fall for a sufficient amount of time to cure the same. Thus, Jackson Properties have failed to establish prima facie that they are not liable pursuant to Administrative Code of City of NY § 7-210 and/or pursuant to contract law.

There remains an issue of fact as to Health Plus' responsibilities pursuant to the subject Lease. Thus, Health Plus has failed to establish its freedom from liability under contract law. Therefore it is,

ORDERED, that **motion sequence #12** and **motion sequence # 13** are **denied**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 12, 2025



Hon. Chereé A. Buggs, JSC

