Ruiz v City of New York
2025 NY Slip Op 35311(U)
October 30, 2025
Supreme Court, Queens County
Docket Number: Index No. 709961/2020
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.:709961/2020

ANA S. RUIZ,

Motion Date: 8/18/2025

Motion Cal. No.: **32** and **33**

Plaintiff,

-against- Motion Sequence No.: **2** and **3**

THE CITY OF NEW YORK, THE BROOKLYN UNION GAS COMPANY D/B/A NATIONAL GRID NY, TC SYSTEMS, INC. and GWY REALTY INC.,

Defendants.

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The following efiled papers numbered EF 64-76, 96, 98-102, and 107-109 submitted and considered on this **motion sequence #2** by defendants TC SYSTEMS, INC. and GWY REALTY INC. (collectively "TC"), seeking an order pursuant to CPLR §3212 granting summary judgment, dismissing the complaint and all cross-claims and the efiled papers numbered EF 77-97 and 103-106 submitted and considered on this **motion sequence #3** by defendant THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID NY (hereinafter referred to as "National") seeking an order pursuant to CPLR §3212 granting summary judgment, dismissing the Complaint and all cross-claims all seeking such other and further relief as this Court deems just and proper.

	Papers Numbered
Motion Sequence #2	
Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 64-76
Aff. In Opp……...	EF 98-100
Aff. In Opp…….	EF 101
Aff In Reply- Exhibits……..	EF 107-109
Motion Sequence #3	
Notice of Motion- Aff. In Support- Exhibits……	EF 77-95
Aff In Opp……	EF 103
Aff. In Reply-Exhibits……..	EF 104-106

As set forth herein, the motion sequence numbers 2 and 3 are **granted**.

Relevant Factual and Procedural Background

This action arises from an alleged trip and fall accident that occurred on December 10, 2019. Plaintiff contends that she was crossing Broadway in the crosswalk at its intersection with Baxter Avenue, but there was a puddle of water located at the sidewalk cut which she avoided by stepping to the side at which point she tripped on a cracked condition located on the curb. The subject curb was in front of the property known as 80-01 Broadway. Plaintiff contends defendants were negligent in their maintenance and/or repair of the sidewalk and the curb.

In support of the motion, TC submitted deposition transcripts, photographs of the subject location, an affidavit from the president of Westmoreland Construction Inc., and a diagram of the construction performed by TC at or near the subject location. Michael Paletta, president of Westmoreland Construction Inc., alleges that Westmoreland was the general contractor for TC who performed work at the intersection of Broadway and Baxter Avenue. The work involved installation of a fiber conduit in the roadway confined between Verizon manhole #5 and a new TC manhole depicted by the construction diagram. The work was completed on August 1, 2019 and subjected to a City DOT inspection on October 30, 2019, which it passed. According to Paletta, the subject work did not involve any work or excavation on the curb in front of 80-01 Broadway. Paletta also attested that he performed a search of the company's records which revealed that "Westmoreland did not construct, erect, control, supervise or maintain or repair the concrete curb which existed on the edge of the public sidewalk where the Plaintiff fell".

TC argues that the Complaint fails to state a cause of action as Plaintiff has failed to plead sufficient facts and should be dismissed pursuant to CPLR 3211 (a)(7). TC further alleges the documentary evidence or the diagram of the work performed by Westmoreland on behalf of TC indicates that TC did not perform work in the subject area, warranting dismissal pursuant to CPLR 3211(a)(1). Furthermore, TC argues that the Complaint should be dismissed as against them pursuant to 3212 as there is no credible evidence in the record to establish liability for a dangerous condition on the part of TC who only performed work on the roadway which did not involve the concrete curb. Based upon the above argument, TC also seeks the dismissal of any common law indemnity claims.

In support of their motion, National provided photographs of the subject location, deposition transcripts and results from various record searches. National mainly points to the deposition testimony and affidavit of Walter Stone, a former record searcher for Brooklyn Union Gas who retired and currently performs consultant work for National. Walter's testimony revealed that he performed a record search that included records from two years prior to and including December 10, 2019, which revealed that neither National nor its agents performed work at or near 80-01 Broadway. An additional record search was performed for the intersection of Broadway and Baxter Avenue and also revealed that National did not perform work at the subject intersection. Stone's testimony also revealed that any complaints related to the subject location would have appeared in his search. Furthermore, Stone testified that the NYC Department of Transportation records shown to him at his deposition contained permits and inspections at various locations in the general vicinity of Broadway near the subject location but none of the permits identified the subject location. Thus, following his deposition Stone conducted a search of National's records to locate records of work performed by National or its agents

pursuant to the permits shown to him at his deposition, which revealed none of the work performed pursuant to the permits were performed at or near the subject location.

National argues that it is entitled to summary judgment as the evidence indicates that National did not excavate the roadway or sidewalk area at the subject location prior to the incident and therefore did not create the alleged defect.

It is undisputed that neither National nor TC owned the property abutting the subject curb.

Law and Application

CPLR §3211 provides:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> 1. a defense is founded upon documentary evidence; or
> 2. the court has no jurisdiction of the subject matter of the cause of action; or
> 3. the party asserting the cause of action has not legal capacity to sue; or
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
> 6. with respect to a counterclaim, it may not properly be interposed in the action; or
> 7. the pleading fails to state a cause of action; or…
>
> (c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion…

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action and, [i]n considering such a motion, the court must accept the facts as alleged

in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see Jennings v Metro. Transportation Auth.*, 226 AD3d 662, 663 [2d Dept 2024]; *Borovina v ACAP Fund GP, LLC*, 220 AD3d 729, 730 [2d Dept 2023]*; Skefalidis v China Pagoda NY, Inc.*, 210 AD3d 925, 926 [2d Dept 2022]; *Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662 [2d Dept 2021]; citing *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*see Silvers v Jamaica Hosp.*, 218 AD3d 817, 818 [2d Dept 2023]; citing *EBC I, Inc. v Goldman*, Sachs & Co., 5 NY3d 11, 19 [2005]). "A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*see B & B Maintenance Services, Inc. v Town of Oyster Bay*, 228 AD3d 808, 808 [2d Dept 2024]; citing *Qureshi v Vital Transportation, Inc.*, 173 AD3d 1076, 1077 [2d Dept 2019]; *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). "The evidence submitted in support of such motion must be documentary or the motion must be denied" (*see Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]; citing *Prott v Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]; *see also Attias v Costiera*, 120 AD3d 1281, 1283 [2d Dept 2014]; *Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010]).

"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" (*see 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]). "Once a prima facie 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" (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]). Summary judgment is a drastic measure that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues (*see 114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, 178 AD3d 757, 759 [2d Dept 2019]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731, 733 [2d Dept 2016]*; Doize v. Holiday Inn Ronkonkoma*, 6 A.D.3d 573, 774 N.Y.S.2d 792 [2nd Dept. 2004]). "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*see Moonilal v R.C. Church of St. Mary Gate of Heaven*, 225 AD3d 592, 593 [2d Dept 2024]; citing *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]*; see also Adams v Bruno*, 124 AD3d 566, 567 [2d Dept 2015]).

New York City Administrative Code §7-210 states the following:

§7-210. Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for

> corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.
>
> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.
>
> d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

"An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty" (*see Giuntini v City of New York*, 226 AD3d 651, 652 [2d Dept 2024]; citing *Petrillo v Town of Hempstead*, 85 AD3d 996, 997 [2d Dept 2011]). "In 2003, the New York City Council enacted section 7–210 of the Administrative Code of the City of New York to shift tort liability for injuries resulting from defective sidewalks from the City to abutting property owners" (*see Id* at 652; citing *Zak v City of New York*, 192 AD3d 734, 735 [2d Dept 2021]). "Administrative Code § 7–210 directs landowners to maintain their abutting sidewalks in a reasonably safe condition" (*see Id* at 652; citing *Brachfield v Sternlicht*, 202 AD3d 742, 743 [2d Dept 2022]). "This liability shifting provision does not, however, apply to 'one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes'" (*see Id* at 652; citing *Zak v City of New York*, 192 AD3d at 735 [2d Dept 2021]). "The purpose of the exception in the Code is to recognize the inappropriateness

of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair" (*see Id* at 652; citing *Zak v City of New York*, 192 AD3d at 735 [2d Dept 2021]).

"Prior written notice of a sidewalk defect is a condition precedent which a plaintiff is required to plead and prove to maintain an action against the City" (*see* Administrative Code of City of N.Y. § 7–201[c] [2]; *Adamson v City of New York*, 87 AD3d 1088, 1089 [2d Dept 2011]; citing *Katz v City of New York*, 87 NY2d 241, 243 [1995]; *Bradley v City of New York*, 38 AD3d 581, 582 [2d Dept 2007]). "The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a defective sidewalk" (*see Id* at 1089; citing *Cuccia v City of New York*, 22 AD3d 516, 516 [2d Dept 2005]; *Katz v City of New York*, 87 NY2d 241, 243 [1995]).

"A defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it" (*see Piltie v Ofori*, 223 AD3d 688, 688 [2d Dept 2024]; citing *Rivera v Queens Ballpark Co., LLC*, 134 AD3d 796, 797 [2d Dept 2015]). "Only after the moving defendant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition" (*see Rivera v Queens Ballpark Co., LLC*, 134 AD3d 796, 797 [2d Dept 2015]).

TC's argument that Plaintiff's complaint must be dismissed due to a failure to state a cause of action lacks merit as Plaintiff's Complaint when viewed in the light most favorable to Plaintiff properly pleads a cause of action for negligence. TC's argument that the documentary evidence refutes Plaintiff's complaint, does not directly specify what documentary evidence amongst the various exhibits presented by TC should be considered. If TC is referring to the construction diagram, that within itself is insufficient to refute the claims in the Complaint as the construction diagram must be considered in conjunction with the Paletta affidavit which is not considered documentary evidence (*see Conte v Tri-State Tech.,* 238 AD3d 704, 706 [2d Dept 2025]). Thus, TC's arguments are best considered pursuant to CPLR 3212.

When viewed in the light most favorable to the Plaintiff, this Court finds that TC has established prima facie entitlement to judgment as a matter of law. Additionally, this Court also finds that National has established prima facie entitlement to judgment as a matter of law. Both parties have established that they did not owe a duty to the Plaintiff. The burden now shifts to the opposing parties to raise a triable issue of fact.

In opposition, Plaintiff argues that the moving defendants failed to address the pooling of water at the intersection, the existence of which caused Plaintiff to take a different path and "forced her to enter the sidewalk at the area where the defective condition existed". According to Plaintiff's counsel, TC admitted to digging trenches and laying a conduit across Broadway, a trench that was alongside the subject crosswalk that Plaintiff traversed. Plaintiff argues that "it is clear that the covering of the trench settled, causing water to accumulate and pool" at the subject location. As to National, Plaintiff contends that the work performed by National in the area could have also caused the pooling at issue. Thus, Plaintiff contends that a jury can infer "that 'but for' the pooling of water, the plaintiff would not have had to step on the defective sidewalk curb".

Notably absent from the Plaintiff's opposition papers is an expert affidavit or affirmation from an engineer explaining how the work performed by the moving defendants contributed to the pooling of water at the subject location. The allegations made by the Plaintiff requires knowledge beyond that which is possessed by the average layperson and the absence of any representation that Plaintiff's counsel has the requisite engineering qualifications is fatal to Plaintiff's opposition. (*see Price ex rel. Price v New York City Housing Auth.* (92 NY2d 553, 563 [1998]).

The City defendant also submitted opposition to TC's motion to the extent that the TC was asserting that the City is liable to the Plaintiff. However, the issue of the City defendant's liability is not currently an issue before this Court. Therefore, it is

ORDERED, that motion sequences #2 and #3 are **granted**; and it is further

ORDERED, that the caption shall be amended as follows:

----------X Index No.:709961/2020
ANA S. RUIZ,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendants.
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The foregoing constitutes the Decision and Order of this Court.

Dated: October 30, 2025

Hon. Chereé A. Buggs, JSC

FILED
10/31/2025
COUNTY CLERK
QUEENS COUNTY