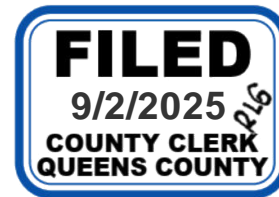


<b>Pollard v 38-18 Crescent St., LLC</b>
2025 NY Slip Op 35315(U)
August 29, 2025
Supreme Court, Queens County
Docket Number: Index No. 709244/2021
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS  
Justice

IAS PART 30

-----X  
DUANE POLLARD,

Index No.:709244/2021

Plaintiff,

Motion

Date: June 30, 2025

-against-

Motion Cal. No.: 32 and 33

38-18 CRESCENT ST., LLC and  
THE CITY OF NEW YORK,

Motion Sequence No.: 2 and 3

Defendants.

-----X

The following efile papers numbered EF 39-53, 77, 79-89, 102-115 and 118-120 submitted and considered on this **motion sequence #2** by plaintiff DUANE POLLARD (hereinafter referred to as "Plaintiff") seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 seeking partial summary judgment on the issue of liability as against defendant 38-18 CRESCENT ST., LLC (hereinafter "LLC") and the cross-motion by LLC seeking an order pursuant to CPLR 3212 granting summary judgment dismissing the Complaint and cross-claims asserted against LLC and the efiled papers numbered EF 54-76, 90-101 and 116-117 submitted and considered on this **motion sequence #3** by defendant THE CITY OF NEW YORK (hereinafter referred to as the "City") also seeking an order pursuant to CPLR 3212 granting summary judgment dismissing the Complaint and any 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-Affidavits-Exhibits.....	EF 39-53
Affirmation in Opposition-Affidavits-Exhibits.....	EF 79-89
Notice of Cross-Aff. In Opp.- Exhibits.....	EF 102-114
Opp to Cross.....	EF 118
Reply Affirmation-Affidavits-Exhibits.....	EF 119
Reply.....	EF 120

Papers

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	<u>Numbered</u>
<b>Motion Sequence #3</b>	
Notice of Motion-Affidavits-Exhibits.....	EF 54-76
Affirmation in Opposition-Affidavits-Exhibits.....	EF 90-101
Reply Affirmation-Affidavits-Exhibits.....	EF 116-117

Plaintiff Duane Pollard commenced this lawsuit on April 22, 2021, seeking to recover damages for personal injuries allegedly sustained on September 1, 2020 while he was traversing on an alleged broken and raised sidewalk in front of 38-18 Crescent Street, Long Island City, New York. The subject property is owned by LLC. LLC and co-defendant the City have both appeared in the action, denying Plaintiff's claims of responsibility for maintenance and repair of the sidewalk and asserting cross-claims against each other.

Plaintiff testified as follows regarding the accident location at his 50-h hearing:

Q: Is the sidewalk in front of the house where the accident happened all concrete, or is there some dirt or grass near the curb?

A: It's all concrete, beside, you know, planted trees.

Q: Did the accident happen near one of those planted trees?

A: That is correct.

Q: Was that tree immediately next to you, were you ahead of that tree, or were you behind that tree when the accident happened?

A: I was immediately next to it.

(EF 42 pg 13 lines 6-17)

Q: When you took that last step, was it on the concrete or was it on the dirt or the grass around the tree?

A: It was the concrete, ma'am.

(EF 42 pg 14 lines 20-23)

Q: Before you continued walking to the store, did you look to see what you tripped on?

A: Yes, I did.

Q: What did you see?

A: I see a raised concrete, a raised slab of concrete.

Q: The place where you tripped, was that closer to the tree, closer to the house, or more or less in the middle?

A: It was closer to the tree, ma'am.

Q: How high would you say the raised area that you tripped on was?

A: It had to be at least – it had to be at least – I'm sorry, I'm outside now. It had to be at least two to three inches.

(EF 42 pg 15 lines 6-23).

At his deposition, Plaintiff described the accident location as follows:

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Q: As you were walking to the store, tell me what happened?

A: As I'm walking to the store I just felt a snag and it made me fall to the ground and when I fell to the ground, I jump up and I look and I see it was a raised curb.  
(EF 64 pg 27 lines 8-12)

Q: Your left foot caught the raised portion of sidewalk, right?

A: Right.  
(EF 64 pg 30 lines 10-12)

Q: From this photo, can you see the raised portion of the sidewalk that your foot caught?

A: I absolutely can. Right there by the root of the tree.  
(EF 64 pg 47-48 lines 24-25 and 2-4)

Q: Did you pass the tree on the left or did you not get past the tree before you fell?

A: I didn't pass the tree, that's why I fell.

Q: You did not pass the tree?

A: I did not pass the tree.

Q: So the raised portion of the sidewalk was prior to the tree; is that correct?

A: No, it wasn't, it was around—honestly, I don't remember I don't recall.  
(EF 64 pg 48 lines 14-24)

Q: How close were you to the tree, a foot or –

A: I could reach my hand out about a foot. I could reach my hand out and touch it if I wanted to.  
(EF 64 pg 53 lines 12-16)

Plaintiff contends that LLC owns the premises that abuts the subject sidewalk which is a three-family home that is not owner occupied. Plaintiff further contends that the testimony of LLC's witness indicates that LLC was on constructive notice of the defect as evidenced by testimony that an employee was sent to the property once or twice a week to inspect and maintain the sidewalk abutting the premises. Thus, Plaintiff contends that LLC had a nondelegable duty to maintain the subject sidewalk.

LLC contends that the City is responsible for maintenance of the portion of the sidewalk where the Plaintiff fell because the City is responsible for maintenance of the tree. In support of this contention LLC submitted the report of engineering expert Rudi Sherbansky who opined that the improper design, construction and maintenance of the tree pit caused or contributed to the height differential that caused Plaintiff's fall because the Plaintiff tripped and fell at the expansion joint that abuts the north side of the tree pit. Sherbansky explained that per New York City Administrative Code § 18-104 the subject tree pit was under the exclusive jurisdiction of the NYC Department of Parks. Sherbansky explained that a partial sidewalk flag was created when the tree was installed and "[t]he partial flag created by the tree pit construction was a defective condition in that the strength to resist differential settlement of the partial flag differs from the strength to

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resist differential settlement of the adjacent 4' feet wide fill flags thereby creating or contributing to the formation of the height differential between the two flags that the plaintiff tripped on". Finally, LLC argues that medical records create an issue of fact as to whether the Plaintiff sustained injuries from the fall.

The City argues that it is not liable to the Plaintiff because of §7-210 of the New York City Administrative Code. According to the City, the Plaintiff testified that his accident occurred on the concrete not on the dirt or grass around the tree. Furthermore, the City argues that it did not cause or create the condition as there is no evidence that the City performed work on the subject sidewalk. Finally, the City argues that it did not derive any special use from the subject sidewalk.

## DISCUSSION

CPLR §3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

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“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 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 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 [2d 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

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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]).

“Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on the owner of the abutting land” (*see Byrams v Hamilton*, 234 AD3d 917, 918 [2d Dept 2025]; citing *James v Blackmon*, 58 AD3d 808 [2d Dept 2009]; *Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *Aracena v City of New York*, 136 AD3d 717, 718 [2d Dept 2016]). “However, liability may be imposed on the abutting landowner where the landowner either affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk” (*see Byrams v Hamilton*, 234 AD3d 917, 918 [2d Dept 2025]; citing *James v Blackmon*, 58 AD3d 808 [2d Dept 2009]; *Hausser v Giunta*, 88 NY2d 453 [1996]; *Kuritsky v Meshenberg*, 211 AD3d 834, 835 [2d Dept 2022]).

In *Yonsufu Sangaray v West River Associates, LLC* (26 NY3d 793 [2016]) where plaintiff claimed that he sustained personal injuries due to a trip and fall where his toe came into contact with a raised sidewalk flag (*id* at 795). The expansion joint that plaintiff’s toe came into contact

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with abutted the Mercado defendant's property but plaintiff sued Mercado and West River who owned the property next to the Mercado property (*id* at 796). West River moved for summary judgment submitting evidence from a land surveyor that the defective condition located on the expansion joint where plaintiff tripped was solely abutting the Mercado property. Plaintiff opposed arguing that West River allowed their sidewalk to fall into disrepair and cannot demonstrate that it maintained its sidewalk in a reasonably safe condition (*id*). Mercado also opposed submitting an affidavit from their own land surveyor who determined that 6% to 8% of the defect fronted the West River property (*id*). The court held "[t]o be sure, the location of the alleged defect and whether it abuts a particular property is significant concerning that particular property owner's *duty* to maintain the sidewalk in a reasonably safe condition. That does not, however, foreclose the possibility that a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained. Thus, to the extent that *Montalbano* and other cases interpreting section 7-210 can be interpreted as holding that only the landowner whose property abuts the *defect* upon which the plaintiff trips may be held liable, they should no longer be followed for that premise. Simply put, section 7-210(b), by its plain language, does not restrict a landowner's liability for accidents that occur on its own abutting sidewalk where the landowner's failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a proximate cause of a plaintiff's injuries" (*id* at 799). The court denied West River's motion for summary judgment (*id*).

In reply to LLC, the City argues that LLC's expert mischaracterized where the fall occurred and provides no basis for his representation that the tree pit was improperly installed as discovery has not been provided related to installation of the tree pit. The City further argues that LLC's argument that the City caused or created the condition fails because the alleged work did not immediately result in the creation of the defect. In support of this contention, LLC cites *Bielecki v City of NY* (14 AAD3d 301, 302 [1<sup>st</sup> Dept 2005]) where the court declined to find that the defendant caused or created a condition due to a negligent repair. *Bielecki* is distinguishable in that that case involves a negligent repair not negligent installation.

In reply to LLC, the Plaintiff argues that LLC's papers fail to create an issue of fact as to whether they had actual or constructive notice of the defect or any other issue of fact that would warrant denial of Plaintiff's motion.

It is clear that an issue of fact remains as to whether the accident occurred as a result of the negligence of both the City and LLC, just LLC or neither of the parties. The City's contention that it cannot be held liable as it had no duty to maintain the subject sidewalk pursuant to NYC Administrative Code § 7-210 ignores the fact that liability for a dangerous or defective condition is not solely predicated upon ownership. Furthermore, LLC's representation that Plaintiff was required to corroborate his allegation that a fall occurred with video or photographic evidence is neither supported by case law nor statute and this Court rejects such as argument.

The Court was presented with photographs allegedly depicting the incident but those photographs were indiscernible. As a result, despite Plaintiff's testimony regarding the happening of the accident, the Court was unable to ascertain a clear understanding of the factors that

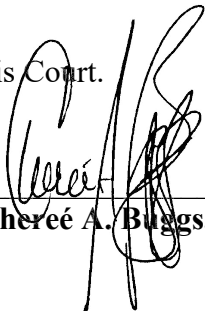
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contributed to the alleged trip and fall. At trial, the parties will be able to provide clearer photographs and offer additional testimony. Therefore it is,

**ORDERED**, that motion sequence #2, the cross-motion to motion sequence #2 and motion sequence #3 are **denied**.

The foregoing constitutes the decision and Order of this Court.

Date: August 29, 2025

  
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Hon. Chereé A. Buggs, JSC

