Burke v 287 E. 10th LLC
2026 NY Slip Op 31481(U)
April 9, 2026
Supreme Court, New York County
Docket Number: Index No. 160808/2022
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** **65M**

Justice

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INDEX NO. 160808/2022

MOTION DATE 03/04/2026

MOTION SEQ. NO. 002

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

DECISION + ORDER ON MOTION

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

Plaintiff,

-against-

THE BOYS CLUB OF NEW YORK

Defendant.

---X

Third-Party
Index No. 595549/2023

The following e-filed documents, listed by NYSCEF document number (Motion 002) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for RENEWAL.

Defendant 287 East 10th LLC moves, pursuant to CPLR § 2221(e), for leave to renew its prior motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) and § 3211(a)(7), or in the alternative, for summary judgment pursuant to CPLR § 3212 dismissing the complaint and all cross-claims against it, based upon documentary materials produced following this Court's prior Decision and Order dated September 17, 2025 directing disclosure concerning whether the accident location constituted a tree well.

For the reasons that follow, the motion is denied.

BACKGROUND AND PROCEDURAL HISTORY

This action arises from a personal injury allegedly sustained by plaintiff on November 8, 2021, when he claims to have tripped and fallen on a defective condition located on the sidewalk adjacent to premises known as 287 East 10th Street in the County, City, and State of New York.

Plaintiff alleges that the fall resulted from a sunken condition in the sidewalk area described in the notice of claim as a defective tree well situated along the Avenue A side of the property.

The record reflects that plaintiff served a notice of claim in January 2022 and thereafter commenced this action in December 2022 by filing a summons and complaint with the New York County Clerk.

Following joinder of issue and discovery proceedings, defendant 287 East 10th LLC previously moved for summary judgment dismissing the complaint, and by decision and order dated September 17, 2025 this court denied that motion without prejudice and directed the City of New York to produce documentation clarifying whether the subject location constituted a tree well.

In response to that directive, the City produced additional materials in November 2025, including a Big Apple Map depicting tree wells along the relevant portion of the sidewalk adjacent to the premises.

The present motion followed.

ARGUMENTS

The moving defendant contends that renewal is warranted because the newly produced documentary materials establish as a matter of law that the location of the accident constituted a tree well and that, as an abutting landowner, it owed no duty to maintain or repair that condition. The defendant further asserts that the Big Apple Map produced by the City constitutes definitive documentary evidence demonstrating the existence of a tree well at the precise location where plaintiff fell and that such evidence eliminates any triable issue of fact concerning liability.

Plaintiff and the City oppose the motion and argue that the newly produced materials do not conclusively establish that the accident location was a tree well or that the condition was owned or controlled by the City, and they maintain that the nature of the location remains a factual issue for jury determination. The City specifically asserts that the records produced did not definitively establish that the subject location constituted a City-owned tree well and that the issue therefore remains one of fact reserved for trial.

The opposing parties further contend that the moving defendant improperly seeks to relitigate issues previously decided and that renewal is inappropriate where the newly submitted materials would not change the prior determination.

DISCUSSION

The court begins its analysis with the well-settled principle that a motion for leave to renew pursuant to CPLR § 2221(e) must be based upon new facts not offered on the prior motion that would change the prior determination, and the movant must provide a reasonable justification for the failure to present such facts on the earlier application, because renewal is not intended to

provide a second opportunity to advance arguments previously rejected by the court (*Deutsche Bank Natl. Trust Co. v. Elshiekh*, 179 AD3d 1017, 1019 [1st Dept 2020]).

Although the materials produced following this court's prior decision constitute new evidence within the meaning of CPLR § 2221(e), the dispositive question is whether those materials would change the prior determination, because renewal must be denied where the new evidence would not alter the legal analysis or outcome (*JPMorgan Chase Bank, N.A. v. Novis*, 157 AD3d 776, 777 [2d Dept 2018]).

The court next considers the substantive issue of whether the moving defendant established entitlement to dismissal or summary judgment based upon the assertion that the accident location constituted a tree well, because the duty to maintain public sidewalks is generally imposed upon abutting property owners pursuant to Administrative Code of the City of New York § 7-210, but that statutory duty expressly excludes tree wells from the definition of sidewalk, thereby leaving responsibility for such areas with the municipality (*Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517, 521–522 [2008]).

The Court of Appeals has made clear that a tree well is not part of the sidewalk within the meaning of Administrative Code § 7-210 and that liability for injuries arising from defects within a tree well remains with the municipality rather than the abutting property owner, because the statutory definition of sidewalk does not encompass the soil-filled area surrounding a tree (*San Marco v. Village/Town of Mount Kisco*, 16 NY3d 111, 116 [2010]).

However, before such legal principles may be applied, the moving party must establish as a threshold matter that the accident location was in fact a tree well, because summary judgment may be granted only where the evidence conclusively demonstrates the absence of any material issue of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The court further recognizes that documentary evidence submitted in support of a motion to dismiss pursuant to CPLR § 3211(a)(1) must utterly refute the plaintiff's factual allegations and conclusively establish a defense as a matter of law, because dismissal is warranted only where the documentary evidence resolves all factual issues and disposes of the claim (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]).

In the present case, the moving defendant relies heavily upon a Big Apple Map produced by the City to establish that the accident location constituted a tree well, yet courts have repeatedly held that such maps constitute evidentiary tools rather than dispositive proof of the precise nature or ownership of a sidewalk condition, because they merely provide notice of potential defects rather than definitive evidence of liability (*see Shaperonovitch v. City of New York*, 49 AD3d 709, 710 [2d Dept 2008]).

The Court of Appeals has likewise recognized that Big Apple Maps serve primarily as notice instruments and that their evidentiary value must be evaluated in the context of the entire record, because the existence of a marking on such a map does not conclusively establish the precise physical condition of a location on the date of the accident (*Katz v. City of New York*, 87 NY2d 241, 243–244 [1995]).

Here, the documentary materials submitted by the moving defendant demonstrate that tree wells existed in the vicinity of the premises, but they do not conclusively establish that the precise location where plaintiff fell constituted a tree well or that the condition was exclusively under municipal control, because the City has specifically asserted that the records produced did not definitively establish the nature of the location and that the issue remains one of fact for jury determination.

The court further observes that plaintiff testified during his examination that he stepped into a dirt area rather than expressly identifying the location as a tree well, thereby creating factual ambiguity concerning the nature of the condition and reinforcing the existence of triable issues of fact.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact, because the function of the court on such a motion is issue finding rather than issue determination (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]).

The court also notes that the doctrine of law of the case requires courts to adhere to prior rulings within the same litigation unless new evidence conclusively establishes a different result, because stability and consistency in judicial decision-making are essential to the orderly administration of justice (*People v. Evans*, 94 NY2d 499, 503 [2000]).

Although the materials produced following this court's prior decision constitute new evidence, they do not conclusively resolve the factual dispute concerning the nature of the accident location, and therefore they do not warrant a different determination.

Upon careful consideration of the motion papers, the documentary evidence submitted, and the applicable controlling precedent of the Court of Appeals and the Appellate Division, First Department, the court concludes that the moving defendant has failed to demonstrate entitlement to dismissal pursuant to CPLR § 3211(a)(1) or § 3211(a)(7), or to summary judgment pursuant to CPLR § 3212, because the nature of the accident location and the scope of any duty owed remain disputed factual issues that must be resolved at trial.

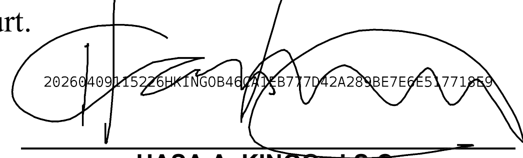
Accordingly, it is hereby

ORDERED that the motion by defendant 287 East 10th LLC for leave to renew pursuant to CPLR § 2221(e) is granted solely to the extent that the court has considered the additional materials submitted; and it is further

ORDERED that, upon renewal, the motion to dismiss pursuant to CPLR § 3211(a)(1) and § 3211(a)(7), or in the alternative for summary judgment pursuant to CPLR § 3212, is denied in its entirety; and it is further

ORDERED that the action shall continue, and the parties are directed to appear on their next scheduled conference date of Tuesday June 2, 2026 at 2:00 PM in the DCM part located in Room 103 of the courthouse located at 80 Centre Street, New York, New York.

This constitutes the decision and order of the court.



4/9/2026	HASA A. KINGO, J.S.C.
DATE	

CHECK ONE:	[ ] CASE DISPOSED			[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[X] DENIED		[ ] GRANTED IN PART		[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER			[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN			[ ] FIDUCIARY APPOINTMENT		[ ] REFERENCE