Carney v City of New York
2023 NY Slip Op 33277(U)
September 20, 2023
Supreme Court, New York County
Docket Number: Index No. 157258/2018
Judge: J. Machelle Sweeting
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** ***Justice*** **PART** **62**

---X

JOSEPH CARNEY,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION

Defendants.

---X

INDEX NO. 157258/2018

MOTION DATE 11/15/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 91, 92

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff alleges that on November 28, 2017, he was injured when he tripped and fell in front of 547 West 26th Street (the "subject property").

Plaintiff had originally filed this action against The City Of New York and the New York City Department Of Parks And Recreation (collectively, the "City"), and also against NWL Real Estate LLC, which owned the subject property at the time of the accident, and Cedar Lake Events, LLC, which was a tenant in the subject property at the time.

In an earlier Decision in this case (NYSCEF Doc. No. 38) issued with respect to Motion Sequence #001, the undersigned granted summary judgment in favor of NWL Real Estate LLC and Cedar Lake Events, LLC. That decision, held, in part:

> […] At approximately 6:00 p.m., on the date of the alleged accident, plaintiff was walking on 26th Street, between 10th and 11th Avenue. Plaintiff was walking to Penn Station from work. Plaintiff's hands were in his pockets. It was "pitch black." Plaintiff was looking straight ahead. Plaintiff's shins hit the front of tree well which did not contain a tree. Plaintiff did not see the tree well before he fell. Plaintiff fell, landing face first on the other side of the tree well.

> […]
>
> […] the Court notes that the City's response to the Case Scheduling Order dated July 22, 2019 indicates that on June 14, 2016, Tim McMurry (an employee of Cedar Lake Events, LLC) requested that the City remove two dead trees in front of the building and plant new ones. The City's service request indicates two dead trees were removed. On September 6, 2016, Tim McMurry requested the City to plant a new tree. The City's service request indicates no action was taken by the City. Plaintiff further argues that the affidavit of its expert, Dr. William Marletta, Ph.D., CSP, establishes that the subject tree well and accident location are dangerous and defective conditions. While Dr. Marletta's affidavit contains an in depth evaluation of the ways in which the accident location was dangerous and violated various statutes and regulations, it is entirely irrelevant to the instant motion as plaintiff tripped over a City owned tree well, which the moving defendants had no duty to maintain. As such, plaintiff has failed to raise an issue of fact to defeat defendants' *prima facie* case.

Now pending before the court is Motion Sequence #002) filed by the City seeking an order, pursuant to Civil Practice Law and Rules 3212, granting summary judgment to the City (i) on the grounds that: (i) the subject tree guard was open and obvious, readily observable, and not inherently dangerous; (ii) or, in the alternative, pursuant to 7-201 of the Administrative Code of the City of New York on the ground that the City did not receive prior written notice of the defect that allegedly caused plaintiff's accident; (iii) or, in the alternative, assuming plaintiff's injury was not caused by a tree guard or tree well, but rather the sidewalk, pursuant to 7-210 of the Administrative Code of the City of New York as the City is not the owner of the abutting property. Oral arguments were heard on the record on June 22, 2023.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment

as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this 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 (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments Made by the Parties

The City argues, first, that the subject tree guard on which plaintiff tripped was open, obvious, and not inherently dangerous. The City argues that by plaintiff's own admission, nothing obstructed his view of the tree well and tree guard, and that the only reason why plaintiff did not see it because of the darkness and the height of the tree guard.

The City argues, second, that it did not receive prior written notice of a defective tree well or tree guard in front of the subject property. In support of this argument, the City submitted, *inter alia*, three sworn affidavits.

The first was a sworn affidavit from Sharon Lai (NYSCEF Doc. No. 68), who is employed as an Assistant Records Officer by the Department of Parks & Recreation of the City of New York in the Office of General Counsel, and who personally conducted a search for complaints, service requests, inspections, work orders, images, Commissioner and Borough Commissioner Correspondence, handwritten inspections, inspection forms, Daily Work Sheets, Borough Forestry contract records, Tree Failure Incident Data Collection Forms, permit applications and permits, for the location at 547 West 26th Street in the City, County, and State of New York, from November 28, 2015 up to and including November 28, 2017.

The second was a sworn affidavit from Yelena Bogdanova (NYSCEF Doc. No. 69), who is employed as a paralegal assigned to the Department of Parks & Recreation of the City of New York in the Central Forestry Division, and who personally conducted three searches: (i) a search for installation records, which include complaints, Commissioner Correspondence, service requests, inspections, work orders, permits and permit applications, for the location at 549[1] West

[1] There was a question as to whether the accident had occurred in front of 547 or 549 West 26th Street. In his opposition papers, plaintiff states that "The correct accident situs address is 547 West 26th Street, New York […] The notice of claim, summons and complaint, bill of particulars, Plaintiff's deposition testimonies all consistently state that the accident occurred at 547 West 26th Street in the City, County and State of New York."

26th Street, County, City, and State of New York, from August 23, 2008 up to and including November 28, 2017; (ii) a search for installation records, which include complaints, Commissioner Correspondence, service requests, inspections, work orders, permits and permit applications, for the location at 547 West 26th Street, County, City, and State of New York, for two (2) years prior to and including November 28, 2017; and (iii) a search for installation records, which include complaints, Commissioner Correspondence, service requests, inspections, work orders, permits and permit applications, for the location at 547 West 26th Street, County, City, and State of New York, from August 23, 2008 up to and including November 28, 2015.

The third sworn affidavit was of Sherri Reid (NYSCEF Doc. No. 73), who is employed by the Department of Transportation of the City of New York ("DOT") to search for records maintained by DOT, and who personally conducted two searches: (i) a search in the pertinent electronic databases and identified and requested a search for corresponding paper records of permits, applications for permits, OCMC files, CARs, NOVs, NICAs, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, and Big Apple Maps for the sidewalk located at West 26th Street between 10th Avenue and 1lth Avenue (the side which includes 547 West 26th Street) (to include Highline) in the County, City, and State of New York, for a period of two years prior to and including November 28, 2017, the date upon which the plaintiff claims to have been injured; and (ii) a search for Big Apple Maps for an area that included the above referenced location.

The City contends that the results of these searches support the City's argument that it did not receive prior written notice of a defective tree well or tree guard in front of the subject property.

The City argues, third, that assuming plaintiff tripped and fell due to a defect in the *sidewalk* instead of the tree well, the City is not liable because the City was not the owner of the subject property on the date of plaintiff's accident, and the subject property is not a one-, two, or three-family property. In support of this argument, the City attached the Affirmation of David Atik (NYSCEF Doc. 75), who is employed by the City of New York, Department of Finance, and who conducted a search of the PTS database for records relating to 547 West 26th Street, NSW York, New York, located at Block 698 and Lot 10 for the County of New York. Mr. Atik's Affirmation states, in part: "[…] on November 28, 2017, the Cit of New York was not the owner of 547 West 26th Street on November 28, 2017, the date of the alleged incident," and "the property was classified as Building Class j9 (theatre), and not as a one-, two, or three-family solely residential property."

Plaintiff opposed the City's motion, and argued, first, that the subject defect is not trivial, open, obvious or readily observable. Second, plaintiff argues that the City actively caused the defect by not planting a tree in the tree well and allowing a tree guard to be in place that was painted black and was relatively short. Plaintiff argues that these factors, along with the fact that the streetlights on the street were spaced far apart, made the tree well a tripping hazard because it could not be adequately seen by pedestrians. In support of these arguments, plaintiff submitted, *inter alia*, an Expert Affidavit by Dr. William Marletta, which stated, in part:

> 2. My expertise includes the inspection and safety evaluation of walkway surfaces including sidewalks, abrupt surface transitions, stairs, ramps, flooring, specializing in slip resistance in public, residential, commercial and industrial applications
>
> […]
>
> 8. On February 8, 2018, I conducted an inspection of a sidewalk tree pit located at 547 West 26th Street, New York, New York 10001 […].
>
> 9. Within the sidewalk is a tree pit that is approximately sixty-one (61) inches by sixty-one (61) inches. Surrounding the tree pit is a black metal fence. The top of the fence is constructed steel arch

or dome design, giving it an overall height of about seventeen (17) inches; each dome is approximately ten (10) inches wide. There is no tree in the pit but rather a low tree trunk stump with a diameter of about seven (7) inches to eight (8) inches. The tree pit is approximately six (6) feet from the building. The next tree pit is approximately eighty-six (86) inches further away which contains a tree within the tree pit.

10. Approximately one-hundred and ninety-four (194) feet to the East of the subject tree pit is an elevated light post. The light post is approximately twenty-eight (28) feet and four (4) inches high and extends ten (10) feet over the street. With that, the second nearest elevated light pole is about three-hundred and twenty (320) feet to the West. Without an alternate and functioning light source, or central light source, the vacant tree pit is completely shaded, dark and hidden with less than 0.0 foot-candles measured at the site.

[…]

44. […] Plaintiff's accident and injuries could have been prevented, had the proper measures been taken into consideration (i.e. adequate and sufficient visual cues, non-obstructed sidewalk width, adequate illumination, and warning signs/ barricades).

[…]

46. […] hazards, such as a vacant tree pit (with low black fence) on walking surfaces are particularly difficult to distinguish due to the normal cone of vision of the pedestrian.

48. […] the removal of a visual cue by a tree is hazardous and dangerous to pedestrians maneuvering within through this area. The seven-inch to eight-inch (7"-8") tree trunk was sawed away at its base, providing no indication nor customary visual cue of its presence.

49. […] the lack of contrast in colors provides no distinction between the low lying black painted fence and its surrounding surfaces. When there are no visual cues provided, such low lying hazards are even more likely to be undetected by pedestrian users. The similarity of colors and lack of contrast used, especially at nighttime, diminishes the ability of pedestrians to quickly perceive the transition.

50. […] tree pit fences less than eighteen inches (18") in height are considered to be low-lying trip hazards, departing from the standards set by the City of New York Department of Parks, and have been recognized as a potential trip hazard to pedestrians. (Many designs for tree pit fences in the City are provided much higher but none should be lower).

51. […] the reduced sidewalk clearance provided between the tree pit and the building is hazardous to pedestrians and departs from the Official Compilation of the Rules of the City of New York and good and accepted safe practice (reducing 11' 2" width to 6' width) causing users of the sidewalk to walk too close to the tree pit.

52. […] street lighting provided on the sidewalk was poor, inadequate, departing from good and accepted practice and applicable codes and or standards and creates dark hazardous place for pedestrian travel.

Plaintiff's Theory of the Case

To properly assess the arguments made by both sides, it is necessary to first understand plaintiff's theory of the case.

In the Complaint (NYSCEF Doc. No. 1), plaintiff states, in part:

> 12**.** That on November 28, 2017, and at all of the times hereinafter mentioned, and upon information and belief, the defendant, THE CITY OF NEW YORK operated, repaired, maintained, controlled, constructed and managed the aforesaid thoroughfare and the sidewalk thereat and surrounding areas, including a tree well(s), located at/in/on/or near the premises located/known as 547 West 26th Street, County of New York, City and State of New York.
>
> […]
>
> 14. That on November 28, 2017, and at all of the times hereinafter mentioned, and upon information and belief, the defendant, NEW YORK CITY DEPARTMENT of PARKS and RECREATION operated, repaired, maintained, controlled, constructed and managed the aforesaid thoroughfare and the sidewalk thereat and surrounding areas, including a tree well(s), located at/in/on/or near the premises located/known as 547 West 26th Street, County of New York, City and State of New York.
>
> […]
>
> 21**.** That on November 28, 2017, while Plaintiff JOSEPH CARNEY was lawfully walking at the aforesaid location, he was caused to slip and/or trip and fall on a defective condition within the sidewalk portions and/or tree well(s) of said premises and sustain severe and permanent injuries.
>
> 22. The above mentioned occurrence, and the results thereof, were caused wholly and solely by the negligence of the Defendant(s), THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT of PARKS and RECREATION, CEDAR LAKE EVENTS, LLC and/or NWL REAL ESTATE, LLC, and/or said Defendant(s)' servants, agents, employees and/or licensees in the ownership, operation, management, maintenance, construction and control of the aforesaid thoroughfares and the sidewalk thereat, including tree well(s); and the Defendants) were otherwise negligent, careless and reckless, without this plaintiff in any way contributing thereto.

In plaintiff's 50-H hearing held on May 4, 2018, plaintiff testified as follows: On November 28, 2017, a little after 6:00 pm (p. 6),[2] plaintiff was walking alone, from his worksite, located at 601 West 26th Street (p. 7), on his way to Penn Station (p. 6). Plaintiff has walked from his worksite to Penn Station before, but did not have a set route and usually "zigzagged" to the

[2] Page numbers are from the Transcript (NYSCEF Doc. Nos. 61-62).

station, deciding where to turn based on foot traffic and car traffic (p. 8-9). Plaintiff had never walked by the accident location before the accident itself occurred (p. 8, 31). At the time of the accident, plaintiff was walking on 26th Street, between 10th and 11th Avenues (p. 9). There was no snow or water on the ground (p. 12). Per plaintiff, "it was pitch black, that I could tell you, pitch black" (p. 12).

With respect the accident itself, plaintiff generally testified that there were at least two tree wells: One which contained a tree, and one which was empty. Plaintiff was aware of the existence of the tree well that contained a tree, as the tree itself was "in [his] line of sight." But plaintiff was unaware of the existence of the tree well that was empty, and it was over the empty tree well that he fell. Some relevant excerpts from plaintiff's testimony include:

> (p, 10-11)
> Q What happened exactly?
> A Literally, I'm walking, cold night, hands in pockets, and I could see probably like twenty feet in front of me. I want to say maybe fifteen, twenty feet. I could see a tree, and I could see folks walking this way. If I recall correctly, it was about four people kind of stacked two, two, and I'm literally, you know, kind of walking in the path. Then, you know, you move over a little bit, making room, and I could see the tree. So, I feel like I'm good, I have room, and I'll come back, and literally before I could -- as, I guess, making that way back, I hit my right shin, immediately followed by my left, and because my hands were in my coat pocket I just had no brace of impact and went boom, face first on -- actually, something like a little bit bigger than this, but you know how the City, they have trees, you can even see in the photographs, but there's these cast iron grids. So, my shins, if you will, hit the front of the grids, and just immediately, because there was no brace for impact, I went face first. My neck snapped back into the grids.
>
> (p. 11)
> Q What caused you to fail?
> A The metal fence, grate, or whatever you want to call it. I guess it's a fence, right? The metal grate that would be surrounding what should have been a tree there.
>
> (p. 13)
> Q At any time before you hit the tree well, the green metal tree well, did you see the tree well at any time before you hit it?
> A No.
> Q When is the first time you saw it?
> A When I literally got up and the blood is pouring out from my face. 1 didn't know what happened. I just literally did not know what happened. 1 couldn't fathom, and I'm staring at it, and that's when it hit me, that's what I must have tripped over . So, I absolutely did not see it.

(p. 18)
Q Was there a tree there when you fell, was the tree still there or no?
A No.
Q When you fell, the tree was already gone?
A Yes

(p. 20)
Q Was there anything obstructing your view of the tree well as you were walking on 26th Street?
A There was no obstruction of a view, other than due to the darkness. I guess the height of it, right, because it was low, the fact that I could not see it, that is why I fell. So, there was no obstruction, if you will.
Q You think you fell because you couldn't see it?
A Oh, I just did not see it. Without a doubt, I did not see that.
Q Why didn't you see it?
A Well, my eye was just looking straight, and what I did see. was a tree in front of me, but that was, I don't know, a good fifteen, twenty feet from where I thought that tree I could actually encounter was.

(p. 23)
A […] So, you have an empty tree well followed by a tree well with a tree in it, which was, again, in my sight line.
Q Your sight line, you saw the second tree well?
A Yes.
Q But. you didn't see the --
A I saw the second tree. I just want to clarify that I saw the second tree, not necessarily -- like, in my mind, it didn't occur to me that there's metal bars surrounding these trees or that tree.

(p. 27-28)
A […] My reason for positioning myself a little to the right was because there was oncoming people that I was just trying to be courteous and slightly move over out of the way for.
[…]
Q The Xs you marked, those were the four people?[3]
A Those were the four people I slight moved little, moved over a little bit for, right. You're walking down the street, you're always on the right, you respect the right. The people were coming my way, I made a little courteous shift to allow them to go by, jus changing my pattern of where I was walking slightly. In my peripheral, I got a sight line of a tree. So, in my mind, I feel like I got room and no issues, and then I do not see this whatsoever I terms of Exhibit A2, pitch black, and I'm assuming I have clearance and I'm on a sidewalk. Then, immediately, without any ability to brace, hit this front edge of this tree well and immediately tumbled face over, face first into the opposite side of the tree well.

(p. 30)
Q How soon after you shifted a little to the right did you bump into the metal tree well in terms of seconds, minutes?
A Oh, it was two seconds. I mean, it was very quick.

[3] NYSCEF Doc. 61 is the photos that plaintiff marked during the 50-H hearing. It is undisputed that the orange cone that is shown in the photos was not present at the time plaintiff fell.

(p. 30-31)
Q When you were walking and hit the tree well and fell, what was the lighting like?
A There was no lighting whatsoever that night.
Q How were you able to see as you were walking; did you have a flashlight or anything like that?
A The only lighting that there was, was sporadic cars' headlights that would go down the block, that would give some sporadic visibility.

(p. 33-34)
Q There was not a tree there when you fell, correct?
A Correct.
Q It there was a tree there, would you not have fallen if here was a tree there?
A I would say correct, I don't think I would have fallen had there been a tree there, because I would have seen it. Just like, I saw the tree behind it or the other tree that was there.

Open and Obvious

The City's first argument is that the tree well was open and obvious and that property owners have no duty to protect or to warn where the condition complained of is open, obvious, and not inherently dangerous (Boyd v New York City Hous. Auth., 105 AD3d 542 [1st Dept 2013]).

While the City is correct in arguing that inadequate lighting, by itself, is not enough to hold the City liable (*see, e.g.*, Adamson v City of New York, 104 AD3d 533 [1st Dept 2013] ["[…] there is no basis for holding the City liable for failing to provide lighting"]). Here, plaintiff argues that it was the *combination* of the inadequate lighting and the lack of visual markers, such as a tree in the tree well, that caused the plaintiff to not see the tree guard prior to his fall.

Plaintiff testified that there was a lack of lighting on the street where plaintiff fell; that it was "pitch black"; and that the tree well did not contain a tree. The City does not dispute these portions of plaintiff's testimony. Plaintiff's expert, Dr. Marletta, examined the site, and found, in part, that the street lighting provided on the sidewalk where plaintiff fell was "poor, inadequate […] creates dark hazardous place for pedestrian travel," and "the vacant tree pit is completely shaded, dark and hidden."

With respect to the City's argument that Dr. Marletta did not inspect the tree guard or tree well until over two months after the accident, there is no indication on this record that the condition of the tree well or the tree guard had changed between the time plaintiff fell and the time Dr. Marletta examined the site.

Given these factors, the court finds that there remain questions of fact as to whether the tree well in this particular case was open and obvious, and denies this branch of the City's motion. *See also* Thompson v City of New York, 78 NY2d 682 (1991) ("Plaintiff's claim that a light bulb burned out was not, standing alone, sufficient to establish a cause of action: she was obliged to show that by failing to replace the bulb, the City created a dangerous condition on the Grand Concourse").

Prior Written Notice/Causation

The City's second argument is that it did not receive prior written notice of any defective tree guard. The City argues that it removed a dead tree from the tree well, and subsequently received a request to plant a new tree but did not do so. The City further contends that it was never put on notice that the tree guard that was in place was actually defective.

If the City is correct that it lacked prior written notice, then the burden shifts to plaintiff to show one of the "two exceptions to this rule, namely, where the locality created the defect or hazard through an affirmative act of negligence [and] where a 'special use' confers a special benefit upon the locality" (Martin v City of New York, 191 AD3d 152 [1st Dept 2020]).

Here, plaintiff does not concede that the City lacked prior written notice, but also argues that the City actively caused the defect. Specifically, plaintiff argues that the City "caused" the

defect by not planting a tree in the tree well, and by allowing a tree guard to be in place that was painted black and was relatively short.

With respect to causation, the City argues:

> Plaintiff has additionally failed to demonstrate how, if at all, the City caused or created the alleged defective tree guard. While the records plaintiff highlights refer to the removal of a tree, plaintiff fails to demonstrate how, if at all, the remove of a tree at the tree well caused a defective tree guard. The burden rests on plaintiff to not only demonstrate that the City caused or created the alleged defective tree guard, but that the defect was immediately apparent following the City's removal of the tree.

The City's argument misunderstands plaintiff's theory of the case. As noted above, plaintiff is not arguing that the tree guard is defective *per se*; nor is plaintiff arguing that the actual act of removing the tree in the tree well was what "caused" the tree guard to become defective. In fact, plaintiff is arguing that it was a *combination* of the factors, including inadequate lighting, the height of the tree well, the color of the tree well, and the lack of a tree in the tree well, that caused him to fall.

The Affidavit of Dr. Marletta states that a vacant tree pit is difficult to distinguish due to the normal cone of vision of the pedestrian; that the removal of a "visual cue" in the form of a tree was hazardous and dangerous to pedestrians; that the lack of contrast in colors provides no distinction between the low lying black painted fence and its surrounding surfaces; and that the lighting on that street was inadequate. Notably, the City did not submit an expert affidavit of its own to counter any of Dr. Marletta's findings. Given the entirety of the record in this case, this court finds that questions of fact exist as to whether the City caused the defect.

Also, to the extent the City argues that an empty tree well is not a defective condition, this is a question of fact for the jury. Finally, with respect to the City's third argument that plaintiff may have fallen due to a defect in the *sidewalk* instead of the tree well, there is no dispute on this record that plaintiff alleges he tripped over a tree guard, in a tree well, that lacked a tree.

Conclusion

For the reasons set forth above, it is hereby:

ORDERED that the City's motion is DENIED.

9/20/2023 DATE					J. MACHELLE SWEETING, J.S.C.		
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