

**Matter of Acquisition Inv., Inc. v City of New  
York**

2009 NY Slip Op 30955(U)

April 10, 2009

Supreme Court, New York County

Docket Number: 110907/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER  
*Justice*

PART 5

Index Number : 110907/2008  
**ACQUISITION INVESTMENT**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 002  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1  
2, 3, 4, 5  
6, 7, 8, 9

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
APR 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 4/20/09

  
**EILEEN A. RAKOWER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

In the Matter of an Article 78 Proceeding

ACQUISITION INVESTMENT, INC., A  
COACH USA, INC. COMPANY

Petitioner,

-against-

THE CITY OF NEW YORK, and NEW YORK  
CITY TRANSIT AUTHORITY

Respondents.

Index No. 10907/08

DECISION and  
ORDER

Mot. Seq. 002

HON. EILEEN A. RAKOWER:

Petitioner Acquisition Investment, Inc. ("Petitioner") brings this Article 78 Petition seeking that this court issue an order compelling Respondents City of New York ("City") and/or New York City Transit Authority ("Transit Authority") to fix an allegedly defective subway grate located in front of Petitioner's place of business. Petitioner alleges that the subway grate on the sidewalk abutting 777 Eighth Avenue, New York, NY is in a "grievously defective condition," and that Petitioner has been notified that two individuals have claimed to have tripped and fallen due to the alleged defect in the subway grate on June 29, 2007 and October 3, 2007, respectively. Petitioner has submitted records indicating that one of the claimants has filed suit against it in connection with the alleged trip and fall (both Respondents are also named in the action).

On July 19, 2007 and December 19, 2007, Petitioner - through counsel - sent letters to Respondents notifying them of the alleged trip and falls, and demanding that they take steps to repair the grate. Petitioner claims it received no response from either the City or the Transit Authority. On January 10, 2008, Petitioner sent a letter to the President of the Transit Authority. Petitioner also claims to have followed up by making telephone calls to the President's office, but was unsuccessful in obtaining a response.

Petitioner further alleges that it placed a warning sign on the sidewalk adjacent to the grate, but was forced to remove it upon demand by the New York City Department of Sanitation.

FILED

APR 28 2009

COUNTY CLERK'S OFFICE  
NEW YORK

X

Petitioner commenced this Article 78 proceeding on or around December 22, 2008. Petitioner's initial moving papers include a Notice of Petition, Verified Petition, and an Affirmation in Support. Annexed to the Affirmation as exhibits are documentation of Petitioner's tenancy in the building abutting the sidewalk which contains the allegedly defective grate; photographs of the the subject grate; an investigation as to one of the alleged trip-and-falls; and the letters to Respondents demanding that they repair the grate.

The City has responded with a Verified Answer and a Memorandum of Law. Annexed to the Verified Answer as exhibits are photographs of the allegedly defective grate and the surrounding area, and court records pertaining to a prior Article 78 Petition which was withdrawn by Petitioner.

The Transit Authority has cross-moved to dismiss pursuant to CPLR §§3211(a)(2), (a)(3), (a)(7), and 7804. The Transit Authority has submitted a Notice of Cross-Motion to Dismiss, an Affirmation in Support, and a Memorandum of Law in Support.

Petitioner has submitted individual reply papers to the City's Verified Answer and in opposition to the Transit Authority's cross-motion. Annexed to the latter as an exhibit is an e-Law printout of the lawsuit filed by one of the aforementioned complainants who allegedly tripped and fell on the subway grate. The Transit Authority has submitted a Reply Affirmation and Reply Memorandum in further support of its cross-motion. Annexed to the Reply Affirmation as an exhibit is a printout of 34 RCNY §2-07.

The City argues that the Petition must be dismissed as to the City because the City neither owns, nor is responsible for the repair and/or maintenance of the allegedly defective grate. The City further argues that, in any event, mandamus to compel does not lie because the performance sought by Petitioner involves discretionary functions not properly the subject of mandamus relief.

In support of its cross-motion, the Transit Authority also argues that Petitioner is not entitled to mandamus relief, but argues that the City is the owner of the grate, and thus 34 RCNY §2-07 does not apply to the Transit Authority. In addition, the Transit Authority argues that Petitioner lacks standing to bring the

instant Petition because Petitioner has failed to show that it has suffered an injury in fact, or that it will suffer an injury.

CPLR §3211 states, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(2) the court has not jurisdiction of the subject matter of the cause of action; or

(3) the party asserting the cause of action has not the capacity to sue; or

(7) the pleading fails to state a cause of action...

The court, on a motion to dismiss an action pursuant to CPLR 3211(a)(7), must accept the factual allegations of the complaint as true, accord the plaintiff all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83[1994]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268[1977]).

The court turns first to whether Petitioner has standing to commence this Article 78 proceeding. In order for a party to seek relief from a court, it must be established as a threshold matter that the party has a "sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution" (*Graziano v. County of Albany*, 3 N.Y.3d 475, 479 [1994]) (citation omitted). This involves a two-part inquiry:

First, [a petitioner] must show 'injury in fact,' meaning that [petitioner] will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury [petitioner] asserts must fall within the zone of interests or concerns sought to be promoted or

protected by the statutory provision under which the agency has acted.

(*New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 [2004]). In addition, “petitioners must show that they have suffered an injury distinct from that of the general public” (*McAllan v. New York State Dept. of Health*, 2009 NY Slip Op 1715, \*1 [1st Dept. 2009] (citing *Matter of Transactive Corp. v. New York State Dept. of Social Servs.*, 92 N.Y.2d 579, 587 [1998])).

Petitioner has failed to demonstrate that it has suffered, or will suffer an injury in fact which would confer standing upon it to bring the instant Article 78 Petition. The mere filing of a lawsuit in which Petitioner is a named defendant does not demonstrate that Petitioner has suffered an injury. At this point, Petitioner has not been found liable for any damages resulting from the alleged trip and fall, and the prospect that Petitioner may in fact incur liability does not rise above the level of speculation. Indeed, if the circumstances are as Petitioner claims them to be, Petitioner should have no liability whatsoever, as it neither owns, nor is responsible for the allegedly defective subway grate.

Moreover, Petitioner has failed to demonstrate that it has any interest in repairing the allegedly defective grate that is distinct from the general public. Petitioner's assertion that it has a judicially cognizable interest in repairing the grate is similar to – if not even more tenuous than – the proposition that a pedestrian would have standing to commence an action compelling Respondents to fix the grate because he or she frequently traverses that sidewalk and fears injury (*see McAllen* at \*1) (petitioner's contention that certain changes to makeup of New York City Advanced Life Support First Response Units would harm him was insufficient to confer standing because: (1) it was speculative; and (2) petitioner's interest was not in any way distinct from the general public).

Even if Petitioner had demonstrated a cognizable stake in the outcome of this proceeding, judicial resolution of the issues presented would unduly enmesh this court into matters of public administration which are firmly and textually committed to the Transit Authority (*see Abrams v. New York City Transit Authority*, 39 N.Y.2d 990 [1976]). Petitioner in effect seeks judicial intervention into the Transit Authority's decision making process which would entail determination of “issues of judgment, allocation of resources and ordering of priorities which are generally not subject to judicial review.”(*New York State*

*Inspection, Sec. and Law Enforcement Empls. v. Cuomo*, 64 N.Y.2d 233, 239 [1984]) (citations omitted).

While the Transit Authority is under a duty to monitor the condition of subway grates and repair or replace subway grates found to be defective (*see* 34 RCNY §2-07(b); *Cruz v. New York City Transit Authority*, 19 A.D.3d 130 [1st Dept. 2005])<sup>1</sup>, it is something else entirely to suggest that the Transit Authority is obligated to respond to each and every demand made by private persons and/or business entities such as Petitioner to fix a purportedly defective subway grate. No such duty has been imposed by statute, and the manner in which to fulfill its statutory obligations is committed firmly to the Transit Authority's exclusive discretion<sup>2</sup>. While the Transit Authority may be discharging its duties in an insufficient – even neglectful – manner, in Petitioner's view, these supposed deficiencies do not rise to the level of illegality, such that judicial intervention is warranted (*see Abrams* at 993).

Wherefore, it is hereby

ORDERED that the Article 78 Petition is denied and dismissed as to both Respondents.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 10, 2009

  
EILEEN A. KOWER, J.S.C.

**FILED**  
APR 28 2009  
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<sup>1</sup> In addition to the reasons set forth above, the City is entitled to dismissal of the Petition since it is not responsible for the maintenance and repair of subway grates.  
<sup>2</sup> For this reason, Respondents are also correct in their assertion that mandamus relief is inappropriate (*see New York Civil Liberties Union v. State*, 4 N.Y.3d 175, 184 [2005]).