

**Brightman v City of New York**

2010 NY Slip Op 32778(U)

October 6, 2010

Supreme Court, New York County

Docket Number: 102051/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Index Number : 102051/2010  
**BRIGHTMAN, ELLIOT**  
VS.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 001  
DISMISS ACTION

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

this motion to/for dismiss

PAPERS NUMBERED  
1

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):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/6/10  
OCT 06 2010

[Signature]  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

-----X  
ELLIOT BRIGHTMAN,

Index No. 102051/10

Plaintiff,

Motion Date: 8/13/10  
Motion Seq. No.: 001

-against-

**DECISION AND ORDER**

THE CITY OF NEW YORK, 239-241 WEST 125<sup>th</sup>  
STREET REALTY LLC AND JIMMY JAZZ  
E-COMMERCE, LLC

Defendants.

**FILED**  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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BARBARA JAFFE, JSC:

For plaintiff:

For defendant City:  
Colin Marville, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church St.  
New York, NY 10007  
212-676-8348

By notice of motion dated May 28, 2010, submitted on default, defendant City moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross-claims against it.

I. PERTINENT BACKGROUND

On October 9, 2009, plaintiff was injured after he allegedly tripped and fell as a result of a defect on the sidewalk in front of 241 West 125<sup>th</sup> Street in Manhattan. (Affirmation of Colin Marville, ACC, dated May 28, 2010, Exh. A).

On or about December 3, 2009, plaintiff served a notice of claim on City, and on or about February 12, 2010, his summons and complaint. (*Id.*, Exhs. A, B). On or about March 10, 2010, City served its answer. (*Id.*, Exh. C).

## II. ANALYSIS

City disclaims liability for plaintiff's injuries on the ground that New York City Administrative Code § 7-210 (the "Sidewalk Law") relieves it of responsibility for the sidewalk in front of 241 West 125<sup>th</sup> Street and submits, in support, the affirmation of David C. Atik, an attorney in its Department of Finance, whose search of the Real Property Assessment Division database reflects that City does not own the property abutting the sidewalk on which plaintiff fell, and that it does not fall within one of the exemptions in the Sidewalk Law as 241 West 125<sup>th</sup> Street is classified as Building Class K2 (2-story building with store/office). (*Id.*, Exh. D).

City also asserts that there is no evidence that it caused or created the defective condition and submits, in support, the affidavit of an employee of its Department of Transportation who conducted a fruitless search of municipal records during the two years prior to and including plaintiff's accident for permits, corrective action reports, notices of violation, complaints, repair orders, sidewalk violations, and contracts. (*Id.*, Exh. E).

"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 eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk,

unless the property is exempt. (Admin. Code 7-210[c] [City liable for injury caused by failure to maintain 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 . . .”]). Therefore, after September 14, 2003, the effective date of the Sidewalk Law, the abutting property owner, not City, is generally liable for accidents caused by sidewalk defects. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]).

Here, as City established that it is not the abutting landowner and that the property at 241 West 125<sup>th</sup> Street is not exempt, it has thus demonstrated, *prima facie*, that it may not be held liable for plaintiff’s injuries. (*Rodriguez v City of New York*, 70 AD3d 450 [1<sup>st</sup> Dept 2010] [City entitled to dismissal of complaint as it did not own property on which plaintiff fell, and as property was vacant lot and thus not exempt pursuant to section 7-210]; *Gordy v City of New York*, 67 AD3d 523 [1<sup>st</sup> Dept 2009] [defendant established that property abutting sidewalk owned by corporate entity and not exempt]).

To the extent that City may be held liable if it caused or created a defective condition on, or made special use of, a sidewalk resulting in an injury occurring after September 14, 2003 (*Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [Sup Ct, Kings County 2007] [finding no indication in New Sidewalk Law that City may not be held liable if it caused or created defect or made special use]; *see also Adler v City of New York*, 52 AD3d 549 [2d Dept 2008] [although City established that abutting property not exempt under section 7-210, discovery may lead to information showing that it created condition or made special use of sidewalk]), it also has established that it neither caused nor created any condition on, nor made special use of, the sidewalk. City has thus demonstrated its entitlement to summary dismissal of

the complaint and any cross-claims against it.

III. CONCLUSION


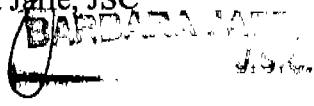
Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted and the complaint and any cross-claims are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City Part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  


DATED: October 6, 2010  
New York, New York

OCT 06 2010

**FILED**  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE