

**Almonte v City of New York**

2010 NY Slip Op 32945(U)

October 15, 2010

Supreme Court, New York County

Docket Number: 100332/05

Judge: Cynthia S. Kern

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SCANNED ON 10/20/2010

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

PRESENT: CYNTHIA S. KERN  
J.S.C.  
Justice

PART 52

Index Number : 100332/2005  
**ALMONTE, GISELLA**  
vs.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 005  
DISMISS

INDEX NO. 100332/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 005  
MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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 is decided in accordance with the attached decision. This action is hereby transferred to a non-city part for the inquest against the defaulting defendant.

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

**FILED**  
OCT 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/15/10

CK  
CYNTHIA S. KERN 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 52

-----X  
GISELLA ALMONTE,

Plaintiff,

Index No. 100332/05

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK and COMMUNITY OF  
POOR PEOPLE OF LOWER EAST SIDE,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

| Papers                                       | Numbered  |
|--|-----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u>  |
| Answering Affidavits.....                    | <u>2</u>  |
| Cross-Motion and Affidavits Annexed.....     | <u>3</u>  |
| Answering Affidavits to Cross-Motion.....    | <u>4</u>  |
| Replying Affidavits.....                     | <u>  </u> |
| Exhibits.....                                | <u>  </u> |

**FILED**  
OCT 20 2010  
NEW YORK  
COUNTY CLERKS OFFICE

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on garbage on the sidewalk at the corner of Clinton Street and Stanton Street in front of the Community of Poor People of the Lower East Side Garden on February 6, 2004. Defendant City of New York (the "City") now moves for summary judgment dismissing the complaint on the ground that it did not have prior written notice of the condition as required by Administrative Code §7-201. For the reasons set forth below, defendant City's motion is granted.

Initially, as Judge Smith held in *Sondervan v. City of New York and the American Museum of Natural History* (N.Y. Sup. Index No. 115770/2006, July 24, 2008), the City is required to have prior written notice of a defective condition on a sidewalk pursuant to the prior written notice provisions of §7-201(c)(2) of the Administrative Code of the City of New York even when it is being sued in its capacity as the abutting property owner rather than as a municipal entity. That section provides as follows:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Plaintiff's argument that prior written notice is not required because the City's liability stems from its capacity as the abutting property owner under §7-210 of the Administrative Code is unavailing because §7-210 preserves the prior written notice requirement for actions arising from accidents taking place on sidewalks, even when the City is the abutting property owner. §7-210(b) provides that "the owner of real property abutting any sidewalk...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." §7-210(d) provides that "[n]othing 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.” § 7-201(c)(2) creates a general requirement of prior written notice to the City in order to establish liability for defective conditions on sidewalks with no exception for cases in which the City is sued as a property owner and §7-210(d) provides that the liability rules for accidents on sidewalk established by §7-210 do not in any way modify any prior written notice requirements for actions against the City. Therefore, the prior written notice requirement applies to actions against the City for accidents taking place on sidewalks, even when the City is being sued in its capacity as the abutting property owner. The Second Department holding in *Dick v. Town of Wappinger*, 63 A.D.3d 661, 662 (2<sup>nd</sup> Dept 2009) that prior written notice is not required when a municipality is sued in its capacity as a property owner is distinguishable because that decision is based on the New York Town Law and not on the Administrative Code of the City of New York. Furthermore, in *Dick*, the plaintiff’s accident took place on the actual premises owned by the municipality and not on the sidewalk as in the instant case.

Moreover, plaintiff’s argument that there is an issue of fact regarding whether a “No Dumping” sign provided by the City to the community garden provides the City with prior written notice is without merit. Edith Stone, the director of the Greenthumb program at the New York City Department of Parks and Recreation, testified that the City provides “No Dumping” signs to community gardens that request them and there is no requirement that there be an incident of dumping before a sign is provided. Therefore, plaintiff’s argument that a “No Dumping” sign could provide prior written notice of a dumping problem is unavailing. There is no evidence to suggest that the City would have any information to suggest that a particular

