

<b>Hagis v City of New York</b>
2011 NY Slip Op 33328(U)
July 15, 2011
Supreme Court, Richmond County
Docket Number: 101227/10
Judge: Thomas P. Aliotta
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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**ROSEMARY HAGIS,**

**Plaintiff,**

**-against-**

**THE CITY OF NEW YORK,**

**Defendant.**

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**Part C-2**

**Present:**

**HON. THOMAS P. ALIOTTA**

**DECISION AND ORDER**

**Index No. 101227/10**

**Motion No. 619-001**

The following papers numbered 1 to 3 were fully submitted on this motion the 1<sup>st</sup> day of June, 2011.

	Papers Numbered
Notice of Motion to Dismiss by Defendant City of New York, with Supporting Papers and Exhibits (dated March 10, 2011).....	1
Affirmation in Opposition by Plaintiff, with Supporting Papers and Exhibits (dated April 25, 2011).....	2
Reply Affirmation by Plaintiff, with Supporting Papers and Exhibits (dated May 4, 2011).....	3

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Upon the foregoing papers, the motion to dismiss the complaint, or, in the alternative for summary judgment dismissing the complaint, as against defendant The City of New York (hereinafter the "City") is granted.

## CONTENTION OF THE PARTIES

In moving, *inter alia*, to dismiss, defendant argues that the complaint fails to state a cause of action because plaintiff is unable to demonstrate that the City had prior written notice of the alleged defect which caused her to stumble on February 24, 2010 on a sidewalk in the vicinity of 120 Kingdom Avenue in Staten Island. In support, defendant notes that it conducted a search for any records that would have provided it with prior written notice, and that none were found to exist. It recognized that a “Big Apple Map” depicting the area in question was filed on February 2, 2004, but that the notations contained on that map and the accompanying legend demonstrated the absence of any indication of defects where plaintiff was allegedly injured.

In opposition, plaintiff argues that the City did have prior written notice of the defect which caused her to stumble<sup>1</sup>. In support of that argument she cites the above-referenced Big Apple Map, as well as an unsworn letter to plaintiff’s attorney dated March 16, 2011 from one Gabriella Pulla of the Big Apple Pothole and Sidewalk Protection Committee, stating that “[t]here is a raise on the sidewalk i/f/o #120 Kingdom Ave. and close to the next building #126 Kingdom Ave., Staten Island, NY”, and offering to provide documentation of same for a stated fee. Given these facts, plaintiff contends that prior written notice was supplied to the City as to the existence of an extended raised and uneven section of sidewalk, creating an issue of fact on the question of liability.

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<sup>1</sup>Plaintiff also contends, in the first instance, that the defendant’s motion is not timely since the Rules of Part C-2 require that such motions be made within 60 days of the filing of the Note of Issue, and that the time to file the instant motion would have expired on March 13, 2011. The Note of Issue in this matter was filed on January 13, 2011. Plaintiff further notes that since the motion itself is dated March 10, 2011 (a Thursday) “... it is likely that the instant motion was not filed until at least the following Monday, therefore the instant motion is likely at least one day, if not more, late”. However, in its reply affirmation defendant has provided a stamped copy showing that the Notice of Motion was received at the Civil Term Clerks Office on March 11, 2011, and was therefore timely filed.

In reply, the City contends that even though the abutting address to the area where the plaintiff claims to have stumbled was 120 Kingdom Avenue, such is a corner property and the plaintiff testified at her deposition that the incident occurred not on Kingdom Avenue, but on Deisius Street. According to the City, an examination of the cited Big Apple Map shows no defects on Deisius Street in that location.

### DISCUSSION

The Administrative Code of the City of New York requires that a plaintiff prove service of a written notice of a defect on the City to successfully maintain an action against it relative to that defect. Section 7-201 (c)(2) of the Code provides:

2. 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.

In consonance with the above provision, it is well settled that plaintiff must plead and prove that the City had prior written notice of a sidewalk defect, or dangerous or obstructed condition before it can be held liable for its alleged negligence in failing to abate same. (see, *Farrell v. City of New York*, 49 AD3d 806 [2d Dept 1988]) The Court of Appeals has recognized only 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. (see, *Amabile v. City of Buffalo*, 93 NY2d 471,474; *Hubbard v. City of New York*, \_\_\_ AD3d \_\_\_, 2011 NY Slip Op 4632 [2d Dept].)

Here, there is no claim that the City created the alleged defect, nor does plaintiff claim that a “special use” existed.

Plaintiff testified at her deposition that she had been employed as a teacher at PS 5 for 15 years prior to the date of this incident. The school itself was located on the southern side of Deisius Street, on the eastern side of Kingdom Avenue, at the intersection of those two streets. She stated that she had parked her car west of that intersection and on the northern side of Deisius. Upon exiting her car, she crossed diagonally over to the sidewalk on the southern side of Deisius and was walking toward the intersection of Deisius and Kingdom when the incident occurred. The Big Apple Map indicates that the corner property to her right was 120 Kingdom Ave. However, plaintiff (who admitted she was very familiar with the area given the length of time she had worked at the school and the hundreds of times she estimated she parked her car in the general area ) stated that the incident occurred on Deisius Street before she reached the intersection with Kingdom Avenue. Her best estimate was that the incident occurred 65-100 feet prior to that intersection. Therefore, while the street address abutting the area was 120 Kingdom Avenue, plaintiff’s own deposition testimony reveals that the incident did not occur on Kingdom Avenue, but rather on Deisius Street.

This established, a review of the Big Apple Map upon which plaintiff purports to rely to support her claim that the defendant had prior written notice, shows no notation of any defects on Deisius Street on that particular block. Indeed, the only notation in that area is “OK” which is

