

**Callan v City of New York**

2012 NY Slip Op 33417(U)

August 2, 2012

Sup Ct, New York County

Docket Number: 109221/07

Judge: Geoffrey D. Wright

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

PRESENT: GEOFFREY D.S. WRIGHT  
*Justice*

PART 62

EUGENE CALLAN,

INDEX NO. 109221/07

Plaintiff/Petitioner

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 0025

MOTION CAL. NO. \_\_\_\_\_

THE CITY OF NEW YORK and APA 216<sup>TH</sup> STREET LLC,

Defendant/Respondent(s)

EUGENE CALLAN,

Plaintiff,

Index #110552/09

-v-

ACADIA REALTY TRUST,

Defendant.

The following papers, numbered 1 to 5 were read on this motion to/for dismiss the complaint and cross-claims against APA 216<sup>th</sup> Street, Acadia Realty; cross-motion to dismiss the complaint against the City of New York.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	3
Replying Affidavits _____	4,5
<u>Other</u> _____	

**FILED**

Cross-Motion:  Yes  No

2 AUG 14 2012

Upon the foregoing papers, it is ordered that this motion/petition by Defendants APA 216<sup>th</sup> Street LLC and Acadia Realty Trust to dismiss the complaint and cross-claims is denied. The cross-motion to dismiss the complaint and cross-claims against the City of New York is granted a/p/o.

NEW YORK COUNTY CLERK'S OFFICE

This case is to be referred to a Non-City Part.

GEOFFREY D. WRIGHT  
J.S.C.

Dated: August 2, 2012

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 62

-----X  
EUGENE CALLAN,

Index #109221/07  
Motion Cal. #

Plaintiff/Petitioner(s),

Motion Seq. #  
**DECISION/ORDER**  
Pursuant To Present:  
Hon. Geoffrey Wright  
Judge, Supreme Court

-against-

THE CITY OF NEW YORK and APA216TH  
STREET LLC,

Defendant/Respondent(s).

-----X  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

**FILED**

AUG 14 2012

-----X  
EUGENE CALLAN,

NEW YORK  
COUNTY CLERK'S OFFICE  
Index #110552709

Plaintiff,

-against-

ACADIA REALTY TRUST,

Defendant.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss all claims and cross-claims against APA 216<sup>th</sup> Street LLC and Acadia Realty Trust, cross-motion to dismiss all claims and cross claims against the City of New York

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	3
Replying Affidavits & Exhibits Annexed	4,5
Other (Cross-motion) & Exhibits Annexed	2

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiff, an employee of the Department of Sanitation of the City of New York, was injured while in the course of inspecting Sanitation trucks that were parked on Tenth Avenue in the Inwood section of Manhattan. When he saw a water bottle in the dashboard of one truck, he entered the truck to retrieve and, while in the act of exiting the truck, stepped into a composite defect that was comprised of portions of the roadbed, sidewalk and curb, as demonstrated by photographs annexed to the moving and opposing papers.

All Defendants now move to dismiss the complaint. To the extent that the curb of the sidewalk was where the Plaintiff fell, APA 216<sup>th</sup> Street and Acadia Realty look to the City of New York, as curbs are not the responsibility of the owners of abutting buildings [*ADMIN. CODE 7-210, ASCENCIO v. NEW YORK CITY HOUSING AUTHORITY*, 77 A.D.3d 592, 910 N.Y.S.2d 61, 2010 N.Y. Slip Op. 07686], leaving responsibility for curb maintenance to the City. For the City's part, it relies on Admin. Code 7-201, which requires proof that the City received written notice of a defect fifteen days before an accident in order to hold it liable.


All sides look to the Plaintiff's pretrial deposition and 50-h hearing to determine the exact mechanism of his injury. Looking at the testimony, the location was either the curb, or the broken sidewalk, or a combination of the two. Photographs of the spot of the accident show that the curb, sidewalk and road bed seem to merge in places, so that it is not possible to draw a line of demarcation. That being said, should either motion be granted?

After a review of the exhibits and affirmations, the City's motion to dismiss the complaint and cross-claims is granted. It is conceded by the Plaintiff that there is no proof of prior written notice of the City, since he relies on a Big Apple map to contest this issue. Although APA 216<sup>th</sup> Street and Acadia Realty claim that complaints were made to the Sanitation Department about trucks being parked on the sidewalk, verbal complaints do not satisfy the statutory requirement [*BATTS v. CITY OF NEW YORK*, 93 A.D.3d 425, 939 N.Y.S.2d 425, 2012 N.Y. Slip Op. 01571, "Nor can a verbal or telephonic communication to a municipal body that is reduced to writing satisfy a prior written notice requirement", quoting *GORMAN v. TOWN OF HUNTINGTON*, 12 N.Y.3d 275, 280, 879 N.Y.S.2d 379, 907 N.E.2d 292 [2009]]. The notice of claim does not set forth a claim of causation and creation of the defects, therefore, this ground for a suit is not available to the Plaintiff. The Big Apple Map that was submitted by the Plaintiff may contain numerous listings of defects, but none conform to the legend for curb defects. Therefore, the City's motion to dismiss the complaint and cross-claims must be granted.

Turning to the motion by APA 216<sup>th</sup> Street and Acadia Realty, the motion is denied. There are questions of fact that cannot be resolved by these papers. Because of the condition of the area where the Plaintiff fell, it is hard to tell where the sidewalk ends and the curb begins, so the exact location, involving Admin. Code 2-710, as well as issues of notice by the remaining Defendants are for the trier of fact to resolve.

The City's motion to dismiss the complaint and cross-claims is granted. The motion by APA 216<sup>th</sup> Street and Acadia Realty is denied. This constitutes the decision and order of the Court.

Dated: August 2, 2012

  
~~GEOFFREY D. WRIGHT~~ **FILED**  
AJSC  
AUG 14 2012  
NEW YORK  
COUNTY CLERK'S OFFICE