

**Barrett v City of New York**

2014 NY Slip Op 31058(U)

April 24, 2014

Sup Ct, New York County

Docket Number: 104537/11

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 5

Index Number : 104537/2011  
BARRETT, SUZETTE  
vs.  
BROADWAY 207 REALTY CORP.  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT CAL: # 9

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

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

**FILED**

APR 28 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4-24-14

\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

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

-----X  
SUZETTE BARRETT,

Plaintiff,

- against -

DECISION/ORDER  
Index No. 104537/11  
Seq. No. 001

CITY OF NEW YORK and BROADWAY 207  
REALTY CORP.,

Defendants.

-----X  
BROADWAY 207 REALTY CORP. ,

Third-Party Plaintiff,

-against-

EZ PAWN CORP.,

Third-Party Defendant.

-----X  
HON. KATHRYN E. FREED:

**FILED**

APR 28 2014

COUNTY CLERK'S OFFICE  
NEW YORK

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1,2(Exs. A-J),3.
NOTICE OF CROSS-MOTION #1 AND AFFIDAVITS ANNEXED	...4(Exs. A-R)....
NOTICE OF CROSS-MOTION #2 AND AFFIDAVITS ANNEXED	...5(Exs. A-K)...
AFFIRMATIONS IN OPPOSITION.....	...6(Exs. A-N)...
REPLYING AFFIRMATION.....	.....7.....
OTHER...(Memoranda of Law) .....	.....8,9.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

This personal injury action arises from an incident on February 11, 2010 in which plaintiff, Suzette Barrett, allegedly slipped and fell on ice and a defective sidewalk in front of the premises located at 4930 Broadway. Defendant /third-party plaintiff Broadway 207 Realty Corp. ("B207") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims asserted against it. Defendant the City of New York ("the City") and third-party defendant EZ Pawn Corp. cross-move for the same relief.<sup>1</sup> Plaintiff opposes the motions by B207 and EZ Pawn. After oral argument and consideration of the parties' papers and the applicable statutes and case law, B207's motion and EZ Pawn's cross motion are denied, and the City's cross motion is granted.

#### **Factual And Procedural Background**

On February 11, 2010, plaintiff was allegedly injured when she slipped and fell in front of the premises located at 4930 Broadway in Manhattan.<sup>2</sup> Plaintiff claims that her fall was caused by ice and a cracked sidewalk. The premises were owned by defendant B207 and leased to EZ Pawn.

In her notice of claim against the City of New York, plaintiff alleged that the accident occurred "in front of the premises known as 4930 Broadway" when she fell as a result of, inter alia, ice and a broken sidewalk. Ex. A to City's cross motion. This action was commenced by the filing of a summons and verified complaint on or about April 14, 2011. Ex. C to City's cross motion. In her complaint, plaintiff alleged that she was injured when she slipped and fell on ice and broken

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<sup>1</sup>The City moves for dismissal pursuant to CPLR 3211 or, in the alternative, for summary judgment pursuant to CPLR 3212.

<sup>2</sup>Inconsistencies regarding the precise location of the accident are addressed in further detail below.

pavement in front of 4930 Broadway. Ex. C to City's cross motion.

At her 50-h hearing on December 2, 2010, plaintiff testified, inter alia, that she fell in front of 4039 West Broadway, between 207<sup>th</sup> and 208<sup>th</sup> Streets. Ex. G to B207's mot., at 6, 10. She said she slipped on ice and a "dented" sidewalk and that she had last been in the area three days before. *Id.*, at 15-16. In her errata sheets, signed February 18, 2011 and April 10, 2012, plaintiff corrected her testimony to reflect that she had fallen in front of 4930A Broadway. *Id.*

In her verified bill of particulars dated October 7, 2011 (Ex. D to plaintiff's aff. in opp.) and amended bill of particulars dated October 14, 2011 (Ex. E to EZ Pawn's cross motion), plaintiff alleged that she was injured in front of 4930 Broadway. In her third supplemental bill of particulars dated June 26, 2012, plaintiff alleged that she fell in front of 4930A Broadway. Ex. A to B207's motion.

At her deposition on July 23, 2012, plaintiff testified, inter alia, that her accident occurred on February 11, 2010 at 7-7:30 a.m. Ex. D to B207's motion, at 22. She said she fell when she slipped "on thin ice" and on cracks in the sidewalk in front of "A-4930 Broadway." *Id.*, at 28, 56-60. She fell about an inch from a metal grate in the sidewalk. *Id.*, at 29-30. She had been in the area of her fall two days prior and it was not slippery. *Id.*, at 63. Prior to the incident, she never complained to anyone about ice in the area where she fell. *Id.*, at 62. At her deposition, she was shown photographs of the accident location and stated that the area marked with an "x" on the photographs represented where she fell. *Id.*, at 60-62.

Armando Guzman was deposed on July 27, 2012. Guzman testified that he was employed by Elysee Investment Company and managed the premises for B207. Ex. M to plaintiff's aff. in opp., at 6-7. He was not aware of any work performed on the sidewalk between February of 2008 and

February of 2010. *Id.*, at 8. He did not know who was responsible for maintaining the sidewalks in front of the premises and was not aware of any complaints made about the sidewalk prior to the alleged incident. *Id.*, at 9-10. He insisted that he “never had anything to do with the sidewalks” because it was his understanding, based on instructions from his supervisor, Avi Dishy, that the commercial tenants were responsible for maintaining them. *Id.*, at 12-13.

On or about September 10, 2012, B207 commenced a third-party action against EZ Pawn. Ex. A to EZ Pawn’s cross motion. Plaintiff then served an amended complaint against the City, B207, and EZ Pawn on or about October 8, 2012 alleging that the incident occurred in front of 4930 Broadway. Ex. A to B207’s motion. The amended complaint annexed as an exhibit, inter alia, the lease between B207 and EZ Pawn.

On or about November 14, 2012, EZ Pawn served a verified answer to the third-party complaint in which it denied all substantive allegations of wrongdoing. It also set forth counterclaims against B207 and cross claims against the City for contribution and common-law indemnification. Ex. A to EZ Pawn’s cross motion.

EZ Pawn served its answer on or about December 6, 2012. In its answer, it denied all allegations of wrongdoing and asserted cross-claims against B207 and the City for contribution and common-law indemnification. Ex. A to EZ Pawn’s cross motion.

On or about December 19, 2012, the City served an answer to the amended complaint denying all substantive allegations of wrongdoing and asserting counterclaims for contribution and common-law and contractual indemnification against B207 and EZ Pawn. Ex. A to City’s cross motion.

On December 21, 2012, B207 served an answer to the amended complaint and asserted cross

claims for contribution and common-law indemnification against the City and EZ Pawn. Ex. C to B207's motion. B207 also asserted cross-claims against EZ Pawn for contractual indemnification and breach of contract to procure insurance. *Id.*

At her deposition on February 14, 2013, plaintiff testified, inter alia, that she slipped and fell on black ice. Ex. E to B207's motion, at 33. She may have also fallen on "a little dent" in the sidewalk. *Id.*, at 36. She did not know how long the ice had been on the sidewalk. *Id.*, at 35-36. The incident occurred in front of "A4430" Broadway. *Id.*, at 23. She further stated that the "x" marks she had made on photographs marked as exhibits at her July 23, 2012 did not depict the precise location of her fall but identified that precise location to be "just below" where she had indicated at her prior deposition. *Id.*, at 50-62. David Kaminsky appeared for a deposition on behalf of EZ Pawn on March 5, 2013. Kaminsky, chairman of the board of EZ Pawn, testified that his company leased 4930 Broadway from B207 and occupied the premises as of the date of the alleged incident. Ex. N to plaintiff's aff. in opp., at 7-8. He admitted that, if snow needed to be removed from the sidewalk during store hours, his employees were responsible for doing so. *Id.*, at 11-12, 14, 23. He insisted that he never received complaints about the sidewalk prior to the date of the incident. *Id.*, at 14.

On March 25, 2013, Janet Bentkowski, an EMT for the New York City Fire Department, appeared for a deposition. Bentkowski testified that she responded to the call to treat plaintiff and that the location to which she responded was 181<sup>st</sup> Street and Broadway. Ex. H to B207's mot., at 13. She based her testimony on the ambulance call report. *Id.*, at 20; Ex. I to B207's motion.

B207 now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it. EZ Pawn cross-moves for the same relief. The City cross-moves for

dismissal pursuant to CPLR 3211 or, in the alternative, for summary judgment pursuant to CPLR 3212.

In support of its motion, B207 submits the supplemental summons and amended complaint, plaintiff's third supplemental bill of particulars, its answer to the amended complaint, plaintiff's 50-h and deposition testimony, the deposition testimony of Janet Bentkowski of the FDNY, the lease agreement between B207 and EZ Pawn, and the affidavit of Avi Dishy, president of Elysee Investments, which manages the property. Dishy states that B207 owns the premises and leases them to EZ Pawn, which was responsible for maintaining the sidewalks adjacent to the building. He states that B207 "never had anyone" work on the sidewalk "during the week surrounding the date of the alleged accident" incident and never received notice of any complaint about the area.

The City, in supporting its cross-motion, submits the notice of claim, plaintiff's 50-h testimony, the verified complaint, its discovery demands, the supplemental summons and amended complaint against the City, B207 and EZ Pawn, the City's answer to the amended complaint, the note of issue, and certified weather records revealing that approximately 10 inches of snow fell on the day before the incident. The City also submits the September 17, 2013 affidavit of David Atik of its Department of Finance attesting to the fact that the City does not own 4930 Broadway and that the premises are commercial in nature. Ex. H to City's cross motion. Further, it submits the September 20, 2013 affidavit of Vernal Guillory of its Department of Sanitation, who states that the City did not undertake any snow removal in front of the subject premises during the two weeks preceding the incident. Ex. Q to City's cross motion. Finally, the City annexes to its motion several judicial decisions which it claims support the dismissal of this action.

In support of its cross motion, EZ Pawn submits the summons and verified complaint, the amended verified complaint, its answer, B207's answer, the City's answer, B207's third-party complaint against EZ Pawn, EZ Pawn's answer to the third-party complaint, the note of issue, plaintiff's 50-h and deposition testimony, plaintiff's supplemental and third supplemental bills of particular, the deposition testimony and affidavit of David Kaminsky of EZ Pawn, and weather records.

In opposing the motion, plaintiff submits the notice of claim, photographs of the accident scene, the verified complaint and amended verified complaint, the verified bill of particulars, plaintiff's discovery responses, including photographs of the accident site, plaintiff's 50-h hearing and errata sheet, plaintiff's deposition transcripts, a Big Apple Map showing a raised sidewalk in front of the premises, and the deposition transcripts of Guzman and Kaminsky.

### **Contentions of the Parties**

B207 argues that it is entitled to summary judgment dismissing the complaint and all cross claims against it because plaintiff testified that she fell within 12 inches of the metal grates on the sidewalk and that 34 RCNY § 2-07(b) provides that it had no duty to maintain that area. B207 admits that the New York City Administrative Code requires real property owners to maintain sidewalks abutting their properties in reasonably safe condition. However, it further asserts that it is entitled to summary judgment because plaintiff "cannot show it caused or created" the allegedly dangerous condition or had actual or constructive notice of the same since she did not know how long the ice was there, did not complain to anyone about the condition prior to the incident, and was

not in the area for at least two days before she fell, and because Dishy's affidavit establishes that B207 did no work in the area "during the week surrounding the date of the alleged incident." Finally, B207 alleges that the complaint must be dismissed based on Bentkowski's testimony that plaintiff's accident occurred approximately 30 blocks from 4930 Broadway.

The City adopts the arguments set forth by B207 and argues that its cross motion should be granted because plaintiff failed to identify the precise location of the incident. The City further asserts that section 7-210 of the Administrative Code of the City of New York requires an abutting landowner to maintain sidewalks unless the premises are a one, two or three family residential property in whole or in part owner occupied and used only for residential purposes, which Atik's affidavit establishes they were not. In addition, the City asserts that it did not cause or create the alleged defect.

In support of its cross-motion, EZ Pawn argues that, because plaintiff contradicted herself regarding the location of the alleged incident, her testimony is incredible as a matter of law. It further asserts that, pursuant to New York City Administrative Code § 16-123, it had four hours to remove the ice from the sidewalk, which time period does not include the hours between 9 p.m. and 7 a.m. Thus, since the weather records submitted in support of its motion reflect that snow stopped falling on the evening of February 10, it had until 11 a.m. on February 11, approximately 4 hours after the alleged incident, to remove the ice. EZ Pawn also asserts that it was not responsible for maintaining the area surrounding the sidewalk grate where plaintiff said she fell since it did own or exclusively control that area. Further, EZ Pawn asserts that it did not create or have actual or constructive notice of the conditions which allegedly harmed plaintiff.

In support of its cross motion, EZ Pawn submits the affidavit of Kaminsky, who avers that EZ Pawn leased the premises from B207 and that, if there was ice or snow in front of the building, EZ Pawn would remove it. He further stated that, prior to the accident he never received any complaints about ice or snow on the sidewalk or any defect in the sidewalk. Ex. K to EZ Pawn's cross motion.

Plaintiff does not oppose the City's cross motion to dismiss. In opposition to the motion by B207 and the cross motion by EZ Pawn seeking dismissal, plaintiff asserts that her testimony regarding the location of the accident is not incredible as a matter of law. She further asserts that defendants' motions must be denied since they have failed to establish that they did not create, or have actual or constructive notice of, the defect(s) which caused the alleged accident. She asserts that the Big Apple Map which she submits as Exhibit K in opposition to the motions reveals that there was an uneven sidewalk in front of the premises. She further maintains that the defendants' arguments regarding the metal grate in front of the premises is irrelevant.

In its reply papers, B207 argues that it is entitled to summary judgment because plaintiff cannot allege where she fell without speculating.

### **Conclusions of Law:**

"[T]he 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 issue of fact from the case. *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (*internal quotation marks and citation omitted*). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562

(1980). The failure to establish one's prima facie entitlement to summary judgment "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

"In order to subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." *Kalish v HEI Hospitality, LLC*, 114 AD3d 444, 445 (1<sup>st</sup> Dept 2014) (*citations omitted*). For the reasons set forth below, this Court finds that B207's motion and EZ Pawn's cross motion must be denied and that the City's motion must be granted.

### **B207's Motion and EZ Pawn's Cross Motion**

Plaintiff correctly asserts that, because B207 and EZ Pawn did not refute her allegation that the dangerous condition(s) existed, they were required to establish that they did not cause or create the conditions or have actual or constructive notice of the same. *See Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422 (1<sup>st</sup> Dept 2011); *Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 (1<sup>st</sup> Dept 2009). B207 and EZ Pawn failed to meet this burden because they “proffered no affidavit or testimony based on personal knowledge as to when [their] employees last inspected the sidewalk or the sidewalk’s condition before the accident.” *Spector, supra* at 423; *see also Rodriguez v Bronx Zoo Restaurant, Inc.*, 110 AD3d 412 (1<sup>st</sup> Dept 2013); *De La Cruz v Lettera Sign & Electric Co.*, 77 AD3d 566 (1<sup>st</sup> Dept 2010).

Although Dishy states in his affidavit in support of B207's motion that B207 did no work in the area “during the week surrounding the date of the alleged incident,” the term “surrounding the date” is extremely vague and he merely states in conclusory fashion that the tenant at the premises, and not B207, was responsible for maintaining the sidewalk.<sup>3</sup>

As noted above, Kaminsky stated in an affidavit in support of EZ Pawn's cross-motion that EZ Pawn leased the premises from B207 and that, if there was ice or snow in front of the building, EZ Pawn would remove it. He further stated that, prior to the accident he never received any

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<sup>3</sup>This Court notes that B207, as well as the City, failed to annex all necessary pleadings to their motion papers. Specifically, while those parties seek dismissal of all cross-claims against them, they do not annex copies of those cross-claims. While this would generally require denial of their motions (CPLR 3212[b], *see Roach v AVR Realty Co., LLC*, 41 AD3d 821 [2d Dept 2007]), the cross claims are contained in the exhibits provided by EZ Pawn and this Court will thus consider the motions by B207 and the City. *See Aviles v Halsted Communications, Ltd.*, 24 Misc3d 1227(A) (Sup Ct Queens County 2009).

complaints about ice or snow on the sidewalk or any defect in the sidewalk. Ex. K to EZ Pawn's cross-motion. Kaminsky admitted at his deposition that his company, EZ Pawn, leased 4930 Broadway from B207 and occupied the premises as of the date of the alleged incident. Ex. N to plaintiff's aff. in opp., at 7-8. He admitted that, if snow needed to be removed from the sidewalk during store hours, his employees were responsible for doing so. *Id.*, at 11-12, 14, 23. He insisted that he never received complaints about the sidewalk prior to the date of the incident. *Id.*, at 14.

Since none of the foregoing individuals had any personal knowledge about what measures, if any, were taken to address the allegedly hazardous conditions, were present at the premises on the date of the incident or just before it occurred, and offered no evidence as to when the sidewalk had last been inspected or cleaned of snow or ice prior to the incident, the evidence adduced by these defendants was "not probative of lack of actual or constructive notice" and was thus insufficient to establish their prima facie entitlement to summary judgment. *Rodriguez*, 110 AD3d *supra* at 413, quoting *De La Cruz*, *supra* at 566.<sup>4</sup>

This Court rejects the argument by B207 and EZ Pawn that the complaint must be dismissed because plaintiff's deposition testimony regarding the location of the accident was incredible as a matter of law. While the Court acknowledges that plaintiff's testimony was at times inconsistent, she has, for the most part, consistently maintained throughout this case that she was injured at 4930 Broadway and thereafter that she was injured at 4930A Broadway. Her 50-h testimony that she was injured at 4039 Broadway (Ex. G to B207's motion, at 6, 10) appears to be a simple reversal of the

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<sup>4</sup>As noted above, Guzman, the property manager of 4930 Broadway, did not testify at his deposition that he had any such personal knowledge. Ex. M to plaintiff's aff. in opp., at 6-10, 12-13. Nor did Kaminsky have such personal knowledge. Ex. N to plaintiff's aff. in opp.

numbers of the address, which was corrected by her errata sheet to 4930A Broadway. Ex. G to B207's motion. At most, this conflicting testimony "raised an issue of credibility inappropriate for summary judgment treatment."<sup>5</sup> See *Binh v Bagland USA, Inc.*, 286 AD2d 613 (1<sup>st</sup> Dept 2001). This testimony was not incredible as a matter of law, as it was not "impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory." *Zapata v Buitriago*, 107 AD3d 977, 979 (2d Dept 2013) (*citation omitted*). On the contrary, plaintiff's testimony was, with the exception of the 50-h hearing, consistent except for changing the address from "4930" to "4930A" Broadway. Neither B207 nor EZ Pawn has shown that they have been prejudiced by this testimony in any way.

In addition to the foregoing, this Court finds without merit the argument by B207 and EZ Pawn that they were not responsible for snow and ice removal in the area of the metal grates in front of the premises. 34 RCNY § 2-07(b) provides that "the owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating." While section 7-210 of the Administrative Code of the City of New York does not impose liability upon a property owner for failure to maintain a sidewalk grate in a reasonably safe condition" (*Hurley v Related Mgt. Co.*, 74 AD3d 648, 649 [1<sup>st</sup> Dept 2010]), the removal of snow or ice from a sidewalk within twelve inches of a grate does not constitute a "repair" as contemplated by section 2-07(b)(2). See *Perry v Rey Sun Realty, LLC*, 42 Misc3d 1209(A) (Sup Ct New York County 2014).

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<sup>5</sup>Other issues of credibility to be resolved by the trier of fact will be plaintiff's inconsistent testimony regarding markings on photographs depicting where she fell and whether the alleged accident actually occurred approximately 30 blocks away from the location alleged, as EMT Bentkowski testified at her deposition.

EZ Pawn's argument regarding section 16-123 of the New York City Administrative Code must fail as well. It asserts that, since the snowfall ended the night before, it had 4 hours pursuant to that statute in which to remove ice and snow from the sidewalk. However, its argument is founded upon uncertified weather records which are not in admissible form and thus may not serve as a basis for establishing its prima facie entitlement to summary judgment. *See Coleman v Maclas*, 61 AD3d 569 (1<sup>st</sup> Dept 2009).

Finally, the Big Apple Map submitted by plaintiff in opposition to the motion (Ex. K to plaintiff's aff. in opp.) raises an issue as to whether the sidewalk in front of the premises was defective. *See Cruzado v City of New York*, 80 AD3d 537, 538 (1<sup>st</sup> Dept 2011).

#### **The City's Cross Motion**

The City is entitled to summary judgment dismissing the complaint and all cross claims against it. Pursuant to New York City Administrative Code section 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 injuries proximately caused by its failure to maintain the sidewalk unless the property is exempt. Section 7-210 (c) provides an exemption for 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..." The failure to maintain a sidewalk includes the negligent failure to remove snow and ice from the sidewalk.

Here, the City established, through Atik's affidavit (Ex. H to City's cross motion), that it is not the owner of the premises abutting the sidewalk where plaintiff allegedly fell and that the

premises are not exempt. Thus, it has established its prima facie entitlement to summary judgment. *See Rodriguez v City of New York*, 70 AD3d 450 (1st Dept 2010). Additionally, the affidavit of Guillory (Ex. Q to City's cross motion) establishes that the City did not cause or create the icy condition on the sidewalk. *See Gumbs v Friedman & Simon*, 35 AD3d 362 (2d Dept 2006).

Since none of the other parties has opposed the City's motion, no triable issue of fact has been raised regarding the City's liability and the complaint as well as all cross claims against it must be dismissed.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendant Broadway 207 Realty Corp. is denied; and it is further,

ORDERED that the cross motion for summary judgment by the defendant City of New York is granted and the complaint and all cross claims against that defendant are dismissed with costs and disbursements to that defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; 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 at 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further,

ORDERED that the Clerk is directed to enter judgment in favor of the defendant City of New York accordingly; and it is further,

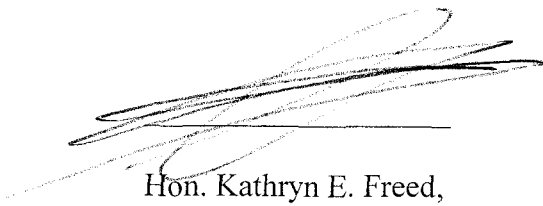
ORDERED that the cross-motion for summary judgment by third-party defendant EZ Pawn Corp. is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: April 24, 2014

ENTER:

APR 24 2014



Hon. Kathryn E. Freed,  
J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

**FILED**

APR 28 2014

COUNTY CLERK'S OFFICE  
NEW YORK