

**Phillips v City of New York**

2016 NY Slip Op 30253(U)

January 13, 2016

Supreme Court, Queens County

Docket Number: 700044/11

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X  
Suzanne Phillips,

Index  
Number: 700044/11

Plaintiff,

Motion  
Date: 12/16/15

- against -

The City of New York, Jamaica Center  
Improvement Association, Inc. and  
Jamaica Center for Arts and Learning, Inc.,

Motion  
Cal. Number: 117

Defendants.

Motion Seq. No.: 6

-----X  
Jamaica Center Improvement Association,  
Inc.,

Third-Party Plaintiff,

- against -

Academic Stone,

Third-Party Defendant.  
-----X

**FILED**  
JAN 15 2016  
COUNTY CLERK  
QUEENS COUNTY

The following papers numbered 1 to read on this motion by defendant, Jamaica Center for Arts and Learning, Inc., for summary judgment; and cross-motion by third-party defendant, Academic Stone, for summary judgment.

	Papers <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
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Affirmation in Partial Opposition.....	8-9
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Reply(Jamaica).....	18-19
Reply(Academic).....	20-21

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Jamaica Center for Arts and Learning for summary judgment dismissing the complaint and all cross-claims against it is granted. Cross-motion by Academic Stone for summary judgment dismissing plaintiff's complaint against it is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling in a hole consisting of a square area of missing bricks in the brick-paved sidewalk on Jamaica Avenue abutting 153-10 Jamaica Avenue in Queens County on July 30, 2010. Said abutting premises is owned by the City and occupied by Jamaica Center for Arts and Learning pursuant to a license agreement with the City.

Jamaica Center for Arts and Learning moves for summary judgment upon the grounds that it had no duty to maintain the sidewalk, either statutory, contractual or common law, that it had no actual or constructive notice of the missing brick condition and that the condition was an open and obvious condition for which Jamaica Center for Arts and Learning had no duty to warn or protect against.

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability for defective public sidewalks remained exclusively upon the City.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes.

Sections 19-152 and 7-210, however, do not impose liability upon tenants. Those sections expressly state that responsibility to repair and maintain the public sidewalk and liability for the breach of that duty rest upon the owner of the abutting real property. Since §7-210 imposes a nondelegable duty upon the owner, no liability may be imposed upon a tenant under that statute (see Collado v Cruz, 81 AD 3d 542 (1<sup>st</sup> Dept 2011)). Indeed, neither plaintiff nor co-defendants contend that Jamaica Center for Arts and Learning may be held statutorily liable under §7-210 and plaintiff concedes that statutory responsibility rests with the City.

Plaintiff only contends that Jamaica Center for Arts and Learning is contractually responsible for the maintenance and repair of the sidewalk and that as a result of its contractual duty, it had a duty to plaintiff. Plaintiff also contends that the motion must be denied because, contrary to the argument of its counsel, there is an issue of fact as to whether Jamaica Center for Arts and Learning had actual or constructive notice of the condition and because whether the condition was open and obvious merely raises a factual issue of comparative negligence.

The City opposes the motion upon the sole ground that the issue of whether the condition was open and obvious merely raises a triable issue of fact as to plaintiff's comparative negligence.

The basis of plaintiff's cause of action against Jamaica Center for Arts and Learning is that although it did not have any statutory duty to plaintiff for the maintenance of the sidewalk, it assumed the responsibility to keep the sidewalk free of any encumbrances pursuant to Paragraph 7 (B) of the license agreement, and assumed responsibility for all interior and exterior repairs to the premises, including the sidewalk, pursuant to Paragraph 7 (A) of the license agreement. In addition, argues plaintiff, Jamaica Center for Arts and Learning agreed to indemnify the City against all legal responsibility for the property, pursuant to Paragraph 23 of the license agreement, and, therefore, assumed the City's responsibility for the maintenance of the sidewalk.

Paragraph 7(A) of the agreement provides, in pertinent part, that Jamaica Center for Arts and Learning shall "take good care of the Premises and the property contained therein, and shall (1) keep the Premises and surrounding areas in good, clean and orderly condition, [and] (2) make all repairs, structural and nonstructural, interior or exterior, required to keep the Premises in good condition at all times". Paragraph 7(B) also requires Jamaica Center for Arts and Learning to "keep clean and free from ice, snow, rubbish and other encumbrances the sidewalks abutting the Premises, and all other areas and spaces located in front of or adjacent to the Premises for which the Corporation would be so responsible by law if it were the fee owner of the Premises."

Since the sidewalk is not part of the "premises" or the "property contained therein", the provision of Paragraph 7(A) requiring Jamaica Center for Arts and Learning to take good care of such areas clearly does not impose upon it an obligation to maintain the public sidewalk. Although the requirement to keep the premises and surrounding areas in "good, clean and orderly condition", is somewhat ambiguous as to what "good condition" or "orderly condition" means and whether "surrounding areas" includes

the sidewalk, the conduct of the parties makes it clear that such provision does not impose upon Jamaica Center for Arts and Learning the responsibility for the repair and maintenance of the sidewalk bricks. Responsibility for the maintenance and repair of the sidewalk was assumed by co-defendant Jamaica Center Improvement Association, pursuant to its agreement with the City, as further evidenced by the fact that Jamaica Center Improvement entered into a maintenance contract with Academic Stone to pick up garbage and debris on the sidewalk and also to report any defective conditions of the sidewalk to Jamaica Center Improvement, including missing bricks, and to repair the sidewalk upon Jamaica Center Improvement's instructions. Indeed, it is undisputed that Academic did perform repairs to the brick pavers on the sidewalk pursuant to its contract with Jamaica Center Improvement. It is also undisputed that Jamaica Center for Arts and Learning never performed any repairs or maintenance work to the sidewalk.

The additional provision requiring Jamaica Center for Arts to make "all repairs, structural and nonstructural, interior or exterior, required to keep the Premises in good condition at all times" has nothing to do with the repair of the sidewalk. It is limited only to the premises itself, not the public sidewalk. Moreover, it is clear from the additional terms "structural and nonstructural" that the repairs contemplated relate only to the premises building itself, as such terms make no sense with respect to a sidewalk.

The only responsibility of Jamaica Center for Arts for the sidewalk is the requirement in Paragraph 7(B) to "keep clean and free from ice, snow, rubbish and other encumbrances the sidewalks abutting the Premises". This paragraph does not set forth any responsibility for the repair of the sidewalk bricks, but is merely an agreement to clean the sidewalk. The term "encumbrances" must be understood in its contextual setting of keeping the sidewalk clean and free from snow, ice and rubbish and other encumbrances. Taken in such context, the provision requiring Jamaica Center for Arts to "keep clean and free from ice, snow, rubbish and other encumbrances the sidewalks" clearly refers only to removal of snow, ice and refuse, and the plain meaning of "encumbrances" within this context is refuse or material deposited on the sidewalk that would interfere with pedestrian traffic, not a condition of disrepair of the sidewalk itself.

Paragraph 23 of the license agreement is merely an indemnification provision in which Jamaica Center for Arts agrees to indemnify and hold harmless the City from any personal injury or property damage claims arising from the occupancy, use or condition of the premises. It does not impose upon Jamaica Center for Arts

the added obligation to repair the sidewalk.

Thus, there is no contractual duty on the part of Jamaica Center for Arts to repair the sidewalk bricks.

In any event, even if, arguendo, there were a contractual provision in the license agreement with the City to repair the sidewalk, as a general rule, a contractual obligation, standing alone, imposes a duty only in favor of the promisee and specified third-party beneficiaries, establishes only a cause of action for breach of contract, and does not give rise to tort liability in favor of a third party where the alleged harm results from mere inaction (see Eaves Brooks Costume Co. V. Y.B.H. Realty Corp., 76 NY 2d 220 [1990]; Torres v. City of New York, 298 AD 2d 318 [1<sup>st</sup> Dept 2002]). "Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff" (Collado v Cruz, supra, 81 AD 3d 542, 542).

Since Jamaica Center for Arts had no legal duty to plaintiff to repair the subject sidewalk, whether or not it had actual or constructive notice of the condition is irrelevant. Likewise irrelevant is whether or not the condition was open and obvious, which, as counsel for plaintiff and counsel for the City correctly note, merely goes to the issue of comparative negligence, an issue that is not presented in this case since movant bears no duty, and thus no liability, to plaintiff for the condition of the sidewalk, as a matter of law.

Cross-motion by third-party defendant Academic Stone for summary judgment "dismissing plaintiff's complaint against Academic Stone" is denied. Plaintiff has no complaint against Academic Stone. Academic Stone is not a defendant in the action-in-chief.

Accordingly, the action and all cross-claims are dismissed against Jamaica Center for Arts and Learning, and the caption is amended to read as follows:

-----X	
Suzanne Phillips,	Index
	Number: 700044/11
Plaintiff,	

- against -

The City of New York and Jamaica Center  
Improvement Association, Inc.,  
  
Defendants.

-----X  
Jamaica Center Improvement Association,  
Inc.,

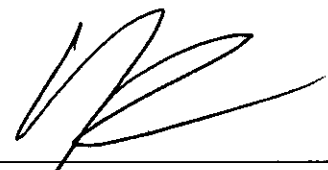
Third-Party Plaintiff,

- against -

Academic Stone,

Third-Party Defendant.  
-----X

Dated: January 13, 2016



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KEVIN J. KERRIGAN, J.S.C.

**FILED**  
JAN 15 2016  
COUNTY CLERK  
QUEENS COUNTY