

**Tevelow v 31 Gramercy Park So. Owners Corp.**

2011 NY Slip Op 32211(U)

July 27, 2011

Sup Ct, NY County

Docket Number: 108910/06

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
*Justice*

PART 5

Index Number : 108910/2006  
TEVELOW, PAUL S.  
VS.  
31 GRAMERCY PARK SOUTH  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT  
Cal #101

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

this motion to/for summary judgment

PAPERS NUMBERED  
1

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

**FILED**  
AUG 11 2011  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 7/27/11

[Signature]  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

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

-----X  
 PAUL S. TEVELOW,

Index No.: 108910/06

Plaintiff,

Mot. Date: 5/24/11

Mot. Seq. Nos.: 005

-against-

**DECISION AND ORDER**

31 GRAMERCY PARK SOUTH OWNERS CORP., THE  
 CITY OF NEW YORK, and GRAMERCY PARK TRUST,

Defendants.  
 -----X

BARBARA JAFFE, J.S.C.:

**For City:**

Lynn M. Leopold, ACC  
 Michael A. Cardozo  
 Corporation Counsel  
 100 Church St., 4<sup>th</sup> Fl  
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 212-442-0398

**For 31 Gramercy:**

Christian Sedereas, Esq.  
 Bates & Baer  
 60 E. 42<sup>nd</sup> St., Ste. 1524  
 New York, NY 10165  
 212-227-1735

By notice of motion dated February 10, 2011, defendant City moves pursuant to CPLR 3211 and/or 3212 for an order dismissing the complaint and all cross claims against it.

Defendant 31 Gramercy Park South Owners Corp. (Gramercy) opposes.

By notice of motion dated February 16, 2011, submitted on default, Gramercy moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross claims against it.

The motions are consolidated for decision.

I. BACKGROUND

On October 12, 2005, plaintiff was allegedly injured when he tripped and fell on a section of tree fencing protruding from a tree well in the sidewalk in front of the building at 31 Gramercy Park South in Manhattan (the premises). (Affirmation of Lynn Leopold, ACC, dated Feb. 10, 2011 [Leopold Aff.], Exh. A). On or about December 15, 2005, plaintiff served City

with a notice of claim. (*Id.*).

On or about May 18, 2006, plaintiff commenced the instant action against defendants City and Gramercy, and on or about August 9, 2006, City served its answer, in which it asserted a cross claim against Gramercy for contribution and/or indemnification. (*Id.*, Exhs. B, C).

At a 50-h hearing held on March 13, 2006, plaintiff testified that at approximately 7:30 pm on October 12, 2005, which was a dark and rainy night, he tripped on a black rod iron fence that was surrounding a tree in the sidewalk in front of the premises. (*Id.*, Exh. D).

On or about December 17, 2007, Gramercy served its answer and asserted a cross claim against City for contribution and/or indemnification. (Affirmation of Christian Sedereas, Esq., dated Feb. 16, 2011 [Sedereas Aff.], Exh. B).

On August 7, 2008, City Department of Transportation (DOT) employee Stacey Williams testified at an examination before trial (EBT) that a fruitless search was conducted of DOT records for any permits, complaints, repair orders, applications for permits, violations, and contracts related to the accident location from October 12, 2003 to October 12, 2005. (Leopold Aff., Exh. E).

The same day, City Department of Parks (Parks) employee William Steyer testified at an EBT that a search was conducted for any Parks records, including complaints or notifications or any activity undertaken by Parks employees or a contractor performing work for City, related to the accident location between October 12, 2003 and October 12, 2005, and that no records were found related to metal fencing surrounding the trees on Gramercy Park South or showing that any permits were requested or obtained by any entity to install the fencing. According to Steyer, although City would not generally install such fencing, it would inspect it if it had issued a

permit to install it or in response to a request or complaint, but no such records were found for the accident location. (*Id.*, Exh. G).

On or about October 7, 2008, plaintiff commenced a separate action against Gramercy Park Trust (Trust), and by stipulation dated October 2, 2009, the two actions were consolidated. (Sedereas Aff., Exh. E).

At an EBT held on August 27, 2009, Dion Harry Fotopoulos, an employee of Gramercy's management company, testified that he was in charge of maintenance of the premises for the past 13 years, that he did not know who had installed the tree guards or fencing around the tree wells in front of the premises, that Gramercy did not take care of the trees outside the premises, and that he had never seen any work or maintenance performed on the tree wells. (*Id.*, Exh. J).

At an EBT held on March 8, 2010, James M. Clark Jr., the chairman of the Trustees of the Trust, testified that the Trust did not plant the trees on the sidewalk outside Gramercy, that to his knowledge no one had complained to the Trust about the trees or tree wells, and that Trust is not responsible for maintaining the trees or tree wells. (*Id.*, Exh. K).

The same day, Patricia G. Clark testified at an EBT that she cleans the premises, that she never saw anyone make repairs to the tree wells in front of the premises, and that while she was working no complaints were made about the sidewalk in front of the premises. (*Id.*, Exh. L).

By decision and order dated August 3, 2010, the complaint and all cross claims were dismissed against the Trust. (*Id.*, Exh. M).

By affidavit dated February 16, 2011, Calvin Skaggs, the board president of Gramercy since 1994, denies that Gramercy owns, operates, maintains or controls the tree well on which plaintiff allegedly tripped, or that it made a special use of it or received any complaints about it.

(*Id.*, Exh. P).

## II. CITY'S MOTION

### A. Contentions

City argues that it may not be held liable for plaintiff's injuries as it received no prior written notice of any defect related to the fencing, nor did it cause or create the defect. (Leopold Aff.).

In opposition, Gramercy asserts that as City and not the abutting landowners are liable for the condition of tree wells in the sidewalk, and that as the identity of the entity which installed the fencing on which plaintiff fell is unknown, City may be held liable, although it concedes that City had no prior notice of the defect. (Affirmation of Christian Sedereas, Esq., dated Feb. 28, 2011).

In reply, City maintains that even if had a duty to maintain tree wells, such duty would not be triggered absent prior written notice of a defect related thereto, and observes that Gramercy concedes that City had received no notice. (Reply Affirmation, dated Mar. 9, 2011).

### B. Analysis

While City may be held liable for any defect related to a tree well located in a City sidewalk (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]), liability may be imposed only upon a showing that City had prior written notice of the defect or caused or created it (*Tucker v City of New York*, 84 AD3d 640 [1<sup>st</sup> Dept 2011]).

"[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City." (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). Where the City establishes a lack of prior written notice of a defect, the burden

shifts to the plaintiff to demonstrate that an exception applies, either that the City affirmatively created the defect through an act of negligence, which requires a showing that work performed by City immediately resulted in the existence of the defect, or that it made a special use of the place where the defect was located. (*Yarborough v City of New York*, 10 NY3d 726 [2008]).

As City submitted evidence showing that it received no prior written notice of any defect associated with the tree well and performed no work on it in the two years prior to plaintiff's accident, it has established, *prima facie*, that it may not be held liable here. (See *Tucker*, 84 AD3d at 644-645 [complaint alleging defect in tree well dismissed against City given "the lack of prior written notice of the alleged defect, and the absence of any evidence that the City created the alleged defect through an affirmative act of negligence or made a special use of the subject tree well"]).

### III. GRAMERCY'S MOTION

Absent any dispute that City and not Gramercy is responsible for maintaining the tree well on which plaintiff fell, and as there is no evidence that Gramercy created the defect, negligently made repairs to the tree well or fencing, or made special use of it, Gramercy has established *prima facie* entitlement to an order dismissing the complaint against it. (See *Fernandez v 707, Inc.*, 85 AD3d 529 [1<sup>st</sup> Dept 2011] [as property owner's duty to maintain sidewalk does not extend to tree wells, it could be held liable only if it created dangerous condition, negligently made repairs to area, or made special use of it]; *Teitelbaum v Crown Heights Assn. for Betterment*, 84 AD3d 935 [2d Dept 2011] [dismissing claim against property owner for injury caused by defect in tree well]).

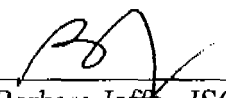
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion to dismiss the complaint and all cross claims against it is granted and the complaint and all cross claims are hereby dismissed, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED, that defendant 31 Gramercy Park South Owners Corp.'s motion to dismiss the complaint and all cross claims against it is granted and the complaint and all cross claims are hereby dismissed, and the Clerk is directed to enter judgment in favor of said defendant.

ENTER:

  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
**JAFFE**  
**J.S.C.**

**FILED**

AUG 11 2011

COUNTY CLERK'S OFFICE  
NEW YORK

DATED: July 27, 2011  
New York, New York

JUL 27 2011

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