

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D12199  
Y/hu

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Argued - September 5, 2006

THOMAS A. ADAMS, J.P.  
GLORIA GOLDSTEIN  
WILLIAM F. MASTRO  
ROBERT A. LIFSON, JJ.

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2004-09729

DECISION & ORDER

Joseph Schimicci, Jr., etc., et al., respondents,  
v City of New York, appellant.

(Index No. 1852/96)

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Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F. X. Hart and Jane L. Gordon of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Stephen C. Glasser, Frank V. Floriani, and Stephanie Hatzakos of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the defendant appeals from an order of the Supreme Court, Kings County (Schmidt, J.), dated September 10, 2004, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The defendant made a prima facie showing of entitlement to judgment as a matter of law on the ground that it never received prior written notice of the alleged street defect at issue in this case. However, contrary to the defendant's contention, the plaintiffs' submissions in opposition to the motion, which included an expert affidavit relying upon photographs and other competent evidence, raised a triable issue of fact with regard to whether the defendant affirmatively created the alleged defect (*see e.g. Ealey v City of New York*, 16 AD3d 543; *Simpson v Tenore & Guglielmo*, 287 AD2d 613). Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment.

October 10, 2006

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The defendant's remaining contentions are without merit.

ADAMS, J.P., GOLDSTEIN, MASTRO and LIFSON, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer  
Clerk of the Court