[* 1]

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

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Index Number : 115471/2002

BERNAS, ROMAN

VS

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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 is decided in accordance with the attached decision.

Dated: 5/11/10

CK

CYNTHIA S. KERN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ 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: Part 52

----------x

ROMAN BERNAS,

Plaintiff,

Index No. 115471/2002

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendant.

----------x

THE CITY OF NEW YORK,

Third Party Plaintiff,

Third Party Index: 590246/06

-against-

PETROCELLI ELECTRICAL, INC,

Third Party Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages for personal injuries that he

allegedly sustained when he tripped and fell while rollerblading in Central Park on April 29, 2002. Defendant Petrocelli Electrical, Inc. ("Petrocelli") now moves for summary judgment dismissing the complaint and any cross-claims against it on the ground that it is not liable because it did not perform any work at the site where the accident allegedly occurred. Defendant City of New York (the "City") moves for summary judgment dismissing the complaint and any cross-claims against it on the ground that it did not have prior written notice of the condition. For the reasons set forth below, the defendants' motions are granted.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). 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 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant case, Petrocelli has established its right to summary judgment because it has produced sufficient evidence to show that it did not perform any work at the site where the accident occurred. While it is undisputed that Petrocelli put in a bid to perform work at that location, there is no evidence that the bid was accepted or that the work was ever performed.

The City has also established that it is entitled to summary judgment because it did not have prior written notice of the condition. It is undisputed that the City is required to have prior written notice of the subject condition pursuant to the prior written notice provisions of § 7-

201(c)(2) of the Administrative Code of the City of New York. That section provides as follows:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Pursuant to § 7-201, a plaintiff is required to both plead prior notice and to prove that the City had prior written notice of the defective condition. Failure to plead compliance with the prior written notice statute requires dismissal of an action against the City. *See Baez v. City of New York*, 236 A.D.2d 305 (1st Dept 1997). Plaintiffs must prove that the City had prior written notice of the specific defect alleged in the complaint. Simply alleging that a roadway is generally neglected or unsafe is not sufficient. *See Belmonte v. Metropolitan Life Ins. Co.*, 304 A.D.2d 471, 474 (1st Dept 2003). Moreover, the Court of Appeals has held that when a Big Apple Map is used to satisfy the prior written notice requirement, the type and location of the defect must be precisely noted on the map. *See D'Onofrio v. City of New York*, 11 N.Y.3d 581 (2008).

Even if the City did not have prior written notice of a defective condition, it can still be held liable for injuries resulting from a condition that it created through an affirmative act of negligence or if the roadway was used for a "special use" which conferred a special benefit upon the City. *See Oboler v. City of New York*, 8 N.Y.3d 888, 889 (2007). If plaintiff claims that the

City caused or created the condition, plaintiff must show that the City created the defect through an affirmative act of negligence "that immediately result[ed] in the existence of a dangerous condition." *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Bielecki v. City of New York*, 14 A.D.3d 301 (1st Dept 2005).

In the instant case, plaintiff did not plead that the City had prior written notice in his notice of claim or complaint. Moreover, the City makes out its prima facie case that it did not receive prior written notice of the defective condition. The City submitted the deposition testimony of Cynthia Howard, who testified that a two year search for records maintained by the Department of Transportation yielded no results for the subject location. The search included permits, applications, correction action reports, notices of violation, inspects, contract information, in-house resurfacing records, maintenance and repair records, complaints, gang sheets and the Big Apple Map. There were no relevant DOT records for the location where plaintiff fell. Furthermore, the Big Apple Map submitted by plaintiff contains no symbols for any defects in the crosswalk at Central Park West and 81st Street.

Moreover, plaintiff fails to raise an issue of triable fact as to whether the City caused or created the condition through an act of affirmative negligence. He does not present any evidence that the City did any work on the road that immediately created the alleged hazard. *See Yarborough*, 10 N.Y.3d 726. Plaintiff argues generally that the City failed to maintain the crosswalk. However, in *Bielicki v. City of New York*, 14 A.D.3d 301 (1st Dept 2005), the Court held that the affirmative negligence exception is limited to work by the City that immediately results in a dangerous condition. Plaintiff also fails to submit any evidence that the City employed the roadway for a "special use."

Accordingly, defendants Petrocelli and City's motions for summary judgment are granted and plaintiff's complaint and any cross-claims are dismissed as against Petrocelli and the City. This constitutes the decision and order of the court.

Dated: 5/11/10

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.