

**Trapanese v City of New York**

2010 NY Slip Op 31279(U)

April 9, 2010

Sup Ct, Richmond County

Docket Number: 102500/07

Judge: Thomas P. Aliotta

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----X  
RICHARD TRAPANESE and ALICE TRAPANESE,

C-2

Plaintiffs,

Present:  
Hon. Thomas P. Aliotta

-against-

**DECISION AND ORDER**

THE CITY OF NEW YORK, S.N. TANNOR, INC.,  
KEYSPAN HOME ENERGY SERVICES, VERIZON  
NEW YORK, INC., LLOYD HUNSDORFER  
PLUMBING AND HEATING, PETROCELLI  
ELECTRIC CO., INC., RICHMOND COUNTY  
SERVICES CORP., LLOYD HUNSDORFER,  
JANINE GREGORIO and RICHMOND  
CONSTRUCTION ASSOCIATES,

Index No. 102500/07

Motion Nos. 2863-002  
4067-003  
4095-004  
108-005

Defendants.  
-----X

The following papers numbered 1 to 12 were fully submitted on the 24<sup>th</sup> day of  
February, 2010:

	<b>Pages Numbered</b>
<b>Notice of Motion for Summary Judgment by Defendant S.N. Tannor, Inc., with Supporting Papers (dated August 8, 2009).....</b>	<b>1</b>
<b>Notice of Cross Motion by Defendant Petrocelli Electric Co., Inc., with Supporting Papers (dated December 11, 2009).....</b>	<b>2</b>
<b>Notice of Cross Motion for Summary Judgment by Defendant Verizon New York Inc., with Supporting Papers (dated December 14, 2009).....</b>	<b>3</b>
<b>Notice of Motion for Summary Judgment by Defendant The City of New York, with Supporting Papers (dated December 15, 2009).....</b>	<b>4</b>
<b>Plaintiffs' Affirmation in Opposition to Motion by Defendant S.N. Tannor, Inc. (dated December 11, 2009).....</b>	<b>5</b>
<b>Plaintiffs' Affirmation in Opposition to Cross Motion by Defendant Petrocelli Electric Co., Inc. (dated December 15, 2009).....</b>	<b>6</b>
<b>Plaintiffs' Affirmation in Opposition to Defendant The City of New York's Motion (dated December 17, 2009).....</b>	<b>7</b>
<b>Plaintiffs' Affirmation in Opposition to Defendant Verizon New York, Inc.'s Cross Motion (dated December 17, 2009).....</b>	<b>8</b>

**TRAPANESE v. CITY**

<b>Reply Affirmation by Defendant Petrocelli Electric Co., Inc., (dated February 18, 2010).....</b>	<b>9</b>
<b>Reply Affirmation by Defendant S.N. Tannor, Inc., (dated February 20, 2010).....</b>	<b>10</b>
<b>Reply Affirmation by Defendant Verizon New York, Inc. (dated February 23, 2010).....</b>	<b>11</b>
<b>Reply Affirmation by Defendant The City of New York (dated February 23, 2010).....</b>	<b>12</b>

---

Upon the foregoing papers, the motion (No. 2863) for summary judgment dismissing the complaint and all cross claims as against defendant S.N. Tannor, Inc. is granted, as are the cross motions (Nos. 4067, 4095 and 108) for like relief of defendants Petrocelli Electric Co., Inc., Verizon New York, Inc, and The City of New York.

In this personal injury action, plaintiff Richard Trapanese alleges that on September 2, 2006 at or about 10:00 p.m., he tripped and fell as a result of a hole in the roadway approximately ten feet from the curb adjacent to the entrance to the parking lot of the Kohl’s Department Store located at 2239 Forest Avenue, Staten Island, New York.

In moving for summary judgment, defendant S.N. Tanner, Inc. (hereinafter, “Tanner”) maintains that there is no evidence that it caused or created the alleged roadway defect at issue. More specifically, this defendant alleges that it did not perform any work at the location of plaintiff’s accident. In support, Tanner cites the deposition testimony of its president, Evan Tanner, who conceded that the company performed certain construction work on Forest Avenue between May 1, 2003 and May 31, 2003 for the installation of traffic signals at the entrance to “Lowe’s”, but that this work, which he personally oversaw, took place approximately 1,000 feet east of the defect depicted in plaintiffs’ photograph of the accident site. In this regard, Tanner points out that Lowe’s is located at 2171 Forest Avenue, and that plaintiff claims to have fallen at the entrance to Kohl’s parking lot located at 2239 Forest Avenue.

In view of the foregoing, it is the Court’s opinion that defendant Tanner has established

**TRAPANESE v. CITY**

its prima facie entitlement to summary judgment based upon the undisputed evidence that this defendant performed no work at the location of the subject accident. Also relevant in this regard is the deposition testimony of the injured plaintiff, who stated that (1) although Kohl's and Lowe's were located at "opposite side[s]" of a shared parking lot, each store had a separate entrance, and (2) the defect at issue was located in the roadway at the entrance to Kohl's, which, unlike the entrance to Lowe's, *was not* controlled by a traffic light. Hence, there are no material issues of fact as to this defendant which would require a trial.

In cross-moving for summary judgment, defendant Verizon New York, Inc. (hereinafter, "Verizon") maintains, in accordance with the deposition testimony of its project manager, James McCue, that it did not perform any work at the location of plaintiff's accident as well. According to this witness, a certain street opening permit issued to Verizon for the period from June 30, 2004 to July 29, 2004 related to a project which involved "the placement of approximately four foot [sic] of conduit from a manhole to a pole, on Forest Avenue and Mersereau [Avenue]." Mr. McCue further noted that Verizon's permit identified the "specific location" of the site of its work to be Forest Avenue between Mersereau Avenue and Grandview Avenue. Finally, the witness testified that he was present at the completion of this project; that Verizon's excavation in relation to the roadway defect depicted in plaintiffs' photographs was farther to the left of the area where plaintiff claims to have fallen; and that said excavation ran for a distance of "four feet along the curblin."

Here, too, it is the opinion of this Court that Verizon has established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not perform any work at the specific location of plaintiff's accident. In opposition, plaintiffs' attempt to raise a triable issue of fact by misconstruing the deposition testimony of Verizon's witness is of no avail.

Defendant Petrocelli Electric Co., Inc. (hereinafter, "Petrocelli") has also cross-moved for summary judgment on the ground that a search of its records, street opening permits and corresponding "cut forms" reveal that the only work which it performed in the vicinity of plaintiff's accident took place in 2004 and 2005 for the purpose of installing traffic signals at

**TRAPANESE v. CITY**

the *intersection* of Forest Avenue and Grandview Avenue. In support, Petrocelli relies upon the deposition testimony of its director of outside installations, David Ferguson, who admittedly did not “visit the area where the accident allegedly occurred”, but described the specific lengths and locations of each of Petrocelli’s excavations based upon his interpretation of the cut forms, prepared daily as required by the New York City Department of Transportation Bureau of Highways. Pertinently, Petrocelli points out that the injured plaintiff has conceded that the roadway defect at issue was located near the entrance to Kohl’s, which was *not* controlled by a traffic signal.

In view of the foregoing, defendant Petrocelli has also demonstrated its prima facie right to summary judgment, and plaintiff has again failed to raise a triable issue of fact.

Finally, the City of New York (hereinafter, “City”) moves for summary judgment on the ground that plaintiffs have failed to comply with the prior written notice requirement of §7-201 of the New York City Administrative Code, more commonly known as the “pothole law”. In support, the City relies upon the deposition testimony of Abraham Lopez, a record searcher employed by its Department of Transportation (hereinafter, “DOT”), who interpreted the results of a DOT roadway search that was conducted relative to the subject location on Forest Avenue for the two year period preceding the date of plaintiff’s accident. According to this witness, the search disclosed nine “street opening permits” and one repair order/“FITS” report. With regard to the latter, Mr. Lopez testified that a complaint was reported to DOT on October 18, 2004 by the Staten Island Borough Office regarding a pothole in front of 2232 Forest Avenue between Grandview Avenue and Samuel Place, but that the relevant FITS report indicates that a DOT maintenance crew “went out” and “closed [that] defect” on November 12, 2004, nearly two years prior to the events underlying the complaint. Mr. Lopez also testified that a second similar search was conducted by DOT’s map unit, which generated the “Big Apple” maps. According to the City, since Big Apple maps reported only defects in sidewalks, curbs and pedestrian crosswalks, any indication thereon does not constitute prior written notice of the roadway defect which forms the crux of plaintiffs’ case.

Here, again, this Court is of the opinion that the City has established its prima facie

**TRAPANESE v. CITY**

entitlement to judgment as a matter of law by demonstrating that it did not have prior written notice of the alleged roadway defect as required by §7-201 of the New York City Administrative Code (*see* Marshall v City of New York, 52 AD3d 586, 586). In opposition, plaintiffs have failed to raise a triable issue of fact. Contrary to plaintiffs' contention, the issuance of a street excavation permit is insufficient as a matter of law to provide the requisite prior written notice (*see* DeSilva v City of New York, 15 AD3d 252, 253; Meltzer v City of New York, 156 AD2d 124, 124), as are repair orders or FITS reports reflecting the repair of a specific defect prior to the accident date (*see* Lopez v Gonzalez, 44 AD3d 1012, 1012-1013; Akcelik v Town of Islip, 38 AD3d 483, 484; Khemraj v City of New York, 37 AD3d 419, 420). Particularly relevant in this regard is the fact that the FITS report refers to a pothole located at 2232 Forest Avenue, on the opposite side of the street from the alleged accident site at 2239 Forest Avenue. As for the marking on the Big Apple map upon which plaintiff purports to rely, the "legend" indicates that a vertical line represents an "extended section of raised or uneven sidewalk", which is not the defect alleged to have caused plaintiff's injury (*see* Ortiz v City of New York, 67 AD3d 21, 29). Finally, no exception to the prior written notice requirement has been alleged.

Accordingly, it is

ORDERED, that the motion and cross motions for summary judgment dismissing the complaint and all cross claims as against defendants S.N. Tannor, Inc., Petrocelli Electric Co., Inc., Verizon New York, Inc. and The City of New York are granted, and the complaint and any cross claims against these defendants are severed and dismissed; and it is further

ORDERED, that the Clerk enter judgment and correct his records to reflect this disposition; and it is further

TRAPANESE v. CITY

ORDERED, that the caption of this matter shall be amended to delete the names of the moving and cross-moving defendants.

E N T E R,

Dated: April 9, 2010

/S/\_\_\_\_\_  
Hon. Thomas P. Aliotta  
J.S.C.