

Attwood v County of Westchester
2020 NY Slip Op 34800(U)
May 18, 2020
Supreme Court, Westchester County
Docket Number: Index No. 67642/2018
Judge: James W. Hubert
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
DAWN ATTWOOD,

Plaintiff,

-against-

THE COUNTY OF WESTCHESTER, CITY OF
NEW ROCHELLE and RAYMOND JONES,

Defendants.
-----X

Hubert, J.S.C.

**DECISION & ORDER ON
SUMMARY JUDGMENT
MOTIONS**

Motion Seqs. 5, 6 & 7

Index No. 67642/2018

The following papers were read on Motion Sequence 5, a motion filed by Defendant City of New Rochelle (“the City”) seeking an Order pursuant to CPLR § 3212 granting summary judgment dismissing Plaintiff’s complaint and all cross-claims asserted against it:

- Notice of Motion - Affirmation in Support - Exhibits A-I; Memorandum of Law in Support Affirmation in Opposition (Owens) - Affidavit of Service
- Affirmation in Reply (Powers) - Exhibits J-M
- NYSCEF File

The following papers were read on Motion Sequence 6, a motion filed by Plaintiff seeking an Order precluding the City from asserting as a defense that it did not cause or create the dangerous condition at issue, and for sanctions against the City for the spoliation of evidence:

- Notice of Cross-Motion - Affirmation in Support - Exhibits A-G - Affidavit of Service - Affirmation in Opposition (Powers)
- NYSCEF File

The following papers were read on Motion Sequence 7, a cross-motion filed by Defendant Raymond Jones i/s/h/a Raymond James (“Jones”) for an Order pursuant to CPLR § 3212 granting summary judgment dismissing Plaintiff’s complaint and all cross-claims asserted against him; denying the City’s motion for summary judgment; precluding the City from asserting as a defense that it did not cause or create the dangerous condition at issue; and for sanctions against the City for the spoliation of evidence:

Notice of Cross-Motion - Affirmation in Support & in Opposition to City of New Rochelle’s motion for SJ (Greisman)- Exhibits A-H
Affirmation in Opposition (Owens) - Affidavit of Service
Affirmation in Opposition (Powers)
NYSCEF File

Upon the foregoing papers, the motions are disposed of as follows:

Background

This action was commenced by Plaintiff Dawn Attwood to recover damages for personal injuries she allegedly sustained on July 23, 2017. Plaintiff alleges that she was out jogging on that date when she tripped on a metal spike protruding from a small grassy area adjacent to the sidewalk along Webster Avenue near Whitfield Terrace in New Rochelle, New York. Plaintiff states that after tripping over the spike, she fell onto the sidewalk and was unable to get up. A pedestrian assisted her and called 911. Plaintiff was transported by ambulance to the hospital, where she was treated for injuries to her right elbow and hand.

Plaintiff filed a Notice of Claim, which the City received on or about October 17, 2017. Upon receiving the notice, John O’Keefe, the City’s Manager of Streets and Highways, went to inspect the location where Plaintiff allegedly fell and found “what appeared to be a spike and old

anchor” protruding several inches from the ground. O’Keefe took a photograph of the metal spike and directed a City employee to come to the location to remove it. At some point thereafter, the City discarded the spike, before the parties had an opportunity to inspect or examine it. However, Plaintiff preserved photographs of the metal spike taken at the time of her accident. These photographs, attached to her notice of claim, depict a utility pole at the very corner of the subject property; a sign reading “No Standing at any Time” along Webster Avenue near the corner; a solid, metal rod in the grassy area along Webster Avenue protruding from the ground; and cables attached to a utility pole that are anchored to the ground along Whitfield Terrace.

Plaintiff commenced this action on October 19, 2018, against the County of Westchester, the City of New Rochelle, and Raymond Jones, the owner of the property where Plaintiff allegedly fell. The complaint alleges that Defendants were negligent in failing to maintain the sidewalk apron abutting the public sidewalk adjacent to 668 Webster Avenue area in a reasonably safe condition and creating and/or allowing a dangerous and defective condition to exist, and failing to properly remove and/or repair the dangerous condition or place warnings in the area.

Issue was joined by the service of a verified answer by Defendant Jones on December 11, 2018. The City filed its answer on May 8, 2019. By Decision & Order dated May 6, 2019, the Hon. John P. Colangelo dismissed all claims against the County of Westchester. The parties subsequently filed non-substantive motions, and the instant summary judgment motions followed.

The standard for granting summary judgment is well established. In order to make a *prima facie* showing of entitlement to judgment as a matter of law, the moving party must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). The parties' competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, that there are disputed issues of material facts for trial. CPLR § 3212 (b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or contentions that are not credible. However, if the moving party fails to sustain its burden, the court need not address the adequacy or sufficiency of the opposing party's proof. *Grant v. 132 W. 125 Co., LLC*, 180 A.D.3d 1005, 2020 N.Y. Slip. Op. 01328 (2d Dep't 2020).

In Motion Sequence No. 5, the City moves for summary judgment dismissing the complaint and any cross-claims asserted against it on the grounds that it lacked prior written notice of the dangerous condition that allegedly caused Plaintiff to fall.

The law requires all municipalities to maintain their streets in a reasonably safe condition. However, since municipalities are not aware of every dangerous condition on public streets and walkways, the law imposes liability only for those defects or hazardous conditions of which the municipality has actual knowledge. *San Marco v. Village/Town of Mount Kisco*, 16 N.Y.3d 111, 919 N.Y.S.2d 459 (2010).

Accordingly, where a municipality has enacted a prior written notice law, it generally cannot be held liable for injuries caused by a dangerous condition or defect which comes within the ambit of the law unless it has received prior written notice of the defect. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, 693 N.Y.S.2d 77 (1999)(post from missing stop sign raised above sidewalk encompassed by Buffalo’s prior written notice law); *Poirier v. City of Schenectady*, 85 N.Y.2d 310, 624 N.Y.S.2d 555 (1995)(signpost anchor protruding above sidewalk constituted an obstructed condition requiring prior written notice in negligence action against the city); *Murphy v. Brown*, 178 A.D.3d 832, 111 N.Y.S.3d 869 (2d Dep’t 2019).

Prior written notice statutes are strictly construed. The requirement of prior written notice is not a procedural requirement, or an affirmative defense, but a substantive element of a plaintiff’s cause of action. *Cipriano v. City of New York*, 96 A.D.2d 817, 465 N.Y.S.2d 564 (2d Dep’t 1983). There are only two exceptions to a statutory rule requiring prior written notice: (1) where the municipality created the defect or hazard through an affirmative act of negligence; or (2) where a “special use” confers a special benefit upon the locality. *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, 693 N.Y.S.2d 77; *Oboler v. City of New York*, 8 N.Y.3d 888, 832 N.Y.S.2d 871 (2007). Thus, where a municipality demonstrates that it lacked prior written notice, the burden generally shifts to the plaintiff to demonstrate the applicability of one of these exceptions. *Yarborough v. City of New York*, 10 N.Y.3d 726, 728, 853 N.Y.S.2d 261 (2008)(citation omitted).

Additionally, “the affirmative negligence exception . . . is limited to work by the City that *immediately* results in the existence of a dangerous condition.” *Oboler v. City of New York*, 8 N.Y.3d 888, 889, 832 N.Y.S.2d 871 (2007), *citing Bielicki v. City of New York*, 14 A.D.3d 301

(1st Dep't 2005); *see also Hanley v. City of New York*, 139 A.D.3d 800, 32 N.Y.S.3d 261 (2d Dep't 2016). This extends to situations where “a hazard was foreseeable, insofar as the municipality created it by, for example, digging an unmarked ditch in a road or neglecting to cover a street drain.” *San Marco v. Village/Town of Mount Kisco*, 16 N.Y.3d 111, 117, 919 N.Y.S.2d 459 (2010).

Here, the City argues that summary judgment is warranted because it lacked prior written notice of the metal spike that allegedly caused Plaintiff to trip and fall, as required by Article XII, Section 127A, of the New Rochelle City Charter. That section provides that:

No civil action shall be maintained against the city for damages or injuries to person or property sustained in consequence of any street, highway, trees, bridge, culvert, sanitary sewer or storm drains, sidewalk or crosswalk or any other public place being defective, out of repair, unsafe, dangerous or obstructed, or in consequence of the existence of snow or ice thereon, unless written notice thereof, specifying the particular place, had actually been given to the Commissioner of Public Works prior to the happening of the event causing such damage or injury to person or property, and there was a failure or neglect by the city to repair or remove the defect, danger or obstruction or to cause the snow or ice to be removed or the specified place to be made reasonably safe within a reasonable time after the receipt of notice relating to it.¹

¹The parties do not address whether the grassy area in question is part of the sidewalk for purposes of the ordinance. However, “both by statute and case law, the strip of grass between the sidewalk and roadway is part of the sidewalk.” *Malone v. Town of Southold*, 303 A.D.2d 651, 652, 757 N.Y.S.2d 85 (2d Dep't 2003); *Oliveri v. Village of Greenport*, 93 A.D.3d 773, 940 N.Y.S.2d 675 (2d Dep't 2012); *Gallo v. Hempstead*, 124 A.D.2d 700, 508 N.Y.S.2d 212 (2d Dep't 1986).

In support of its argument that it lacked prior written notice, the City has submitted the deposition testimony of John O’Keefe. O’Keefe testified that as the City’s Manager of Streets and Highways, he personally conducted a search of the “Prior Written Notice” log books which contain notices and complaints made about property conditions in New Rochelle. His search encompassed the time period from 2013 through June 23, 2017, the date of Plaintiff’s accident. O’Keefe stated that based on his review of these records, the City had not received any reports or complaints about a metal spike at the location where Plaintiff’s accident allegedly occurred during that time period.

The City has also submitted an affidavit from James Moran, who holds positions as New Rochelle’s Deputy Commissioner of the Department of Public Works and City Engineer. Moran states that he searched the records maintained by the Department of Public Works that contain prior written notices. He also searched files maintained for every City-owned street and a block and lot file. Moran states that upon reviewing these sources, he determined that there are no records of the City ever having received written notice of a defective or dangerous condition in front of 668 Webster Avenue between the curb and sidewalk where Plaintiff’s accident allegedly occurred. Moran further states that “there are no records of permits, logs, work orders or reports in connection with the grassy area between the curb and sidewalk adjacent to the premises located at 668 Webster Avenue, New Rochelle, New York prior to July 23, 2017.”

Based on these submissions, the Court finds that the City has established, *prima facie*, its entitlement to judgment as a matter of law based on the lack of prior written notice of the dangerous condition, as required by Article XII, Section 127A, of the New Rochelle City Charter.

In opposition, Plaintiff argues that O’Keefe arbitrarily limited his search for prior written notices to the five years prior to Plaintiff’s accident, instead of searching all documents maintained by the City. However, the Courts routinely uphold searches for prior written notice spanning a five-year time period, and in some cases shorter time periods. *See Walker v. County of Nassau*, 147 A.D.3d 806, 46 N.Y.S.3d 647 (2d Dep’t 2017)(County established *prima facie* case for summary judgment through search of records covering five-year period prior to Plaintiff’s accident); *Fisher v. Town of N. Hempstead*, 134 A.D.3d 670, 20 N.Y.S.3d 167 (2d Dep’t 2015)(Town established *prima facie* entitlement to summary judgment based on search of records covering five-year period prior to Plaintiff’s accident); *Pallotta v. City of New York*, 121 A.D.3d 656, 993 N.Y.S.2d 726 (2d Dep’t 2014)(search by City of records covering two-year period prior to Plaintiff’s accident sufficient to establish *prima facie* entitlement to summary judgment); *Foley v. County of Suffolk*, 80 A.D.3d 658, 915 N.Y.S.2d 157 (2d Dep’t 2011)(search of town records for three years prior to accident sufficient); *Elstein v. City of New York*, 209 A.D.2d 186, 618 N.Y.S.2d 528 (1st Dep’t 1994)(City entitled to summary judgment based on proof that it lacked prior written notice of alleged defective condition or records of work, construction or repair in two-year period prior to incident).

Plaintiff further argues that the City failed to establish a *prima facie* case for summary judgment because it did not establish that it hadn’t affirmatively created the dangerous condition that caused her accident.

As noted above, in the absence of prior written notice, a plaintiff must generally demonstrate that the municipality caused or created the dangerous condition in order to defeat a summary judgment motion. However, “the *prima facie* showing which a defendant must make

on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings.” *Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 214, 905 N.Y.S.2d 226 (2d Dep’t 2010). Thus, if a complaint or a plaintiff’s bill of particulars alleges specific acts of affirmative negligence by the defendant municipality, the defendant must demonstrate both its lack of prior written notice and the absence of triable issues of fact as to whether it created the dangerous condition in order to establish a *prima facie* case on summary judgment. *See, e.g., Murphy v. Brown*, 178 A.D.3d 832, 111 N.Y.S.3d 869 (2d Dep’t 2019)(where plaintiff’s pleading alleged that Town created a dangerous condition, the Town was required to demonstrate both that it lacked prior written notice and did not create the alleged defect); *Eisenberg v. Town of Clarkstown*, 172 A.D.3d 683, 99 N.Y.S.3d 394 (2d Dep’t 2019)(since plaintiff alleged that defendant created an allegedly dangerous ice condition through its snow removal operations, defendant was required to make a *prima facie* showing that it lacked prior written notice and did not create a dangerous condition).

Here, neither the complaint nor Plaintiff’s bill of particulars allege any specific acts of affirmative negligence on the part of the City. The complaint alleges that “the subject location was left by the defendants, and/or created by the defendants, to be in an unreasonably raised, unreasonably dangerous and defective condition, to wit: a hidden and obscured metal stake/pole/object. . . was permitted to be partially embedded in the ground in and about the area where the subject incident occurred.” The complaint further alleges that Defendants failed to properly and reasonably remove and/or repair the dangerous condition(s). Similarly, Plaintiff’s bill of particulars states that the City was negligent “in causing, permitting and allowing a trap, hazard and nuisance to be and exist for an excessive and unreasonable period of time” and “in

failing to remove the protruding metal spike; in removing the metal spike in a negligent manner so as to create a defective and dangerous condition; in allowing the location to be, become and remain in a dangerous and defective condition.”

In the Court’s opinion, these allegations do not expressly set forth acts of affirmative negligence so as to place the burden on the City to establish that it did not cause or create the dangerous condition. However, even assuming that Plaintiff pleaded sufficient facts, the Court finds that the City has nevertheless established, *prima facie*, that the affirmative negligence exception does not apply.

As discussed above, the affidavit of James Moran states that he personally reviewed records maintained by the City and determined that there were no records of any permits, logs, work orders or reports pertaining to the grassy area between the curb and sidewalk adjacent to the premises at 668 Webster Avenue where Plaintiff allegedly fell. The Court also notes that according to John O’Keefe’s deposition testimony, he believed that the metal spike appeared to be an old anchor for a ConEd cable wire. In any event, Moran’s affidavit is sufficient to establish that the City performed no repair work, construction or other work that created the alleged condition through an affirmative act of negligence.

Plaintiff argues that she cannot demonstrate that the City affirmatively created the dangerous condition because the City discarded the metal spike. However, the affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition. *Oboler v. City of New York*, 8 N.Y.3d 888, 889, 832 N.Y.S.2d 871; *Liverpool v. City of New York*, 163 A.D.3d 790, 83 N.Y.S.3d 64 (2d Dep’t 2018). Plaintiff must therefore show that the City performed repairs, construction or some other affirmative act that

“immediately” resulted in a dangerous condition. While the City had the obligation to preserve the metal spike, Plaintiff has not shown that the City’s disposal of the spike fatally affected Plaintiff’s ability to prove an affirmative act of negligence. *See, e.g., Harvish v. City of Saratoga Springs*, 172 A.D.3d 1503, 99 N.Y.S.3d 472, 474 (3d Dep’t 2019)(holding that municipality was entitled to summary judgment where proof established that it lacked prior written notice of missing traffic sign or protruding metal anchor protruding from sidewalk, which caused Plaintiff to trip and fall, since plaintiff failed to present any proof that defendant performed any work immediately resulting in the detachment of the sign and sign pole from its anchor); *Brown v. City of New York*, 150 A.D.3d 615, 56 N.Y.S.3d 67 (1st Dep’t 2017)(affirming summary judgment where plaintiff tripped and fell over the stump of a sign pole protruding from the sidewalk, since plaintiff’s contention that City affirmatively created the condition by removing the sign from the sleeve was unsupported by any evidence, and the sign was last repaired two years prior to plaintiff’s accident).

Notwithstanding the photographs of the metal spike, some taken on the date of her accident, Plaintiff has submitted no evidence, expert or otherwise, raising a triable issue of fact as to whether the City created or caused the condition. *See, e.g., Cabrera v. City of New York*, 21 A.D.3d 1047, 1048, 803 N.Y.S.2d 584 (2d Dep’t 2005)(triable issue of fact precluding summary judgment where plaintiff allegedly tripped and fell on a metal pipe protruding from the ground where City had no prior written notice, but a City employee testified at his deposition that the City performed construction work in the area where plaintiff fell, and records indicated that the City removed a pole from the ground prior to plaintiff’s accident); *Mayer v. Town of Brookhaven*, 266 A.D.2d 360, 698 N.Y.S.2d 312, 313 (2d Dep’t 1999)(defendant/town did not

have prior written notice as required by local statute, but there was evidence that the town performed repair work at the exact site of the accident, raising a triable issue of fact as to whether defendants were actively negligent in creating the dangerous condition); *also see Ahern v. City of Syracuse*, 150 A.D.3d 1670, 53 N.Y.S.3d 787 (4th Dep't 2017)(evidence that plaintiff was familiar with condition of the walk and curb before and after excavation work had been performed by defendant, and noticed that the curb had been damaged immediately after construction fencing had been removed, sufficient to raise issue of fact as to whether defendant's affirmative act of negligence immediately resulted in the existence of a dangerous condition).

Plaintiff contends that “[t]here are any number of potential scenarios wherein a spike could have ended up in the area in question.” In support of this contention, Plaintiff relies on various images derived from Google maps, presumably from satellite imagery, allegedly captured in October 2007, May 2012, and May 2016.² Plaintiff states that these images demonstrate that a curb cut was made to the corner of the sidewalk, and “[a]s this sidewalk belongs to the City, and the work unquestionably was done by the City, there is a question as to whether that work may have caused or created the condition in question.”

The submission of evidentiary proof on a summary judgment motion must be in admissible form. *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067-68, 416 N.Y.S.2d 790 (1979). Unauthenticated photographs or images are not admissible. *Burns v. City of Poughkeepsie*, 293 A.D.2d 435, 739 N.Y.S.2d 458 (2d Dep't 2002)(unauthenticated photographs of depressed asphalt submitted by plaintiff to show that the city created the defect, are not admissible evidence); *Gutierrez v. Cohen*, 227 A.D.2d 447, 643 N.Y.S.2d 121, 122 (2d

²The images are contained in Exhibit G to Plaintiff's attorney's affirmation on Motion Seq. 6.

Dep't 1996)(same); *Charlip v. City of New York*, 249 A.D.2d 432, 671 N.Y.S.2d 502 (2d Dep't 1998)(unauthenticated photographs do not constitute evidentiary proof in admissible form so as to raise a triable issue of fact as to negligent repairs. Here, Plaintiff's submission of unauthenticated satellite images derived from the internet do not constitute evidentiary proof in admissible form.

Even assuming, *arguendo*, that Plaintiff's photographs were admissible proof, her argument fails for several reasons. First, Plaintiff does not allege that she fell due to a dangerous or defective condition of the sidewalk curb that is depicted in the images, but rather on the grassy area adjacent to the sidewalk, as depicted in the photographs attached to her notice of claim. *See* NYSCEF Doc. No. 5. Second, only changes to the corner curb appear to be reflected in Plaintiff's submissions. The utility pole on the corner, the street sign on Webster Avenue, and the wire extending from the ground to the utility pole where Plaintiff allegedly fell all appear to be essentially unchanged, at least since 2007, eleven years prior to her accident.

The assertion by Plaintiff's attorney's that "[m]etal spikes are commonly used in creating form for the pouring of concrete" is not supported by any evidence in the record. Mere speculation and unsubstantiated allegations do not raise triable issues of fact. *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 693 N.Y.S.2d 67 (1999), *citing Zuckerman v. City of New York*, 49 N.Y.2d at 562; *Pena v. City of Yonkers*, 82 A.D.3d 728, 917 N.Y.S.2d 903 (2d Dep't 2011)(plaintiff, who fell on piece of metal protruding from sidewalk, failed to raise triable issue as she only offered speculation that defendant created the defect); *Cordova v. Vinueza*, 20 A.D.3d 445, 798 N.Y.S.2d 519 (2d Dep't 2005)(attorney's affirmation, unsupported by any evidence that metal protrusions were from a pre-existing fence that was negligently removed

from the defendants' premises, insufficient to raise triable issue of fact); *Hall v. City of Syracuse*, 275 A.D.2d 1023, 713 N.Y.S.2d 384 (4th Dep't 2000)(speculation that the City created the allegedly dangerous condition is insufficient to defeat a summary judgment motion). Moreover, an affirmation of an attorney who lacks personal knowledge of the facts is of no probative value. *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980).

Intertwined with the City's motion is Plaintiff's cross-motion for an Order precluding the City from asserting as a defense that it did not cause or create the subject condition, since it disposed of the metal spike, despite having received Plaintiff's notice of claim. "Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence." *Morales v. City of New York*, 130 A.D.3d 792, 793, 13 N.Y.S3d 548 (2015); CPLR § 3126. The party requesting sanctions for spoliation of evidence must demonstrate that a party has intentionally or negligently disposed of critical evidence and has thereby "fatally compromised its ability" to prove a claim or defense. *Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 A.D.3d 717, 718, 872 N.Y.S.2d 166 (2d Dep't 2009), quoting *Lawson v. Aspen Ford, Inc.*, 15 A.D.3d 628, 629, 791 N.Y.S.2d 119 (2d Dep't 2005).

In this case, the City clearly had an obligation to preserve the metal spike. Plaintiff states that she has been "extremely prejudiced in her ability to prove a prima-facie case against the City of New Rochelle now that this evidence has been disposed of," yet fails to explain in any detail how her ability to prove that the City performed any work at the subject location, creating an affirmative act of negligence, has been "fatally compromised."

"When a municipal corporation does some affirmative act which causes the injury or which sets in motion a chain of events leading to the injury, the municipality is liable for

affirmative negligence because it has created a new risk of harm to the plaintiff.” *Pittel v. Town of Hempstead*, 154 A.D.2d 581, 546 N.Y.S.2d 411 (2d Dep’t 1989)(internal citations and quotations omitted); *see also* PJI 2:225.A.1 (“[a]n unsafe condition is caused by an affirmative act if it is produced by some specific action of the municipality, such as the construction or repair of the roadway or installation of a traffic sign. The failure of [defendant] to repair an unsafe condition caused by traffic or weather conditions or erosion or by someone other than [defendant] is not an affirmative act”). Here, the preservation of the metal spike would not have proved, in and of itself, that the City engaged in an “affirmative act” of negligence.

Additionally, Courts “possess broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action.” *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 551, 26 N.Y.S.3d 218 (2015). “[S]triking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct” and therefore the courts must “consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness.” *Iannucci v. Rose*, 8 A.D.3d 437, 438, 778 N.Y.S.2d 525 (2d Dep’t 2004). “When the moving party is still able to establish or defend a case, a less severe sanction is appropriate.” *Morales v. City of New York*, 13 N.Y.S.3d 548, 130 A.D.3d 792 (2d Dep’t 2015).

In any event, the Court finds that the City has established, *prima facie*, that it did not have prior written notice of the metal spike protruding from the ground, and did not create that

condition through any affirmative act of negligence. In opposition, Plaintiff has failed to submit proof in admissible form raising a triable issue of fact as to whether an exception to the prior written notice requirement applies. *See Gutierrez v. Cohen*, 227 A.D.2d 447, 643 N.Y.S.2d 121 (2d Dep't 1996). The City's motion for summary judgment is therefore granted.

In Motion Sequence No. 7, Raymond Jones cross-moves for an Order pursuant to CPLR § 3212 granting summary judgment dismissing Plaintiff's complaint and any cross-claims asserted against him, denying the City's motion for summary judgment, and precluding the City from asserting that it did not cause or create the dangerous condition based on spoliation of evidence. By stipulation filed on today's date, Plaintiff has discontinued all claims against Defendant Jones. Accordingly, this motion is moot.

For the foregoing reasons, it is hereby:

ORDERED that Motion Sequence Number 5; the City's motion for summary judgment dismissing the complaint and all cross-claims asserted against it, is granted; and it is further

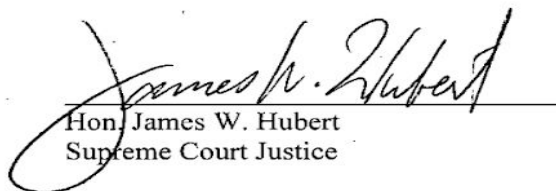
ORDERED that Motion Sequence Number 6 is denied; and it is further

ORDERED, that Cross-Motion Sequence Number 7 is denied as moot; and it is further

ORDERED, that the City shall serve a copy of this Decision & Order, with notice of entry, upon all parties within five (5) days of entry.

The foregoing constitutes the Decision & Order of the Court.

Dated: White Plains, New York
May 18, 2020


Hon. James W. Hubert
Supreme Court Justice