SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

WIESLAW KOWALCZYK,

Plaintiffs,

- v -

TIME WARNER ENTERTAINMENT COMPANY, L.P., TIME WARNER CABLE OF NEW YORK CITY, AS A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY L.P., AND THE CITY OF NEW YORK,

Respondents.

INDEX NO. 100176/2005

MOTION DATE _____

MOTION SEQ. NO. 6

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answer — Affidavits — Exhibits	4, 5
Replying Affidavits	6

Cross-Motion: Yes X No

Plaintiff brings the instant action to recover for injuries allegedly sustained on December 4, 2003, at approximately 10:45 p.m. when he allegedly tripped and fell on a piece of a metal vault on the sidewalk near the corner of Madison Avenue and East 91st Street, in New York, NY. Defendants Time Warner Entertainment Company, L.P., and Time Warner Cable of New York City, as a division of Time Warner Cable Entertainment Company, L.P. (collectively, "Time Warner Cable"), now move for summary judgment on all of Plaintiff's claims and cross-claims pursuant to CPLR §3212. The City of New York ("the City") cross-moves for summary judgment.

After oral argument, on May 15, 2013, the Honorable Margaret Chan granted the City's motion for summary judgment. However, she stated that "[t]he remainder of the motions for summary judgment by co-defendant Time Warner and opposed by Plaintiff, shall be transferred to another Justice of the Court, as the City is no longer a party here." Accordingly, only Time Warner's motion for

summary judgment remains outstanding.

Plaintiff was a porter for Weinreb Management, the management company for the building known as 46 East 91st Street, New York, NY, where he worked for over 22 years. Plaintiff alleges that on December 4, 2003, at approximately 10:45 p.m., he was cleaning the sidewalk in front of the premises with a hose, when he tripped and fell on a metal sidewalk vault which was protruding from the sidewalk. It is undisputed that Time Warner owns the subject sidewalk vault where Plaintiff allegedly tripped. Victor Flores, on behalf of Time Warner, testified that all cable boxes and vaults installed within the sidewalk in Manhattan were owned by Time Warner.

Plaintiff brings causes of action against Time Warner for negligence in the "ownership, operation, management, supervision, maintenance and control of the aforesaid premises."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. (*CPLR §3212*). That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the *case. (See, Royal v. Brooklyn Union Gas Company*, 122 A.D.2d 132, 504 N.Y.S.2d 519 [2nd Dept 1986]). Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the *issue. (See, CPLR §3212 [b]; Bachrach v. Farbenfabriken Bayer et al.,* 36 N.Y.2D 696, 325 N.E.2d 872 [1975]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 257 N.E.2d 890, 309 N.Y.S.2d 341 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 538 N.Y.S.2d 249 [1st Dept. 1989]).

34 RCNY §2-07, which governs the maintenance and repair of sidewalk grates, places maintenance and repair responsibilities on the owners of covers or gratings. 34 RCNY §2-07(b)(1) states that "[t]he owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware." Further, 34 RCNY §2-07(b)(2) requires that "[t]he owners of covers or gratings

shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."

Although Admin Code §7-210 generally imposes liability for injuries resulting from negligent sidewalk repair on the abutting property owners, 34 RCNY §2-07 places the responsibility for upkeep and maintenance of a sidewalk grate on the owner of the grate. (*Storper v. Kobe Club*, 76 AD3d 426 [1st Dept 2010]). Thus, where as here, Time Warner owns the cover or grate, they are responsible for replacing or repairing any cover or grating found to be defective. (*Id.*)

Defendant has the initial burden of showing that it neither created the allegedly hazardous condition nor had actual or constructive notice of its existence. (*See, Resto v. 798 Realty, LLC,* 28 AD3d 388 [2006]). To meet that burden, defendant must offer some evidence as to when the area was last inspected relative to the accident. "Constructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit a defendant to discover it and take corrective action." (*Boyko v. Limowski*, 223 A.D.2d 962, 636 N.Y.S.2d 901 [1996]). Proof of regular inspections and maintenance of the area in question including an inspection and any remedial action just prior to the incident is ordinarily sufficient to satisfy a defendant's burden of showing no notice of a dangerous condition. (*See, Tucci v. Stewart's Ice Cream Co.*, 296 A.D.2d 650, 746 N.Y.S.2d 60 [2002]).

In support of its motion, Time Warner Cable provides: the amended verified complaint; Time Warner's verified answer; the verified bill of particulars; the affidavit of James Yandoli, Director of Construction for Time Warner Cable in New York County; the deposition testimony of Plaintiff; the deposition testimony of Nalik Zeigler and Cynthia Howard, record searchers for the NYC Department of Transportation's Litigation Support Unit; and the deposition testimony of Victor Flores, the foreman for survey and design for Time Warner, and Jimmy Yandoli, director of construction for Time Warner.

Mr. Yandoli, the director of construction for Time Warner, indicates that Time Warner first learned of the broken sidewalk installation in January 2004, and immediately sent Victor Flores, a foreman for Time Warner, to inspect the

sidewalk installation, which he referred to as a "sidewalk box" or "vault". Mr. Flores testified that he observed a vault cover at that location, and described the cover as two pieces of iron that could be raised using hooks in order to access the cable amplifiers housed in the box beneath the sidewalk. When he arrived at the scene, Mr. Flores observed that part of the vault cover had been broken into two pieces. He testified that it appeared as though "something heavy rolled over and broke one half in two pieces."

Despite owning the subject sidewalk vault, Mr. Flores states in his deposition that he did not know of any inspection procedure in place regarding Time Warner's equipment:

> Q. Is there any type of inspection procedure that was in place back at Time Warner in 2003 concerning its monitoring of its equipment to make sure that its equipment was in proper working order, that none of its boxes were defective or anything of that nature?
>
> A. Not that I know of.
>
> Q. And, again, part and parcel with that question would be, was there any time Warner crews that in addition to going to specific locations as requested or designated, would customarily check Time Warner equipment which may be located in the neighborhood or vicinity that you're aware of?
>
> A. Not that I know of.

Furthermore, Mr. Yandoli admitted the same, as related specifically to sidewalk vaults:

> Q. Did Time Warner institute any type of inspection procedure regarding the sidewalk plates from 1992 through December 4, 2003; that you are aware of?
>
> A. No they didn't.
>
> Q. As of December 4, 2003, in Manhattan, was there any type of

inspection procedure that your department did with respect to the sidewalk lids, within your jurisdiction?

A. No, there wasn't.

Mr. Yandoli also states that Time Warner did not keep records regarding whether work or an inspection was ever performed at the subject location.

Inasmuch as Time Warner does not to offer any evidence as to when the area was last inspected relative to the accident, it fails to demonstrate that it did not have notice of the condition. Accordingly, Time Warner's motion for summary judgment is denied.

Wherefore, it is hereby,

ORDERED that Time Warner Cable's motion for summary judgment is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: October 17, 2013

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE