CITY DID NOT DEMONSTRATE ABSENCE OF WRITTEN NOTICE OF THE POTHOLE WHERE PLAINTIFF SLIPPED AND FELL, PROPERTY OWNER DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF FELL WAS NOT SUBJECT TO THE OWNER'S SPECIAL USE, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the city did not demonstrate it did not have notice of the pothole which caused plaintiff to slip and fall, and the abutting property owner did not demonstrate it did not have a special use of the area. Therefore neither the city's nor the property owner's motion for summary judgment should have been granted:

> The City failed to establish, prima facie, the absence of a written acknowledgment of the alleged dangerous condition. Documents produced by the City's Department of Transportation demonstrated that the City acknowledged in writing that a pothole existed in the vicinity of the plaintiff's accident … . Any dispute as to the precise location of the noticed pothole is a question of fact for the jury … . …
>
> Likewise, the owner failed to meet her prima facie burden. Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street "is placed on the municipality and not the abutting landowner"… . However, liability may be imposed on an abutting property owner where, inter alia, the owner of the abutting property caused the condition to occur through a special use of that area… . Here, the owner failed to demonstrate, prima facie, that she did not cause the alleged condition to occur because of some special use. The record establishes that the area where the plaintiff was injured was at the dead-end of Atkins Avenue, which was bordered on each side by Arlington Village apartment buildings. Indeed, part of Atkins Avenue is used for a parking lot solely for the benefit of Arlington Village tenants. The parking lot is partitioned from Atkins Avenue by chain link fencing and a gate maintained by the owner. The garbage dumpsters maintained for use by the tenants of Arlington Village are kept in the parking lot. There are no sidewalks in the dead-end area of Atkins Avenue. Accordingly, the roadway was used by tenants and employees of Arlington Village as a walkway, as a driveway for their vehicles, and as a driveway and walkway to access the adjacent parking lot and the garbage dumpsters. Thus, the owner failed to establish, prima facie, that she did not derive a special use from the area which contained the defect. Furthermore, "[w]hether an entity is liable for creating a defect as a special user is generally a question for the jury" … . Llanos v Stark, 2017 NY Slip Op 04828, 2nd Dept 6-14-17

NEGLIGENCE (SLIP AND FALL, MUNICIPAL LAW, SPECIAL USE, CITY DID NOT DEMONSTRATE ABSENCE OF WRITTEN NOTICE OF THE POTHOLE WHERE PLAINTIFF SLIPPED AND FELL, PROPERTY OWNER DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF FELL WAS NOT SUBJECT TO THE OWNER'S SPECIAL USE, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED)/MUNICIPAL LAW (SLIP AND FALL, WRITTEN NOTICE, CITY DID NOT DEMONSTRATE ABSENCE OF WRITTEN NOTICE OF THE POTHOLE WHERE PLAINTIFF SLIPPED AND FELL, PROPERTY OWNER DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF FELL WAS NOT SUBJECT TO THE OWNER'S SPECIAL USE, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED)/WRITTEN NOTICE REQUIREMENT (SLIP AND FALL, MUNICIPAL LAW, CITY DID NOT DEMONSTRATE ABSENCE OF WRITTEN NOTICE OF THE POTHOLE WHERE PLAINTIFF SLIPPED AND FELL, PROPERTY OWNER DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF FELL WAS NOT SUBJECT TO THE OWNER'S SPECIAL USE, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED)/SPECIAL USE (SLIP AND FALL, PROPERTY OWNER DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF FELL WAS NOT SUBJECT TO THE OWNER'S SPECIAL USE, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED)