

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - January 11, 2007

REINALDO E. RIVERA, J.P.
FRED T. SANTUCCI
PETER B. SKELOS
WILLIAM E. McCARTHY, JJ.

2005-10670

DECISION & ORDER

Delores Perrington, respondent, v City of
Mount Vernon, appellant.

(Index No. 3363/02)

Helen M. Blackwood, Mount Vernon, N.Y. (Nichelle A. Johnson of counsel), for
appellant.

Michael T. Ridge, Bronx, N.Y. (Elizabeth Anne Bannon of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an
order of the Supreme Court, Westchester County (Lefkowitz, J.), entered October 3, 2005, which
denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

A municipality that has enacted a prior written notice law is excused from liability
absent proof of prior written notice or an exception thereto (*see Poirier v City of Schenectady*, 85
NY2d 310). The Court of Appeals has recognized two exceptions to this rule, “namely, where the
locality created the defect or hazard through an affirmative act of negligence” and “where a ‘special
use’ confers a special benefit upon the locality” (*Amabile v City of Buffalo*, 93 NY2d 471, 474; *see*
Lopez v G&J Rudolph Inc., 20 AD3d 511, 512; *Filaski-Fitzgerald v Town of Huntington*, 18 AD3d
603, 604; *Gold v County of Westchester*, 15 AD3d 439, 440). Here, in opposition to the defendant’s
prima facie showing of entitlement to judgment as a matter of law, the plaintiff raised a triable issue
of fact as to whether there was a defect and, if so, whether the defendant affirmatively created the

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defect by either failing to place blacktop around the subject metal plate or negligently securing such metal plate with blacktop (*see Padula v City of Long Beach*, 20 AD3d 555, 556; *Maggio v City of New York*, 305 AD2d 554, 555; *Kupfer v Village of Briarcliff Manor*, 288 AD2d 269, 270; *Mayer v Town of Brookhaven*, 266 AD2d 360, 361). Moreover, a triable issue of fact exists as to whether the condition was open and obvious at the time of the accident (*cf. Dominitz v Food Emporium*, 271 AD2d 640).

RIVERA, J.P., SANTUCCI, SKELOS and McCARTHY, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court