

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

D17051
W/cb

_____AD3d_____

Argued - November 5, 2007

ROBERT A. SPOLZINO, J.P.
ANITA R. FLORIO
MARK C. DILLON
DANIEL D. ANGIOLILLO, JJ.

2006-08951

DECISION & ORDER

Bernadette A. Lawler, appellant, v City of Yonkers,
respondent.

(Index No. 21029/02)

John E. Lawler, Yonkers, N.Y., for appellant.

Frank J. Rubino, Yonkers, N.Y. (Rory McCormick of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (Smith, J.), dated August 22, 2006, which granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff allegedly was injured when she tripped and fell on a public sidewalk from which a rock was protruding. According to the plaintiff, the rock protrusion was surrounded by a lumpy and uneven mass of asphalt. She commenced this action to recover damages against the City of Yonkers, the municipal owner of the sidewalk.

The City made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it had no prior written notice of the allegedly defective sidewalk condition that caused the plaintiff's injuries (*see* General Municipal Law § 50-e[4]; Second Class Cities Law § 244; Charter of the City of Yonkers § C24-11; *Amabile v City of Buffalo*, 93 NY2d 471; *Jacobs v Village of Rockville Ctr.*, 41 AD3d 539, 540; *Giffords v Water Auth. Of Great Neck N.*, 40 AD3d 695, 695-696; *Ferreira v County of Orange*, 34 AD3d 724, 725; *Granderson v City of White Plains*, 29 AD3d

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739; *Gold v County of Westchester*, 15 AD3d 439, 440). In opposition, the plaintiff failed to raise a triable issue of fact because she offered only speculation that the City affirmatively created the alleged sidewalk defect (see *Delgado v County of Suffolk*, 40 AD3d 575, 576; *Khemraj v City of New York*, 37 AD3d 419, 420; *Ferreira v County of Orange*, 34 AD3d 724; *Hyland v City of New York*, 32 AD3d 822, 823; *Gold v County of Westchester*, 15 AD3d 439, 440).

The plaintiff's contention that the alleged sidewalk defect constituted a public nuisance is not properly before this Court as it was raised for the first time on appeal (see *Matter of AIU Ins. Co. v Rodriguez*, 43 AD3d 1042; *Ferreira v County of Orange*, 34 AD3d 724, 725).

SPOLZINO, J.P., FLORIO, DILLON and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court