

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

D18687  
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Argued - February 26, 2008

ROBERT A. SPOLZINO, J.P.  
DAVID S. RITTER  
FRED T. SANTUCCI  
EDWARD D. CARNI, JJ.

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2007-02583

DECISION & ORDER

Lester Henry, appellant, v Devonshire Tire Co., d/b/a  
390 Riverdale Avenue Corp., respondent.

(Index No. 14937/05)

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Raskin & Kremins, LLP (Alexander J. Wulwick, New York, N.Y., of counsel), for  
appellant.

Camacho Mauro Mulholland, LLP, New York, N.Y. (Kathleen M. Mulholland and  
Suzanne M. Lodge 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 (Giacomo, J.), entered February 14, 2007, which  
granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff commenced this action seeking damages for injuries sustained when he  
fell from a ladder, based upon common-law negligence and alleged violations of the Labor Law.  
However, the plaintiff subsequently withdrew all Labor Law claims and proceeded solely upon the  
cause of action alleging common-law negligence.

In support of its motion for summary judgment the defendant demonstrated its  
entitlement to judgment as a matter of law and, in opposition thereto, the plaintiff failed to raise a  
triable issue of fact (*see Lundquist v Ditmas Realty Co.*, 230 AD2d 830). Indeed, on appeal, the  
plaintiff, in effect, concedes that the Supreme Court properly dismissed the common-law negligence

claim. Instead, the plaintiff seeks to raise a new, unpleaded theory of liability. However, inasmuch as the plaintiff failed to raise said theory before the Supreme Court, it is improperly raised for the first time on appeal and thus will not be addressed (*see Stern v 522 Shore Rd. Owners*, 237 AD2d 277; *Gordon v Hong*, 126 AD2d 514).

Accordingly, the defendant was entitled to summary judgment dismissing the complaint (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320).

SPOLZINO, J.P., RITTER, SANTUCCI and CARNI, 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