

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

D19450
C/prt

_____AD3d_____

Argued - April 28, 2008

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY, JJ.

2007-04009

DECISION & ORDER

Dominique Smith, respondent,
v County of Orange, appellant,
et al., defendant.

(Index No. 3788/04)

David L. Darwin, County Attorney, Goshen, N.Y. (Matthew J. Nothnagle of counsel), for appellant.

Steven M. Melley, Rhinebeck, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendant County of Orange appeals from so much of an order of the Supreme Court, Orange County (McGuirk, J.), dated February 19, 2007, as denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The defendant County of Orange established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not have prior written notice of the allegedly dangerous condition that purportedly caused the plaintiff's fall, as required by Local Law No. 3 (1978) of Orange County (*see Delgado v County of Suffolk*, 40 AD3d 575). However, the plaintiff's opposition papers raised a triable issue of fact regarding whether the ice upon which the plaintiff slipped was formed when snow piles created by the the County's snow removal efforts melted and refroze (*see Ricca v Ahmad*, 40 AD3d 728, 729; *Knee v Trump Vil. Constr. Corp.*, 15 AD3d 545, 546).

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The County's contention that the plaintiff raised a new theory of liability in her opposition papers not contained in her notice of claim was improperly raised for the first time in its reply papers, and the plaintiff did not have a fair opportunity to address this issue. Thus, reversal is not warranted for that reason alone (*see McCarthy v City of New York*, 5 AD3d 445, 446). In any event, this contention is without merit, since the plaintiff alleged in her notice of claim that the County created the dangerous condition (*see Streletskaya v New York City Transit Authority*, 27 AD3d 640, 641-642; *cf. Semprini v Village of Southampton*, 48 AD3d 543).

RIVERA, J.P., COVELLO, ANGIOLILLO and McCARTHY, JJ., concur.

ENTER:


James Edward Pelzer
Clerk of the Court