

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

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Submitted - May 27, 2008

WILLIAM F. MASTRO, J.P.
ROBERT A. SPOLZINO
DAVID S. RITTER
JOHN M. LEVENTHAL, JJ.

2007-09076

DECISION & ORDER

Beatrice Levy, et al., plaintiffs-respondents, v Town of Huntington, appellant, Long Island Power Authority, defendant-respondent.

(Index No. 20566/04)

John J. Leo, Town Attorney, Huntington, N.Y. (Margaret L. Pezzino of counsel), for appellant.

Siben & Siben, LLP, Bay Shore, N.Y. (Alan G. Faber of counsel), for plaintiffs-respondents.

In an action to recover damages for personal injuries, etc., the defendant Town of Huntington appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Doyle, J.), dated August 6, 2007, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

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

The plaintiff Beatrice Levy (hereinafter the plaintiff) commenced this action against the appellant Town of Huntington, among other entities, for injuries she allegedly sustained on September 13, 2003, when she tripped and fell in a sunken, depressed, and uneven area in front of a property in Dix Hills, in the Town.

The Town established its prima facie entitlement to judgment as a matter of law based upon the plaintiff's failure to comply with the prior written notice requirements of Town Law § 65-a.

September 9, 2008

Page 1.

LEVY v TOWN OF HUNTINGTON

One of the exceptions, however, to the rule requiring prior written notice, discussed in *Amabile v City of Buffalo* (93 NY2d 471, 474) is that the locality created the defect through an affirmative act (*see Corey v Town of Huntington*, 9 AD3d 345). In this case, the evidence which the plaintiff submitted in opposition to the motion, including, inter alia, the affidavit of the plaintiff's engineering expert, raised a triable issue of fact (*see* CPLR 3212[b]) as to whether the appellant created the defect through opening and subsequently repaving the roadway in question.

MASTRO, J.P., SPOLZINO, RITTER and LEVENTHAL, 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