

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

D20728
C/kmg

_____AD3d_____

Argued - September 23, 2008

ROBERT A. LIFSON, J.P.
DAVID S. RITTER
HOWARD MILLER
RUTH C. BALKIN, JJ.

2007-09247

DECISION & ORDER

Kimmarie Hornbeck, appellant,
v Village of Tarrytown, et al., respondents.

(Index No. 17325/06)

Jonathan Rice, New York, N.Y., for appellant.

Donald L. Frum, Elmsford, N.Y. (Robert M. Nachamie of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (Giacomo, J.), dated September 4, 2007, which granted the defendants' motion for summary judgment dismissing the complaint and denied her cross motion to compel discovery.

ORDERED that the order is reversed, on the law, with costs, the motion for summary judgment dismissing the complaint is denied, the cross motion to compel discovery is granted, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings, including scheduling a conference to address outstanding discovery.

The defendants failed to make a prima facie showing that the area where the plaintiff fell was within the scope of the applicable prior written notice provisions set forth in Village Law § 6-628 and Village of Tarrytown Code § 216-1 (*see Davis v County of Nassau*, 166 AD2d 498). Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Furthermore, the record indicates that there are certain outstanding items of

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discovery, including the examinations before trial of the defendants. Accordingly, the plaintiff's cross motion to compel discovery should have been granted.

LIFSON, J.P., RITTER, MILLER and BALKIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer
Clerk of the Court