

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

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Argued - December 7, 2009

FRED T. SANTUCCI, J.P.
RUTH C. BALKIN
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2009-01408

DECISION & ORDER

Susan Rick, appellant, v Paul J. DiFusco, et al.,
respondents.

(Index No. 2576/07)

Elovich & Adell, Long Beach, N.Y. (Mitchel Sommer, Darryn Solotoff, and A. Trudy Adell of counsel), for appellant.

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck, N.Y. (Elizabeth M. Hecht of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Winslow, J.), entered January 28, 2009, which granted the defendants' 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 over a raised flagstone on the sidewalk in front of the defendants' home. The plaintiff subsequently commenced this action alleging, inter alia, that the defendants had created a dangerous condition by planting pachysandra, a type of evergreen groundcover, and allowing it to spread onto the public sidewalk, thereby obscuring the raised flagstone. However, at her deposition, the plaintiff testified that she was aware of the existence of a raised flagstone in front of the defendants' home, and had probably seen it from a distance prior to her fall. The plaintiff further testified, that just before her fall, she heard the sound of children screaming, and that when she turned her head to the left to see what was wrong, her foot "hit something" and she "went flying." The defendants thereafter moved for summary judgment and

the Supreme Court granted their motion, concluding that, even if the allegedly overgrown pachysandra constituted a dangerous condition for which the defendants could be held liable, it was not a proximate cause of the accident as a matter of law. We affirm.

The defendants made a prima facie showing of their entitlement to judgment as a matter of law through the submission of the plaintiff's deposition testimony, which demonstrated that the defendants' alleged negligence in allowing pachysandra to spread onto the public sidewalk was not a proximate cause of the accident (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). The affidavit which the plaintiff submitted in opposition to the motion for summary judgment was insufficient to raise a triable issue of fact. Accordingly, the court properly granted the defendants' motion.

SANTUCCI, J.P., BALKIN, ENG and CHAMBERS, 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