

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

D25749
C/kmg

_____AD3d_____

Argued - December 8, 2009

MARK C. DILLON, J.P.
ANITA R. FLORIO
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2009-00066

DECISION & ORDER

Mary Ellen Morris, et al., appellants, v City of New York, respondent.

(Index No. 4472/03)

Irom, Wittels, Freund, Berne & Serra, P.C., Bronx, N.Y. (Richard W. Berne and Wesley Serra of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Larry A. Sonnenshein and Julian L. Kalkstein of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from a judgment of the Supreme Court, Queens County (Kitzes, J.), entered December 22, 2008, which, after a jury trial, and upon the granting of the defendant's motion, in effect, pursuant to CPLR 4401, made at the close of evidence, for judgment as a matter of law for the plaintiff's failure to establish a prima facie case, is in favor of the defendant and against them dismissing the complaint.

ORDERED that the judgment is affirmed, with costs.

In granting a motion pursuant to CPLR 4401 for judgment as a matter of law, the trial court must determine that by no rational process could the trier of fact find in favor of the nonmoving party on the evidence presented (*see Szczerbiak v Pilat*, 90 NY2d 553; *Alicea v Ligouri*, 54 AD3d 784; *Alameldin v Kings Castle Caterers, Inc.*, 53 AD3d 514). Here, the trial court properly granted the defendant's motion, in effect, pursuant to CPLR 4401. The plaintiffs failed to submit evidence sufficient to establish, prima facie, that the defendant had prior written notice of the alleged hazardous condition that purportedly caused the subject accident or that the defendant created the alleged

hazardous condition by an affirmative act of negligence (*see* Administrative Code of City of NY § 7-201[c]; *Amabile v City of Buffalo*, 93 NY2d 471; *Farrell v City of New York*, 49 AD3d 806).

DILLON, J.P., FLORIO, HALL and SGROI, 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