

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

D26438  
G/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - January 26, 2010

STEVEN W. FISHER, J.P.  
ANITA R. FLORIO  
ARIEL E. BELEN  
L. PRISCILLA HALL, JJ.

---

2009-01566

DECISION & ORDER

Dale Denio, respondent, v  
City of New Rochelle, appellant.

(Index No. 16453/07)

---

Bernis Shapiro, Corporation Counsel, New Rochelle, N.Y. (Marie R. Hodukavich of counsel), for appellant.

Worby Groner Edelman LLP, White Plains, N.Y. (Michael L. Taub of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Westchester County (Liebowitz, J.), entered January 5, 2009, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is granted.

On February 23, 2007, the plaintiff allegedly slipped and fell on ice in the New Rochelle Municipal Marina parking lot. The plaintiff commenced this action against the City of New Rochelle alleging, inter alia, that the City created a dangerous condition.

It is undisputed that the City did not receive prior written notice of the dangerous condition that allegedly caused the plaintiff's accident, as required by the relevant local law (*see* City Charter of the City of New Rochelle, art XII, § 127A). The City thus established its prima facie entitlement to judgment as a matter of law, and the burden shifted to the plaintiff to demonstrate a

March 9, 2010

Page 1.

DENIO v CITY OF NEW ROCHELLE

factual issue as to the existence of an exception to the notice requirement (*see Babenzien v Town of Fenton*, 67 AD3d 1236). “The Court of Appeals has recognized two exceptions to this rule, ‘namely, where the locality created the defect or hazard through an affirmative act of negligence’ and ‘where a “special use” confers a special benefit upon the locality” (*DiGregorio v Fleet Bank of N.Y., NA*, 60 AD3d 722, 723, quoting *Amabile v City of Buffalo*, 93 NY2d 471, 474; *see Babenzien v Town of Fenton*, 67 AD3d at 1236; *Trinidad v City of Mount Vernon*, 51 AD3d 661; *Delgado v County of Suffolk*, 40 AD3d 575).

Contrary to the Supreme Court’s determination, in opposition, the plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562). Here, the plaintiff failed to demonstrate that the City’s alleged negligence “immediately result[ed] in the existence of a dangerous condition” (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Oboler v City of New York*, 8 NY3d 888, 889; *San Marco v Village/Town of Mount Kisco*, 57 AD3d 874, 876). Nor did the plaintiff demonstrate that the City derived a special benefit unrelated to the public use or different from that conferred on the public at large (*see Vrabel v City of New York*, 308 AD2d 443, 444).

Accordingly, the Supreme Court should have granted the City’s motion for summary judgment dismissing the complaint.

FISHER, J.P., FLORIO, BELEN and HALL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court