

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

D26641
H/prt

_____AD3d_____

Submitted - March 4, 2010

MARK C. DILLON, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
PLUMMER E. LOTT, JJ.

2008-11281

DECISION & ORDER

John Yeancades, et al., plaintiffs-respondents, v
Fam-Bur Realty, Inc., et al., appellants, City of
New York, defendant-respondent.

(Index No. 16576/07)

Kaufman Borgeest & Ryan, LLP, New York, N.Y. (Jacqueline Mandell and Dennis
J. Dozis of counsel), for appellants.

Robert G. Goodman, P.C., New York, N.Y., for plaintiffs-respondents.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Kristin M. Helmers and
Alan G. Krams of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, etc., the defendants Fam-Bur Realty, Inc., and Francmen Realty LLC, appeal from an order of the Supreme Court, Kings County (Rothenberg, J.), dated October 31, 2008, which denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

ORDERED that the order is affirmed, with one bill of costs to the respondent appearing separately and filing separate briefs.

On the morning of October 3, 2006, the plaintiff John Yeancades (hereinafter the plaintiff) allegedly tripped and fell over a depression in the roadway in front of certain premises in Brooklyn. Thereafter, the plaintiff and his wife, suing derivatively, commenced this action against, among others, the defendants Fam-Bur Realty, Inc., the entity that owned the premises, and

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Francmen Realty LLC, the entity that managed the premises (hereinafter together the appellants). The appellants subsequently moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

The appellants made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that they did not create the alleged roadway defect or cause it to occur through a special use of the roadway (*see Hyland v City of New York*, 32 AD3d 822). However, in opposition, a triable issue of fact was raised as to whether plumbers hired by the appellants created the alleged defect by opening and subsequently repaving the roadway in question (*see Levy v Town of Huntington*, 54 AD3d 732, 733). Accordingly, the Supreme Court properly denied the appellants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

DILLON, J.P., BALKIN, DICKERSON and LOTT, 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