

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

D26650  
Y/prt

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

Argued - March 3, 2010

STEVEN W. FISHER, J.P.  
JOSEPH COVELLO  
PLUMMER E. LOTT  
SANDRA L. SGROI, JJ.

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2009-06157

DECISION & ORDER

Leia Vandermast, appellant, v New York City  
Transit Authority, et al., respondent.

(Index No. 9044/08)

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Block O'Toole & Murphy (Pollack, Pollack, Isaac & De Cicco, New York, N.Y.  
[Brian J. Isaac], of counsel), for appellant.

Wallace D. Gossett, Brooklyn, N.Y. (Lawrence Heisler of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Miller, J.), dated May 21, 2009, which granted that branch of the defendants' cross motion which was to dismiss the complaint for failure to serve a timely notice of claim, and denied, as academic, her motion, in effect, pursuant to CPLR 3126 to strike the defendants' answer or, in the alternative, to compel certain discovery.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly rejected the plaintiff's equitable estoppel claim. Estoppel against a municipal defendant will lie only when the municipal defendant's conduct was calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim and when that conduct was justifiably relied upon by that party (*see Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668; *Wade v New York City Health & Hosps. Corp.*, 16 AD3d 677). The plaintiff failed to demonstrate that the defendants engaged in any misleading conduct that would support a finding of estoppel.

March 30, 2010

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Accordingly, the Supreme Court properly granted that branch of the defendants' cross motion which was to dismiss the complaint, and properly denied, as academic, the plaintiff's motion, in effect, pursuant to CPLR 3126 to strike the defendants' answer or, in the alternative, to compel certain discovery (*cf. Commack Roller Rink v Commack Arena Mktg.*, 154 AD2d 327, 329).

FISHER, J.P., COVELLO, LOTT and SGROI, 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