

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

D27099
H/prt

_____AD3d_____

Argued - December 4, 2009

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
ARIEL E. BELEN
LEONARD B. AUSTIN, JJ.

2009-03250

DECISION & ORDER

Helen Gruenfeld, et al., plaintiffs-respondents, v
City of New Rochelle, appellant, New Rochelle
YMCA, defendant-respondent.

(Index No. 20678/08)

Marie R. Hodukavich, New Rochelle, N.Y., for appellant.

Daniel A. Kalish, White Plains, N.Y., for plaintiffs-respondents.

O'Connor, McGuinness, Conte, Doyle & Oleson, White Plains, N.Y. (Montgomery
L. Effinger of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, etc., the defendant City of New Rochelle appeals from an order of the Supreme Court, Westchester County (Smith, J.), dated February 18, 2009, which denied, as premature, its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, without prejudice to renewal following the completion of discovery.

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

The plaintiff Helen Gruenfeld (hereinafter the plaintiff) allegedly tripped and fell as a result of stepping into a depression located in the sidewalk on Bayard Street in the City of New Rochelle. Thereafter, the plaintiff and her husband, suing derivatively, commenced the present action, naming as defendants the City of New Rochelle and New Rochelle YMCA (hereinafter YMCA), the

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abutting property owner. The City moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it on the grounds, among others, that it never received prior written notice of the alleged defect, as required by New Rochelle City Charter, Article XII, Section 127A, and that none of the exceptions to the prior written notice requirement applied. Given that no discovery had yet been conducted, the Supreme Court denied the City's motion as premature, without prejudice to renewal following the completion of discovery. We affirm.

The Supreme Court correctly determined that the plaintiffs and the YMCA should have been afforded an opportunity to conduct discovery prior to the award of summary judgment in favor of any of the parties (*see* CPLR 3212[f]; *Elliot v County of Nassau*, 53 AD3d 561, 563).

MASTRO, J.P., FISHER, BELEN and AUSTIN, 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