

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

D35702  
Y/kmb

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Submitted - June 8, 2012

RUTH C. BALKIN, J.P.  
L. PRISCILLA HALL  
PLUMMER E. LOTT  
JEFFREY A. COHEN, JJ.

2012-01303

DECISION & ORDER

Victoria Cuebas, et al., respondents, v City of Yonkers,  
appellant.

(Index No. 11441/10)

Edward P. Dunphy, Corporation Counsel, Yonkers, N.Y. (Michael Levinson of  
counsel), for appellant.

Solomon Rosengarten, Brooklyn, N.Y., for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from  
so much of an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered January 18,  
2012, as denied its motion for summary judgment dismissing the complaint.

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

The defendant demonstrated its prima facie entitlement to judgment as a matter of  
law since it demonstrated that it did not receive prior written notice of the icy condition complained  
of in the roadway where the injured plaintiff fell, as required by the Charter of the City of Yonkers  
§ C24-11 (*see Pena v City of Yonkers*, 82 AD3d 728), and that it did not create the dangerous  
condition through an affirmative act of negligence (*cf. Braver v Village of Cedarhurst*, 94 AD3d  
933).

In opposition, the plaintiffs failed to raise a triable issue of fact (*see Amabile v City  
of Buffalo*, 93 NY2d 471; *Lichtman v Village of Kiryas Joel*, 90 AD3d 1001). The injured plaintiff's  
affidavit, submitted in opposition, presented feigned issues of fact designed to avoid the

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consequences of her earlier testimony, taken pursuant to General Municipal Law § 50-h, and thus was insufficient to defeat the defendant's motion (*see Hunt v Meyers*, 63 AD3d 685, 685-686). Accordingly, the Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint.

BALKIN, J.P., HALL, LOTT and COHEN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court