

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

D19743  
O/hu

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

Argued - May 20, 2008

REINALDO E. RIVERA, J.P.  
DAVID S. RITTER  
HOWARD MILLER  
MARK C. DILLON, JJ.

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2007-06116

DECISION & ORDER

Patrizia Vittorio, etc., respondent, v U-Haul  
Company, et al., appellants, et al., defendant.

(Index No. 1404/04)

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Gallo Vitucci Klar Pinter & Cogan, LLP, New York, N.Y. (Kimberly A. Ricciardi of  
counsel), for appellants.

Frederick Bittner, Poughkeepsie, N.Y., for respondent.

In an action to recover damages for personal injuries, the defendants U-Haul  
Company, U-Haul Company of New York, Inc., and U-Haul International appeal from so much of  
an order of the Supreme Court, Dutchess County (Sproat, J.), dated June 1, 2007, as denied their  
cross motion for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The appellants failed to make a prima facie showing that they neither created nor had  
actual or constructive notice of the allegedly dangerous condition (*see Hudlin v Epicurean Deli*, 46  
AD3d 752). In addition, the appellants did not submit any evidence to establish their contention that  
the allegedly defective condition was trivial (*see Reeves v New York City Tr. Auth.*, 276 AD2d 543).  
The appellants merely pointed to gaps in the plaintiff's proof, rather than affirmatively demonstrating  
the merit of their defense, and thus they failed to carry their burden as movants seeking summary  
judgment (*see Pappalardo v Long Is. R. R. Co.*, 36 AD3d 878; *Kucera v Waldbaums Supermarkets*,

June 24, 2008

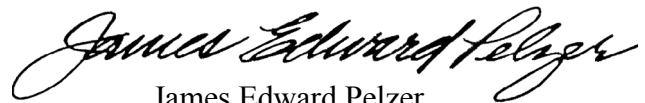
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304 AD2d 531). We reach this conclusion without considering the decedent's pre-action examination under oath, taken by the defendant Republic Western Insurance Company, which the appellants contend is inadmissible against them (*cf.* CPLR 3117[a][3]).

RIVERA, J.P., RITTER, MILLER and DILLON, 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