

Supreme Court, Appellate Division, Second
Department, New York.

Samuel E. VELEZ, appellant,

v.

955 TENANTS STOCKHOLDERS, INC., respondent.

Oct. 27, 2009.

Gary E. Rosenberg, P.C., Forest Hills, N.Y., for
appellant.

Molod Spitz & DeSantis, P.C., New York, N.Y. (Marcy
Sonneborn and [Salvatore J. DeSantis](#) of counsel), for
respondent.

[STEVEN W. FISHER](#), J.P., [JOSEPH COVELLO](#),
[THOMAS A. DICKERSON](#), and [PLUMMER E. LOTT](#),
JJ.

*1 In an action to recover damages for personal injuries,
the plaintiff appeals, as limited by his brief, from so much
of an order of the Supreme Court, Kings County (Starkey,
J.), dated January 27, 2009, as granted the defendant's
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 denied.

The plaintiff commenced this action to recover damages
for personal injuries allegedly sustained by him on
December 12, 2005, when he slipped and fell from the top
of a stairway at the defendant's premises. The defendant
moved for summary judgment dismissing the complaint,

arguing that the so-called "storm in progress" doctrine
precluded recovery, and that any alleged defect in the
handrail of the stairway did not proximately cause the
plaintiff's accident. The Supreme Court granted the
defendant's motion. We reverse.

The defendant established, prima facie, that it neither
created nor had actual or constructive notice of the
allegedly dangerous condition created by snow and water
that allegedly accumulated in the subject stairway. In
opposition, the plaintiff failed to raise a triable issue of
fact in this regard (see [Tomao v. City of New York](#), 61
AD3d 674, 674; [Negron v. St. Patrick's Nursing Home](#),
248 A.D.2d 687; see also [Marchese v. Skenderi](#), 51 AD3d
642, 642-643). However, viewing the evidence in the light
most favorable to the plaintiff (see [Wilson v. Rojas](#), 63
AD3d 1048, 1049), the defendant failed to demonstrate its
prima facie entitlement to judgment as a matter of law by
eliminating all issues of fact as to whether the existing
single handrail violated applicable statutory and code
provisions, whether the presence of another handrail was
required, and whether the defendant's alleged failures in
this regard proximately caused the plaintiff's accident (see
[Palmer v. 165 E. 72nd Apt. Corp.](#), 32 AD3d 382, 382;
[Asaro v. Montalvo](#), 26 AD3d 306, 307; [Viscusi v. Fenner](#),
10 AD3d 361, 361-362; see also [Christian v. Railroad
Deli Grocery](#), 57 AD3d 599, 601; [Martinez v. Melendez](#),
32 AD3d 999, 1000; [Scala v. Scala](#), 31 AD3d 423, 425;
[Cruz v. Lormet Hous. Dev. Fund Corp.](#), 7 AD3d 660,
660). Contrary to the defendant's contention, as the
movant, it had the burden of refuting the plaintiff's
contention that the stairway where the accident took place
was in violation of certain statutory and code provisions
(see [Camarda v. Sputnik Rest. Corp.](#), 65 AD3d 561;
[Viscusi v. Fenner](#), 10 AD3d at 361-362; cf. [Asaro v.
Montalvo](#), 26 AD3d at 307; [Hotzoglou v. Hotzoglou](#), 221
A.D.2d 594).

The defendant's remaining contentions are raised for the

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first time on appeal and, therefore, are not properly before
this Court.

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