

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

D19210  
G/kmg

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Argued - April 10, 2008

REINALDO E. RIVERA, J.P.  
FRED T. SANTUCCI  
RANDALL T. ENG  
CHERYL E. CHAMBERS, JJ.

2007-07325

DECISION & ORDER

Francis Mooney, Jr., respondent,  
v Petro, Inc., et al., appellants.

(Index No. 239/05)

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Hodges Walsh & Slater, LLP, White Plains, N.Y. (Lisa M. Rolle, Paul E. Svensson, and Cynthia K. Messemer of counsel), for appellants.

Laub & Delaney, LLP (Diane Welch Bando, Irvington, N.Y. [Alfred C. Laub], of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Dutchess County (Brands, J.), dated July 11, 2007, which denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint. In support of their motion, the defendants primarily argued that the allegedly dangerous condition which caused the subject accident was open and obvious. Although there is no duty to warn of an open and obvious condition, this principle does not absolve a landowner of the duty to maintain the property in a reasonably safe condition (*see Cupo v Karfunkel*, 1 AD3d 48, 51-52; *DiVietro v Gould Palisades, Corp.*, 4 AD3d 324). Here, the defendants failed to establish their entitlement to judgment as a matter of law because they did not make a prima facie showing that they maintained their premises in a reasonably safe condition (*see Fabish v Garden Bay Manor Condominium*, 44 AD3d 820; *Hogan v Baker*, 29 AD3d 740; *Femeneglla v Pellegrini*

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*Vineyards, LLC*, 16 AD3d 546). Furthermore, contrary to their contentions on appeal, the defendants also failed to demonstrate as a matter of law that the accident was unforeseeable (see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315; *Gray v Amerada Hess Corp.*, 48 AD3d 747; *Adams v Lemberg Enters., Inc.*, 44 AD3d 694; *Culotta v Smithtown Cent. School Dist.*, 37 AD3d 755), or that the plaintiff's alleged negligence was the sole proximate cause of the accident (see *Pabon v Nouveau El. Indus., Inc.*, 49 AD3d 702; *Gray v Amerada Hess Corp.*, 48 AD3d 747). In light of this determination, we need not examine the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *Pabon v Nouveau El. Indus., Inc.*, 49 AD3d 702; *Fabish v Garden Bay Manor Condominium*, 44 AD3d 820).

RIVERA, J.P., SANTUCCI, ENG and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court