

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

D21374
G/kmg

_____AD3d_____

Argued - November 7, 2008

ROBERT A. SPOLZINO, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS, JJ.

2008-03768
2008-06161

DECISION & ORDER

Karen Christian, et al., appellants, v Railroad
Deli Grocery, defendant, Joe II Realty Corp.,
respondent.

(Index No. 5561/06)

Pazer & Epstein, P.C., New York, N.Y. (Thomas Torto and Jason Levine of counsel), for appellants.

Tromello, McDonnell & Kehoe, Melville, N.Y. (Kevin P. Slattery of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Suffolk County (Weber, J.), dated March 26, 2008, as granted that branch of the motion of the defendant Joe II Realty Corp. which was for summary judgment dismissing the complaint insofar as asserted against it, and (2) from so much of an order of the same court dated June 10, 2008, as denied that branch of their motion which was for leave to renew, and upon, in effect, reargument, adhered to the original determination.

ORDERED that the appeal from so much of the order dated March 26, 2008, as granted that branch of the motion of the defendant Joe II Realty Corp. which was for summary judgment dismissing the complaint insofar as asserted against it is dismissed, as that portion of the order was superseded by so much of the order dated June 10, 2008, as was made upon reargument; and it is further,

ORDERED that the appeal from so much of the order dated June 10, 2008, as denied that branch of the plaintiffs' motion which was for leave to renew is dismissed as academic; and it is further,

December 9, 2008

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ORDERED that the order dated June 10, 2008, is reversed insofar as reviewed, on the law, upon reargument, so much of the order dated March 26, 2008, as granted that branch of the motion of the defendant Joe II Realty Corp. which was for summary judgment dismissing the complaint insofar as asserted against it is vacated, and that branch of the motion is denied; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs.

On the morning of January 24, 2005, the plaintiff Karen Christian (hereinafter the injured plaintiff) went to a deli located on the first floor of a building owned by the defendant Joe II Realty Corp. (hereinafter the respondent). When she left, she slipped on ice that had accumulated on a concrete ramp leading down from the door of the deli to the sidewalk, fell on the ramp, and allegedly sustained certain injuries. The injured plaintiff and her husband, suing derivatively, then commenced the instant personal injury action against the respondent and another defendant.

In the first order appealed from, the Supreme Court, inter alia, granted that branch of the respondent's motion which was for summary judgment dismissing the complaint insofar as asserted against it. In the second order appealed from, the Supreme Court, among other things, upon, in effect, reargument, adhered to its original determination.

The Supreme Court, upon reargument, should have vacated its original determination and denied that branch of the respondent's motion which was for summary judgment dismissing the complaint insofar as asserted against it. Contrary to the Supreme Court's determination, in opposition to the respondent's demonstration of its prima facie entitlement to judgment as a matter of law, the plaintiffs raised triable issues of fact (*see Grayson v Hall*, 31 AD3d 606, 606-607). The plaintiffs provided evidence tending to show that the respondent was negligent, specifically, an affidavit from a "certified safety professional" establishing that it violated certain applicable building code provisions which required that the ramp have a handrail (*see Major v Waverly & Ogden*, 7 NY2d 332, 336). Furthermore, the injured plaintiff's deposition testimony that she unsuccessfully attempted to "reach[]" out and "grab for something . . . to hold on to" after slipping on the ice, raised a triable issue of fact as to whether the absence of a handrail required by law was a proximate cause of her injuries (*see Ocasio v Board of Educ. of City of N.Y.*, 35 AD3d 825, 826; *Scala v Scala*, 31 AD3d 423, 425; *Asaro v Montalvo*, 26 AD3d 306, 307; *Viscusi v Fenner*, 10 AD3d 361, 361-362; *Hotzoglou v Hotzoglou*, 221 AD2d 594; *see also Spallina v St. Camillus Church*, 53 AD3d 650, 651).

The plaintiffs' contention that the Supreme Court erred in denying that branch of their motion which was for leave to renew has been rendered academic in light of our determination (*see Payano v Milbrook Props., Ltd.*, 39 AD3d 518, 520).

SPOLZINO, J.P., COVELLO, ANGIOLILLO and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court