

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

D22702  
G/kmg

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

Argued - February 26, 2009

PETER B. SKELOS, J.P.  
STEVEN W. FISHER  
ANITA R. FLORIO  
JOHN M. LEVENTHAL, JJ.

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2008-05812

DECISION & ORDER

Anthony Colombo, etc., respondent,  
v Salvatore Sanfilippo, et al., appellants.

(Index No. 29612/06)

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Richard T. Lau (Rivkin Radler LLP, Uniondale, N.Y. [Evan H. Krinick and Cheryl F. Korman], of counsel), for appellants.

Joseph N. DiGrazia, Brooklyn, N.Y. (Louis R. Lombardi of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Hinds Radix, J.), dated May 29, 2008, which denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

In October 2003, the plaintiff's then-81-year-old mother (hereinafter the decedent) allegedly tripped and fell on a walkway at the defendants' house. The decedent died of an unrelated cause in August 2005. At no time between the time of the accident and her death did the decedent provide a sworn statement or sworn testimony describing the events leading up to the accident or the cause of the accident.

The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff failed or was unable to identify the cause of the decedent's fall (*see Hennington v Ellington*, 22 AD3d 721). In opposition to the motion, the plaintiff failed to submit

April 7, 2009

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evidence in admissible form sufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Fenko v Mealing*, 43 AD3d 856). The plaintiff's affidavit submitted in opposition to the motion, in which he averred that, approximately three hours after the accident, his mother told him that she had fallen, did not identify the cause of the fall and, in any event, did not qualify as a present sense impression exception to the hearsay rule (*see People v Vasquez*, 88 NY2d 561, 575; *Matter of Talisveyber v Motor Veh. Acc. Indem. Corp.*, 16 AD3d 425). Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint.

SKELOS, J.P., FISHER, FLORIO and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court