

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

D30284
Y/prt

_____AD3d_____

Argued - January 6, 2011

JOSEPH COVELLO, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2009-08321

DECISION & ORDER

Alexia Anastasio, appellant, v Berry Complex, LLC,
et al., respondents.

(Index No. 42/06)

Favata & Wallace, LLP, Garden City, N.Y. (Everett N. Nimetz of counsel), for appellant.

Schindel, Farman, Lipsius, Gardner & Rabinovich, LLP, New York, N.Y. (Lorienton N.A. Palmer of counsel), for respondent Berry Complex, LLC.

O'Connor, O'Connor Hintz & Deveney, LLP, Melville, N.Y. (Eileen M. Baumgartner of counsel), for respondent A Design Built Group, Inc.

Fischetti & Pesce, LLP, Garden City, N.Y. (Frank V. Pesce of counsel), for respondent York Scaffold Equipment Corp.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated June 25, 2009, as granted that branch of the motion of the defendant A Design Built Group, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it, that branch of the cross motion of the defendant York Scaffold Equipment Corp. which was for summary dismissing the complaint insofar as asserted against it, and that branch of the cross motion of the defendant Berry Complex, LLC, which was for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with one

March 8, 2011

Page 1.

ANASTASIO v BERRY COMPLEX, LLC

bill of costs payable by the respondents appearing separately and filing separate briefs, and that branch of the motion of the defendant A Design Built Group, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it, that branch of the cross motion of the defendant York Scaffold Equipment Corp. which was for summary judgment dismissing the complaint insofar as asserted against it, and that branch of the cross motion of the defendant Berry Complex, LLC, which was for summary judgment dismissing the complaint insofar as asserted against it, are denied.

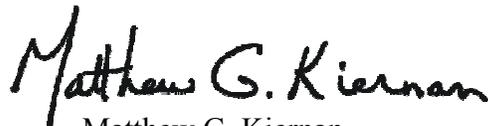
The plaintiff slipped and fell on ice as she was walking on a sidewalk abutting premises owned by the defendant Berry Complex, LLC (hereinafter Berry). The abutting premises was undergoing renovation, and a sidewalk shed had been erected. The defendant A Design Built Group, Inc. (hereinafter Design Built), was the general contractor, and the sidewalk shed was erected by the defendant York Scaffold Equipment Corp. (hereinafter York). The plaintiff alleged that the ice had formed from water which was dripping from the sidewalk shed. At her deposition, she testified that she stepped aside to avoid the dripping water and slipped on ice which was covered with water which had dripped from the sidewalk shed.

None of the defendants submitted evidence sufficient to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851). Contrary to York's contention, a triable issue of fact exists as to whether it launched an instrument of harm by allegedly negligently erecting the sidewalk shed (*see Manicone v City of New York*, 75 AD3d 535; *Ragone v Spring Scaffolding, Inc.*, 46 AD3d 652; *Phillips v Seril*, 209 AD2d 496). With respect to Design Built, triable issues of fact exist as to whether it exercised control over the construction site, as the general contractor, and whether it created or had actual or constructive notice of the alleged hazardous conditions (*see Mancone v City of New York*, 75 AD3d 535). Berry failed to establish, prima facie, that it lacked constructive notice of the alleged ice condition on the sidewalk abutting its property (*see Martinez v Khaimov*, 74 AD3d 1031; *see generally* Administrative Code of the City of New York 7-210). Since none of the parties satisfied their prima facie burden as the movants, we need not review the sufficiency of the plaintiff's opposition papers (*see Totten v Cumberland Farms, Inc.*, 57 AD3d 653; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409).

Accordingly, the Supreme Court should have denied the subject branches of the motion and cross motion which were for summary judgment.

COVELLO, J.P., DICKERSON, HALL and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court