

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

D30329  
W/prt

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

Argued - February 4, 2011

WILLIAM F. MASTRO, J.P.  
PETER B. SKELOS  
RANDALL T. ENG  
SANDRA L. SGROI, JJ.

2010-07205

DECISION & ORDER

Rita Lester, respondent, v Rosina Ackerman, et al.,  
appellants.

(Index No. 19476/08)

Jacobson & Schwartz, LLP, Jericho, N.Y. (Henry J. Cernitz of counsel), for  
appellants.

Isaacson, Schiowitz & Korson, LLP, New York, N.Y. (Jeremy Schiowitz 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 (Knipel, J.), dated June 11, 2010, which denied the  
motion of the defendant Rosina Ackerman Revocable Trust for summary judgment dismissing the  
complaint insofar as asserted against it.

ORDERED that the appeal by the defendant Rosina Ackerman is dismissed, as she  
is not aggrieved by the order appealed from (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144,  
156); and it is further,

ORDERED that the order is affirmed on the appeal by the defendant Rosina Ackerman  
Revocable Trust; and it is further,

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

The defendant Rosina Ackerman Revocable Trust (hereinafter the Trust), the owner

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of real property on which the subject accident allegedly occurred, failed to make a prima facie showing that it was entitled to judgment as a matter of law dismissing the complaint insofar as asserted against it based on the “storm in progress” rule. Although the Trust submitted the affidavit of a meteorologist to support its contention that a winter storm was in progress at the time of the subject slip-and-fall accident, it also submitted the plaintiff’s deposition testimony, which indicated that snow had fallen during the night prior to the accident, but that it was not snowing at the time of the accident. This conflicting evidence was insufficient to establish, as a matter of law, that there was a storm in progress at the time and location of the accident, and that the plaintiff slipped on snow or ice accumulated during an ongoing storm (*see Wood v Schenectady Mun. Hous. Auth.*, 77 AD3d 1273; *Caldwell v S&S Levittown, LLC*, 70 AD3d 881; *Verleni v City of Jamestown*, 66 AD3d 1359, 1360; *Daniels v Meyers*, 50 AD3d 1613, 1614; *Lotenberg v Long Is. R.R.*, 34 AD3d 435; *Calix v New York City Tr. Auth.*, 14 AD3d 583, 584). Since the Trust did not sustain its prima facie burden, we need not review the sufficiency of the papers submitted by the plaintiff in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Caldwell v S&S Levittown, LLC*, 70 AD3d at 882).

Accordingly, the Supreme Court properly denied the Trust’s motion for summary judgment dismissing the complaint insofar as asserted against it.

MASTRO, J.P., SKELOS, ENG and SGROI, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court