

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

D30474
O/prt

_____AD3d_____

Argued - February 28, 2011

JOSEPH COVELLO, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
SANDRA L. SGROI, JJ.

2009-09747
2010-05721

DECISION & ORDER

Diane Sickle, et al., appellants, v King Kullen
Grocery Co., Inc., respondent.

(Index No. 37059/07)

Duffy & Duffy, Uniondale, N.Y. (Michael A. Santo of counsel), for appellants.

Kennedy & Gillen, Garden City, N.Y. (Christopher F. Mansfield of counsel), for
respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Suffolk County (Molia, J.), dated October 1, 2009, which denied their motion for summary judgment on the issue of liability, and (2), as limited by their brief, from so much of an order of the same court dated April 14, 2010, as, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order dated October 1, 2009, is dismissed, as that order was superseded by the order dated April 14, 2010, made upon reargument; and it is further,

ORDERED that the order dated April 14, 2010, is affirmed insofar as appealed from; and it is further,

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

The plaintiffs failed to sustain their burden of making a prima facie showing of their

March 22, 2011

Page 1.

SICKLE v KING KULLEN GROCERY CO., INC.

entitlement to judgment as a matter of law on the issue of liability. The evidence submitted in support of the motion for summary judgment on the issue of liability, which included the deposition testimony of the plaintiff Diane Sickle and of an employee of the defendant's supermarket, revealed that there are triable issues of fact as to how the accident occurred (*see generally Collins v 5840 Merrick Rd. Realty Corp.*, 80 AD3d 551; *Barrett v New York City Tr. Auth.*, 80 AD3d 550). The failure to make a prima facie showing eliminating those issues of fact required the denial of the motion, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

COVELLO, J.P., DICKERSON, ENG and SGROI, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court