

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

D30653
H/hu

_____AD3d_____

Argued - March 11, 2011

WILLIAM F. MASTRO, J.P.
MARK C. DILLON
RUTH C. BALKIN
ROBERT J. MILLER, JJ.

2010-06459

DECISION & ORDER

Nyoka Young, etc., respondent, v Abbott & Mills, Inc.,
et al., appellants.

(Index No. 139/08)

Hodges, Walsh & Slater, LLP, White Plains, N.Y. (Paul E. Svensson of counsel), for
appellant Abbott & Mills, Inc.

Henderson & Brennan, White Plains, N.Y. (John T. Brennan of counsel), for appellant
Excelsior Insurance Company.

Mary Patricia Papini Guidetti, Middletown, N.Y., and Oxman Tulis Kirkpatrick
Whyatt & Geiger, LLP, White Plains, N.Y. (Brian J. Stone of counsel), for
respondent (one brief filed).

In an action, inter alia, pursuant to Navigation Law §§ 181 and 190 to recover damages for the discharge of oil onto real property, the defendant Abbott & Mills, Inc., appeals, and the defendant Excelsior Insurance Company separately appeals, as limited by their respective briefs, from so much of an order of the Supreme Court, Orange County (Slobod, J.), dated June 4, 2010, as denied those branches of their respective motions which were, in effect, for summary judgment dismissing the first, second, and fourth causes of action in the complaint insofar as asserted against each of them, and granted those branches of the plaintiffs' cross motion which were for summary judgment on the issue of liability on the first and second causes of action of the complaint.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

March 29, 2011

YOUNG v ABBOTT & MILLS, INC.

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On July 2, 2007, the defendant Abbott & Mills, Inc., mistakenly delivered 400 gallons of fuel oil to the plaintiff's residence. Although the oil tank had been removed from the residence when the plaintiff purchased the home, an oil fill pipe had not been removed, and oil was pumped through that pipe into the garage.

Contrary to the defendants' contentions, the plaintiff demonstrated her prima facie entitlement to judgment as a matter of law on her first two causes of action pursuant to Navigation Law §§ 181 and 190 to recover for property damage and litigation costs resulting from the erroneous delivery of oil (*see generally State of New York v Green*, 96 NY2d 403; *Tift v Bigelow's Oil Serv., Inc.*, 70 AD3d 1248). In opposition, the defendants failed to raise a triable issue of fact (*see Tift v Bigelow's Oil Serv., Inc.*, 70 AD3d 1248). Accordingly, the Supreme Court correctly granted those branches of the plaintiff's cross motion which were for summary judgment on the issue of liability on the first and second causes of action, and denied those branches of the defendants' respective motions which were, in effect, for summary judgment dismissing those causes of action insofar as asserted against each of them.

The defendants' remaining contentions are without merit.

The plaintiff's contention that her fifth cause of action should not have been dismissed is not properly before this Court, since the plaintiff failed to appeal from the order (*see Village of Croton-on-Hudson v Northeast Interchange Ry, LLC*, 46 AD3d 546, 548).

MASTRO, J.P., DILLON, BALKIN and MILLER, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court