

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

D33573
C/kmb

_____AD3d_____

Argued - December 16, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2011-03129

DECISION & ORDER

John Vierno, respondent, v Grocery Haulers, Inc.,
et al., appellants.

(Index No. 101985/09)

Hardin, Kundla, McKeon & Poletto, P.A., New York, N.Y. (Eileen Budd and Stephen J. Donahue of counsel), for appellant Grocery Haulers, Inc.

Morrison Mahoney LLP, New York, N.Y. (Brian P. Heermance and Christopher P. Keeney of counsel), for appellant C & S Wholesale Grocers, Inc.

Decker, Decker, Dito & Internicola, LLP, Staten Island, N.Y. (Frank J. Dito, Jr., of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Grocery Haulers, Inc., appeals, as limited by its brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated March 1, 2011, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the defendant C & S Wholesale Grocers, Inc., separately appeals from so much of the same order as denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from, on the law, with one bill of costs, and the motion and cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against the defendants Grocery Haulers, Inc. and C & S Wholesale Grocers, Inc., respectively, are granted.

In support of their respective motion and cross motion, the defendants established,

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prima facie, that they did not create or have actual or constructive notice of the alleged hazardous condition which caused the plaintiff's personal injuries (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836). In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, the motion and cross motion were not premature. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered is an insufficient basis for denying the motions (*see Min Whan Ock v City of New York*, 34 AD3d 542, 543; *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760). Accordingly, the Supreme Court should have granted the motion and cross motion.

DILLON, J.P., DICKERSON, ENG and LEVENTHAL, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court