

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1641

CA 08-01110

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, AND PERADOTTO, JJ.

CYNTHIA J. MATTHEWS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KEVIN T. SMALLRIDGE AND KSPM VENDING,
DEFENDANTS-RESPONDENTS.

ALEXANDER & CATALANO, LLC, SYRACUSE (FRANCES P. MANCE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LAW OFFICE OF LAURIE G. OGDEN, ROCHESTER (DAVID F. BOWEN OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered December 11, 2007 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle she was driving collided at an intersection with a vehicle owned by defendant KSPM Vending and operated by Kevin T. Smallridge (Smallridge vehicle). Plaintiff was traveling eastbound as she attempted to make a left turn, whereupon her vehicle was struck by the westbound Smallridge vehicle. The sole issue on appeal is whether Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. We conclude that the court erred, inasmuch as defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, defendants raised a triable issue of fact concerning the negligence of Smallridge, and thus the vicarious liability of KSPM Vending, by submitting plaintiff's deposition testimony in support of their motion. Plaintiff testified therein that Smallridge pulled out from behind a large westbound vehicle that was waiting to turn left and that he then proceeded into the intersection where plaintiff was already located. Thus, defendants raised an issue of fact whether Smallridge "failed to use reasonable care when proceeding into the intersection" (*Halbina v Brege*, 41 AD3d 1218, 1219; *see Fleming v Graham*, 34 AD3d 525, 526, *rev'd on other grounds* 10 NY3d 296; *Boston v Dunham*, 274 AD2d 708, 710; *Teller v*

Anzano, 263 AD2d 647, 647-648).

Entered: February 6, 2009

JoAnn M. Wahl
Clerk of the Court