

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

1109

CA 08-02053

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

PAUL RUDAT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MARK COLF EXCAVATING CONTRACTING, INC.,
JAMES ROSE AND MARYANN ROSE,
DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO, GANNON,
ROSENFARB, MOSCOWITZ, NEW YORK CITY (JENNIFER B. ETTENGER OF COUNSEL),
FOR DEFENDANT-RESPONDENT MARK COLF EXCAVATING CONTRACTING, INC.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS JAMES ROSE AND MARYANN ROSE.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered September 11, 2008 in a personal injury action. The order granted the respective motions of defendants for summary judgment dismissing the amended complaint against them and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as the result of diving into a pond located on property owned by defendants James Rose and Maryann Rose and constructed by defendant Mark Colf Excavating Contracting, Inc. Supreme Court properly granted the respective motions of defendants for summary judgment dismissing the amended complaint against them. Defendants met their initial burdens of establishing that "plaintiff's act of diving headfirst into water [that] he knew to be shallow was an unforeseeable superseding event absolving the defendants of any liability" (*Donohoe v Town of Babylon*, 246 AD2d 576; see *Olsen v Town of Richfield*, 81 NY2d 1024, 1026; *Howard v Poseidon Pools*, 72 NY2d 972, 974-975; *Smith v Stark*, 67 NY2d 693, 694), and plaintiff failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court