

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

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CA 09-02196

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND GORSKI, JJ.

VIOLET ATKINS AND WILLIAM ATKINS,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

UNITED REFINING HOLDINGS, INC.,
DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR
DEFENDANT-APPELLANT.

CAMPBELL & SHELTON LLP, EDEN (ERIC M. SHELTON OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered July 13, 2009 in a personal injury action. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Violet Atkins (plaintiff) when she allegedly tripped and fell on a sidewalk on property owned by defendant. We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. "It is well established . . . that '[a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof' " (*Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902, 903; see e.g. *Hunley v University of Rochester Strong Mem. Hosp.*, 294 AD2d 923; *Donohue v Seven Seventeen HB Buffalo Corp.*, 292 AD2d 786). We conclude that "[d]efendant failed to meet its initial burden of establishing as a matter of law that it was not negligent . . . or that its alleged negligence was not a proximate cause of plaintiff's injuries" (*Hunley*, 294 AD2d 923; see also *Kanney v Goodyear Tire & Rubber Co.*, 245 AD2d 1034, 1036; cf. *McGill v United Parcel Serv., Inc.*, 53 AD3d 1077). In any event, we agree with plaintiffs that they alleged facts in opposition to the motion from which defendant's negligence may reasonably be inferred and thus that they raised a triable issue of fact sufficient to defeat the motion (see generally *Zuckerman v City of New York*, 49 NY2d 557,

562).

Entered: March 19, 2010

Patricia L. Morgan
Clerk of the Court