

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

578

CA 08-02435

PRESENT: HURLBUTT, J.P., PERADOTTO, CARNI, GREEN, AND PINE, JJ.

JAMES KORTHAS AND CHRISTINE KORTHAS,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

U.S. FOODSERVICE, INC., DOING BUSINESS AS
U.S. FOODSERVICE OF BUFFALO, INC.,
DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (PATRICIA A. LYNN-FORD OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, A.J.), entered July 7, 2008 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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 James Korthas (plaintiff) when he slipped and fell on an icy walkway leading to the receiving office at defendant's warehouse facility. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint on the ground that there was a storm in progress at the time of the accident. Defendant failed to meet its burden of establishing as a matter of law that "plaintiff's injuries [were] sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter" (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735). We do not consider the affidavit of defendant's expert meteorologist in determining whether defendant met its initial burden because that affidavit was submitted in reply to the affidavit of plaintiffs' expert meteorologist (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court