

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

787

CA 08-01909

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

DONNA M. CHAPMAN AND SAMUEL CHAPMAN,
INDIVIDUALLY AND AS WIFE AND HUSBAND,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

PYRAMID COMPANY OF BUFFALO, THE PYRAMID
COMPANIES, WALDEN GALLERIA LLC, WALDEN
GALLERIA ENTERPRISES, LLC, PYRAMID
MANAGEMENT GROUP, INC., AND PYRAMID
WALDEN COMPANY, L.P.,
DEFENDANTS-RESPONDENTS.

LAWRENCE A. SCHULZ, ORCHARD PARK, FOR PLAINTIFFS-APPELLANTS.

RODGERS LAW FIRM, BUFFALO (MARK C. RODGERS OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered December 3, 2007 in a personal injury action. The order granted the motion of defendants for summary judgment and dismissed 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 Donna M. Chapman (plaintiff) when she allegedly slipped and fell on snow and ice in the parking lot of a mall. Supreme Court properly granted defendants' motion seeking summary judgment dismissing the complaint. Contrary to plaintiffs' contention, defendants met their initial burden by submitting evidence establishing that there was a storm in progress at the time of the accident (see *Brierley v Great Lakes Motor Corp.*, 41 AD3d 1159, 1160; *Camacho v Garcia*, 273 AD2d 835). In opposition to the motion, plaintiffs failed to raise a triable issue of fact with respect to their allegation that the ice that caused the accident existed prior to the storm, and whether the precipitation from the ongoing storm was a proximate cause of plaintiff's fall (see *Martin v Wagner*, 30 AD3d 733, 735; *Parker v Rust Plant Servs., Inc.*, 9 AD3d 671, 672-673; cf. *Pacelli v Pinsley*, 267 AD2d 706, 707-708). Plaintiffs' contention that the court erred in granting the motion because defendants failed to attach a copy of the pleadings to the motion papers is raised for the first time on appeal and thus is not properly before us (see

Provident Bank v Giannasca, 55 AD3d 812; *Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1169, *lv dismissed in part and denied in part* 11 NY3d 825).

Entered: June 5, 2009

Patricia L. Morgan
Clerk of the Court