

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

1087

CA 09-00659

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

---

EDWIN DZIENGIELEWSKI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOPS MARKETS, LLC (FORMERLY SUED HEREIN AS  
TOPS MARKETS, ALSO KNOWN AS TOPS, ALSO KNOWN  
AS TOPS FRIENDLY MARKETS), DEFENDANT-RESPONDENT.

---

THE BALLOW LAW FIRM, P.C., BUFFALO (JASON A. RICHMAN OF COUNSEL), FOR  
PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (NICHOLAS J. DICESARE OF COUNSEL), FOR  
DEFENDANT-RESPONDENT.

---

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered December 11, 2008 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the amended 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 amended complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while using a handleless cart to move two large barrels of animal refuse in defendant's receiving area. We agree with plaintiff that Supreme Court erred in granting defendant's motion for summary judgment dismissing the amended complaint. Defendant failed to establish its entitlement to summary judgment as a matter of law, inasmuch as its submissions in support of its motion raised an issue of fact whether defendant had undertaken the duty of providing the means by which plaintiff was to move the barrels from the receiving area (see *Anderson v Bush Indus.*, 280 AD2d 949, 950; see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 9, 2009

Patricia L. Morgan  
Clerk of the Court