

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