

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

391

CA 09-02176

PRESENT: CENTRA, J.P., FAHEY, CARNI, GREEN, AND PINE, JJ.

KRYSTAL TONKIN AND RICHARD TONKIN,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

WIDEWATERS LAKEWOOD VILLAGE CENTER COMPANY,
AND THE WIDEWATERS GROUP, INC.,
DEFENDANTS-APPELLANTS.

BRIAN P. FITZGERALD, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

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 1, 2009 in a personal injury action. The order denied the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Krystal Tonkin (plaintiff) when she slipped and fell on snow-covered ice in a parking lot owned by defendants. Supreme Court properly denied defendants' motion seeking summary judgment dismissing the amended complaint. Defendants' own submissions raise a triable issue of fact whether plaintiff fell "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), or whether she fell as the result of ice that had accumulated prior to the storm (*see Stalker v Crestview Cadillac Corp.*, 284 AD2d 977). In addition, defendants failed to meet their initial burden of establishing that they lacked constructive notice of the icy condition (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187; *Simmons v Oswego County Sav. Bank*, 306 AD2d 825).

Entered: March 19, 2010

Patricia L. Morgan
Clerk of the Court