



LINDA JORDAN AND FRANCIS JORDAN v. JULES MUSINGER AND SUSAN MUSINGER

602 N.Y.S.2d 289 (1993) | Cited 1 times | New York Supreme Court | October 1, 1993

Order unanimously reversed on the law without costs, motions denied and complaint reinstated. Memorandum: Supreme Court erred in granting the motions of defendants for summary judgment dismissing plaintiffs' complaint. Although plaintiffs will bear the burden at trial of proving that defendants had constructive notice of the icy condition in the parking lot (see, *Anderson v Klein's Foods*, 139 A.D.2d 904, *aff'd* 73 N.Y.2d 835, *rearg denied* 73 N.Y.2d 918; *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837), on this motion for summary judgment, defendants bore the burden of showing entitlement to judgment as a matter of law (see, *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 325). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Center*, 64 N.Y.2d 851, 853). We conclude that defendants did not carry their burden of proving lack of constructive notice (cf., *Walton v Wegmans Food Markets*, A.D.2d [decided Mar. 12, 1993]).

Defendants presented sworn testimony from the restaurant owner that the parking lot was merely wet at 1:00 P.M., but it is undisputed that the parking lot was icy at approximately 7:00 P.M. when plaintiff Linda Jordan fell, sustaining a broken ankle. Defendants failed to prove that the ice formed so close in time to the accident that they could not reasonably have been expected to notice and remedy the condition (see, *Gordon v American Museum of Natural History*, *supra*, at 837). The meteorological data supplied by defendants does not prove when the ice formed.

