

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

890

CA 20-01483

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

MICHELLE H., INDIVIDUALLY, AND AS PARENT AND
NATURAL GUARDIAN OF AJ, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BUFFALO EDGE, LLC, BNYP PROPERTIES, LLC,
BNYP MAINTENANCE, LLC, BNYP, LLC,
DEFENDANTS-RESPONDENTS,
KEY PROPERTY CONSULTING, INC., ET AL.,
DEFENDANTS.

FEROLETO LAW, BUFFALO (JOHN FEROLETO OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL),
FOR DEFENDANT-RESPONDENT BUFFALO EDGE, LLC.

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
DEFENDANT-RESPONDENT BNYP PROPERTIES, LLC.

TREVETT CRISTO P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS BNYP, LLC AND BNYP MAINTENANCE, LLC.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 13, 2020. The order, among other things, granted the motions of defendants Buffalo Edge, LLC, and BNYP Properties, LLC, and the cross motion of defendants BNYP Maintenance, LLC, and BNYP, LLC, seeking, inter alia, summary judgment dismissing plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions of defendants Buffalo Edge, LLC and BNYP Properties, LLC and the cross motion of defendants BNYP Maintenance, LLC and BNYP, LLC and reinstating the complaint and cross claims against those defendants, and as modified the order is affirmed without costs.

Memorandum: In this negligence action, plaintiff appeals from an order that denied her cross motion for partial summary judgment and that granted the respective motions and cross motion of Buffalo Edge, LLC, BNYP Properties, LLC, BNYP Maintenance, LLC, and BNYP, LLC (collectively, defendants) for summary judgment dismissing, inter alia, the complaint against them. Contrary to plaintiff's contention, her cross motion was properly denied (*see generally Beatty v Williams,*

227 AD2d 912, 912 [4th Dept 1996]). We agree with plaintiff, however, that defendants failed to meet their initial burdens on their respective motions and cross motion insofar as they sought summary judgment dismissing the complaint against them (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to Supreme Court's determination, "[i]t is well established that a party cannot obtain summary judgment 'by pointing to gaps in its opponent's proof' " (*Frank v Price Chopper Operating Co.*, 275 AD2d 940, 941 [4th Dept 2000]). We therefore modify the order accordingly. The indemnification-related arguments by Buffalo Edge, LLC are not properly before us (*see Armental v 401 Park Ave. S. Assoc., LLC*, 182 AD3d 405, 408 [1st Dept 2020]) and should be addressed in the first instance by the motion court.

Entered: November 19, 2021

Ann Dillon Flynn
Clerk of the Court