

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33280
H/kmb

_____AD3d_____

Argued - November 28, 2011

PETER B. SKELOS, J.P.
JOHN M. LEVENTHAL
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-07184

DECISION & ORDER

Shu-Feng Lin, appellant, v Dial Container Service,
Inc., et al., respondents (and a third party action).

(Index No. 28382/06)

Caesar & Napoli, New York, N.Y. (James C. Napoli and Milena Hanukov of counsel), for appellant.

Edward Garfinkel, Brooklyn, N.Y. (Fiedelman & McGaw [Joseph Horowitz], of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated May 26, 2010, as denied her motion for summary judgment on the issue of liability with leave to renew upon the completion of discovery.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the plaintiff's motion for summary judgment on the issue of liability is granted.

The plaintiff alleged that she was walking on a sidewalk when she was struck by a portion of a limb which broke off from a nearby tree. A tractor-trailer operated by the defendant Neuschel N. Newman and owned by the defendant Dial Container Service, Inc. (hereinafter Dial), made contact with the tree, causing the limb to break off from the tree. Newman, who was aware of the presence of the tree, which hung over the roadway, testified at his deposition that the middle of the roadway was under construction, and that a flagman was directing all traffic in his direction of travel to drive all the way to the right of the roadway. The plaintiff commenced this action to

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recover damages for personal injuries against Newman and Dial. Newman and Dial commenced a third-party action against the City of New York, and a second third-party action against Delaney Associates, L.P., which was performing construction work on the roadway.

The plaintiff established her prima facie entitlement to judgment as a matter of law by demonstrating that Newman's negligent operation of the vehicle proximately caused her accident and that she was not comparatively at fault in the happening of the accident (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320). In opposition, the defendants failed to raise a triable issue of fact. Under the circumstances of this case, the mere fact that discovery was outstanding in the third-party and second third-party actions was an insufficient basis for delaying determination of the motion (*see Silberman v Surrey Cadillac Limousine Serv.*, 109 AD2d 833; *see also Cortes v Whelan*, 83 AD3d 763).

Accordingly, the Supreme Court should have granted the plaintiff's motion for summary judgment on the issue of liability.

SKELOS, J.P., LEVENTHAL, BELEN and ROMAN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court