

**Nunez v Wah Kok Realty Corp.**

2013 NY Slip Op 30782(U)

April 16, 2013

Supreme Court, New York County

Docket Number: 108771/10

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

EMILIANA NUNEZ and ALEJANDRO NUNEZ,

Plaintiffs,

-against-

WAH KOK REALTY CORP.,

Defendant.

**FILED**  
APR 18 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

INDEX NO. 108771/10

MOTION SEQ. NO. 002

The following papers, numbered 1-4 were considered on this motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: [ ] Yes [ X ] No

Upon the foregoing papers, it is ordered that this motion for summary judgment is denied for the reasons set forth below.

Plaintiff Emiliana Nunez (Emiliana) brings this action to recover damages for personal injuries allegedly sustained as a result of a trip and fall in front of 250 Mulberry Street, New York, New York (Building), owned by defendant Wah Kok Realty Corp. Plaintiff Alejandro Nunez, plaintiff Emiliana's husband, has a derivative cause of action.

BACKGROUND

On January 13, 2010, plaintiff Emiliana tripped on a Christmas tree in front of the Building and fell to the floor hitting her right arm and shoulder (Accident). Thereafter, plaintiffs commenced this action against defendant alleging that defendant was negligent in maintaining the public sidewalk in front of the Building in a reasonably good and safe condition. Specifically, plaintiffs allege that on the

date of the Accident, the sidewalk in front of the Building had, *inter alia*, a Christmas tree discarded near the curb which caused plaintiff Emiliana to trip and fall. Defendant now moves for summary judgment.

#### DISCUSSION

In order to establish negligence, a plaintiff is required to prove “the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury”. *Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 (1<sup>st</sup> Dep’t 2006), citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 (1928). Additionally, “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Id.* at 853. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1<sup>st</sup> Dep’t 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1<sup>st</sup> Dep’t 1990). The court’s role is “issue-finding, rather than issue-determination”. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *Ugarriza v Schmieder*, 46 NY2d

471, 475-476 (1979).

Defendant argues that it is entitled to summary judgment, as it did not breach any duty to plaintiffs, it complied with the regulations set forth by the Department of Sanitation for the proper disposal of Christmas trees, and that the condition was open and obvious. Specifically, defendant contends that, at the time of the Accident, as per the Department of Sanitation's guidelines, the Christmas tree was put on the sidewalk outside the Building at the prescribed time period, the tree was not wrapped or tied, and the tree was close to the curb. In support of its motion, defendant proffers, *inter alia*, the deposition transcript of plaintiff Emiliana, the deposition transcript of the assistant to the building manager, Michelle Zhang, and a print out of a press release, dated December 28, 2009, from the Department of Sanitation regarding the disposal of Christmas trees. Such press release states that "[t]rees must not be placed into plastic bags. Clean, non-bagged Christmas trees that are left at the curb between Monday, January 4<sup>th</sup> and Friday, January 15<sup>th</sup> will be collected". Antanesian Affirmation, Exh. J, Department of Sanitation New York City Press Release.

In opposition, plaintiffs argue that defendant failed to make a *prima facie* showing of entitlement to summary judgment. Plaintiffs contend that the evidence provided by defendant lacks any statement to establish, as a matter of law, that defendant did not have notice, either actual or constructive, that the Christmas tree was a tripping hazard. Alternatively, plaintiffs argue that issues of fact exist sufficient to preclude the granting of defendant's motion for summary judgment. Specifically, plaintiffs contend that whether the Christmas tree was an open and obvious condition, as claimed by defendant, is an issue of fact as to plaintiff Emiliana's comparative negligence.

Plaintiffs further contend that there is an issue of fact as to whether defendant complied with the guidelines, set forth by the Department of Sanitation, regarding the disposal of Christmas trees. In

support, plaintiffs proffer the deposition transcript of defendant's current superintendent, Pedro Cuate, who testified that at the time of the Accident, he was working as the superintendent of 230 Mulberry Street, New York, New York, a building close to the Building, and that the guidelines for disposal of a Christmas tree stated that trees must be wrapped with plastic and tied. See Zuller Affirmation in Opposition, Exh. 2, Cuate deposition, p. 15, l. 10-16. Plaintiff claims that the press release provided by defendant is a hearsay document and should not be considered.

In reply, defendant, citing an Appellate Division, First Department case, argues that the burden to show that defendant had notice of a defect or condition is on plaintiffs. See *Strowman v Great Atlantic and Pacific Tea Co., Inc.*, 252 AD2d 384, 385 (1<sup>st</sup> Dep't 1998). However, the *Strowman* court specifically held that "[a] defendant's burden on the issue of notice on a summary judgment motion is met if he demonstrates the absence of a material issue of fact on the question." *Id.* Moreover, to prevail on a motion for summary judgment, the Appellate Division, First Department, has held that "it is the defendant[s] burden to establish the lack of notice as a matter of law". *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 (1<sup>st</sup> Dep't 2001).

Upon the within submissions, defendant has failed to establish entitlement to summary judgment as a matter of law. Here, defendant has failed to demonstrate the absence of a material issue of fact as to notice, or that it lacked notice. In fact, defendant has failed to provide any sufficient evidence that would tend to show periodic or regular inspections of the sidewalk, or any evidence by someone with personal knowledge as to how defendant's employees disposed of Christmas trees at the time of the Accident. The testimony of assistant building manager Michelle Zhang does not provide any indication as to the regular procedures followed by defendant regarding disposal of Christmas trees, or the inspection of the sidewalk abutting the Building at the time of the Accident. In fact, Ms. Zhang had no personal

knowledge as to the procedures followed by the superintendent regarding garbage disposal. Thus, defendant failed to provide, through the deposition of its employees, any testimony or evidence as to the sidewalk, or the Christmas tree, prior to the Accident. See *Baines v G&D Ventures, Inc.*, 64 AD3d 528, 529 (2d Dep't 2009) (holding that defendant failed to make a prima facie showing as to the absence of notice where defendant submitted the deposition transcript of its president, which did not provide "any testimony as to when he last inspected the subject sidewalk prior to the accident or what it looked like when he last inspected it"). Drawing all reasonable inferences in favor of plaintiffs, defendant is not entitled to summary judgment as defendant has failed to establish lack of notice.

Additionally, the Court notes that both defendant and plaintiffs proffered only an attorney's affirmation in support of their respective positions. It is well settled that "a bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing." *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1<sup>st</sup> Dep't 1981), aff'd 54 NY2d 715 (1981). Here, in support of its motion, defendant provides a copy of the alleged guidelines from the Department of Sanitation regarding disposal of Christmas trees without providing any foundation for its inclusion. Thus, defendant has failed to establish that it properly disposed of the Christmas tree in accordance with the guidelines set by the Department of Sanitation at the time of the Accident. As defendant has failed to establish entitlement to summary judgment as a matter of law, despite the sufficiency of plaintiffs' opposing papers, defendant's motion for summary judgment must be denied. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985).

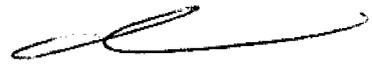
As such, it is

ORDERED that defendant's motion to for summary judgment is denied; it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon defendant with notice of entry.

This constitutes the decision/order of the Court.

Dated: 4/16/13

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

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