

Silverberg v Palmerino
2007 NY Slip Op 31756(U)
June 19, 2007
Supreme Court, Albany County
Docket Number: 0035302/0051
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT
DEBRA SILVERBERG,

COUNTY OF ALBANY

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 3530-05
RJI NO. 0105083868

ROBERT PALMERINO,
DEBORAH PALMERINO and
MURIEL HAUSLER

Defendants.

Supreme Court Albany County All Purpose Term, May 21, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Defendant, Muriel Hausler (“Defendant” or “Ms. Hausler”), brings this motion seeking

summary judgment, pursuant to CPLR § 3212. Plaintiff, Debra Silverberg (“Plaintiff” or “Ms. Silverberg”) and co-defendants, Robert Palmerino and Deborah Palmerino (“the co-defendants” or “the Palmerinos”) separately oppose the motion.

Plaintiff brings this action against Defendants, Muriel Hausler and Mr. and Mrs. Palmerino. Ms. Silverberg, a former tenant of the Palmerinos, contends that on January 21, 2004 at approximately 3:00 P.M. she slipped and fell after walking on an icy “party” driveway allegedly co-owned by the defendants. As a result of the fall, Plaintiff allegedly sustained serious personal injuries to her right arm including fractures, numbness and swelling, scarring and disfigurement, the need for surgery, and permanent injury. Plaintiff asserts that Defendants had constructive and actual notice of the condition because Ms. Hausler lives at one of the residences, could observe the ice and alert the Palmerinos, and because both defendants were aware of the inclement weather conditions.

Ms. Hausler has filed this motion for summary judgment asserting that Plaintiff has failed to meet her burden in establishing that she had a duty to prevent harm to the plaintiff, when she fell on the driveway designated by the property line as Mr. Palmerino’s side of the driveway. Because Plaintiff has failed to establish triable issues of material fact this Court will grant the Defendant Hausler’s motion.

In contrast, the co-defendants, Mr. and Mrs. Palmerino, argue that the motion should be denied because there is a question of Ms. Silverberg’s credibility. The co-defendants argue that despite Plaintiff’s indication of where she fell, she was dazed at the time of the accident and thus could not accurately locate the true location (be it the Palmerino’s half or Ms. Hausler’s). Finally, the co-defendants argue that Ms. Hausler is not merely a disinterested neighbor, but is a co-owner of the driveway who could have used the property and who also shared equally in its

maintenance, care, and plowing.

After a full review of the record this Court will grant Ms. Hausler's motion for summary judgment.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." Napierski v. Finn, 229 A.D.2d 869, 870 (3d Dept 1996). In deciding whether summary judgment is warranted, the court's main function is issue identification, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law. See Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986); see also Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

Negligence causes of action require a plaintiff "to demonstrate (1) that [the defendant] owed plaintiff a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach." McGill v. Caldors, Inc., 135 A.D.2d 1041, 1042 (3d Dept. 1987). Further, in order to establish a breach of the duty, by the defendant, in a slip and fall action the "plaintiff must demonstrate that defendant had actual or constructive notice of the condition" which allegedly caused the fall. Stoerzinger v. Big V Supermarkets, Inc., 188 A.D.2d 790, 790 (3d Dept. 1992).

In the instant case, this Court will grant the Defendant Hausler's motion for summary

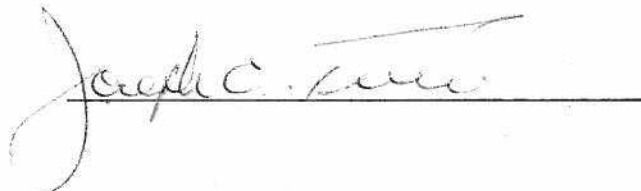
judgment finding that Ms. Hausler did not assume a duty to the co-defendant's tenant by merely providing half of the snow plowing fees when the ownership of the driveway was designated by the property line. Further, this Court finds that the co-defendants, Palmerino, did not establish a question of fact as to where the fall occurred. Accordingly, the Defendant Hausler's motion for summary judgment is granted.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York

June 19, 2007



PAPERS CONSIDERED:

1. Affidavit of Joan Matalavage, dated April 30, 2007.
2. Notice of Motion containing Exhibits A through I, with Affidavit of Joan Matalavage, dated April 30, 2007.
3. Affirmation in Opposition to Motion for Summary Judgement of Thomas J. Johnson, Esq. dated May 10, 2007.
4. Reply Affidavit of Joan Matalavage, dated May 10, 2007.

5. Affirmation in Opposition to Motion for Summary Judgment of George A. Kohl, Esq. dated May 16, 2007.
6. Second Reply Affidavit of Joan Matalavage, dated May 21, 2007.