

Mougiannis v Dermody

2010 NY Slip Op 30805(U)

March 9, 2010

Supreme Court, Nassau County

Docket Number: 9146/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

**JOHANNA MOUGIANNIS and DOMENICA
MOUGIANNIS,**

Index No. 9146/07

Motion Submitted: 2/8/10
Motion Sequence: 002, 003, 004

Plaintiff(s),

-against-

**WALTER DERMODY and CAROL DERMODY
and GILBERT ALBANESE,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....X
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....

This motion by the defendants Walter and Carol Dermody for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint against them is denied.

This motion by the defendant Gilbert Albanese for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint against him is granted.

This cross-motion by the plaintiffs Johanna Mougiannis and Domenica Mougiannis for, *inter alia*, an order pursuant to CPLR §3212 granting them partial summary judgment on liability against the Dermody defendants is denied.

In this action, the plaintiffs seek to recover damages they allegedly suffered when their next door neighbors, the Dermody's, above ground pool collapsed at about 8:15 p.m. on August 3, 2006. They allege that the Dermody's and their pool maintenance man, the defendant Albanese, failed to properly maintain the pool which led to its collapse.

All of the defendants presently seek summary judgment dismissing the complaint on the grounds that they did not create the condition(s) that caused the pool's collapse nor did they have actual or constructive notice of them.

“On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Sheppard-Mobley v. King*, 10 A.D.3d 70, 74, 778 N.Y.S.2d 98 (2d Dept., 2004), *aff'd. as mod.*, 4 N.Y.3d 627 (2005), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Sheppard-Mobley v. King, supra*, at p. 74; *Alvarez v. Prospect Hosp., supra*; *Winegrad v. New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (*Alvarez v. Prospect Hosp., supra*, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, *Demshick v. Community Housing Management Corp.*, 34 A.D.3d 518, 521, 824 N.Y.S.2d 166 (2d Dept., 2006), citing *Secof v. Greens Condominium*, 158 A.D.2d 591, 551 N.Y.S.2d 563 [2d Dept. 1990]).

“The owner . . . of property has a duty to maintain his or her property in a reasonably safe condition under the existing circumstances and may be liable in tort if the plaintiff can establish that the landowner either affirmatively created or had actual or constructive notice of a hazardous condition.” (*Berkowitz v. Long Island Water Corp.*, ___ A.D.3d ___, 2010 WL 654400 (2d Dept., 2010), citing *Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976); *Kimen v. False Alarm, Ltd.*, 69 A.D.3d 579, 893 N.Y.S.2d 158 (2d Dept., 2010); *Williams v. Long Island Rail Road*, 29 A.D.3d 900, 816 N.Y.S.2d 153 [2d Dept., 2006]). “To provide constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendants to discover and remedy it.” (*Medina v. LaFiura Development Corp.*, ___ N.Y.S.2d ___, 69 A.D.3d 686 (2d Dept., 2010), citing *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 (1986); *Scott v. Redl*, 43 A.D.3d 1031, 842 N.Y.S.2d 485 [2d Dept., 2007]).

The Dermody's testified at their examinations-before-trial that they never experienced any problems with the pool in the ten years they had it. It never warped or leaked nor did they have any problems with its structural integrity. In fact, they testified that they used it regularly without incident, even on the night it collapsed. The plaintiff Johanna Mougiannis herself admitted at her examination-before-trial that she never complained to the defendants regarding the pool.

Both Mrs. Dermody and Albanese testified at their examination-before-trial that Albanese serviced the Dermody's pool from when it was put up. While Albanese testified that he did not manufacture or install the pool, both of the defendants testified that he may have purchased and/or installed it for them. Albanese testified that he opened and closed the pool seasonally and serviced it about two times a month during the summer while it was open by vacuuming it and adjusting the pool chemicals. Mrs. Dermody and Albanese agreed that Albanese was never hired to inspect or repair the pool nor was he ever told of any specific problems with it. Albanese himself testified that he never noticed any problems with the pool throughout the summer preceding its collapse. More specifically, he testified that he never observed any leaks, walls warping or unlevel ground and with the exception of rusty skimmer screws, he never noticed any rust, either. Mrs. Dermody testified that she never hired anyone else in the summer of 2006 to check or work on the pool. Mr. Dermody testified that he occasionally added chlorine and skimmed the pool.

Having established that they did not have any notice of any defective conditions that could have given rise to their pool's collapse, the Dermody defendants have established their entitlement to summary judgment dismissing the complaint against them. (See, *Stile v. Jen Marine Development, LLC*, 69 A.D.3d 707, 891 N.Y.S.2d 667 (2d Dept., 2010). The burden accordingly shifts to the plaintiffs to establish the existence of a material issue of fact.

Barring an exception, Albanese's relationship with the Dermody's does not give rise to a duty to the plaintiffs, thus barring the plaintiffs' recovery from him. (*Church ex rel. Smith v. Callanan Industries, Inc.*, 99 N.Y.2d 104, 111, 99 N.Y.2d 104, 782 N.E.2d 50, 752 N.Y.S.2d 254 (2002); see also, *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002); *Palka v. Servicemaster Management Services Corp.*, 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994); *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226, 556 N.E.2d 1093, 557 N.Y.S.2d 286 (1990); *George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 878 N.Y.S.2d 143 [2d Dept., 2009]). Those three exceptions are "where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely." (*George v. Marshalls of MA, Inc.*, *supra*, at p. 928, citing *Espinal v. Melville Snow Contractors, Inc.*, *supra*, at p. 140). None of these exceptions

apply here. It is unclear whether Albanese's nonfeasance, i.e., his failure to adequately inspect and discover the condition(s) that gave rise to the pool's collapse, launched an instrument of harm. (See, *Vignapiano v. Herbert Const. Co.*, 46 A.D.3d 544, 846 N.Y.S.2d 610 (2d Dept., 2007) (plaintiff failed to raise an issue of fact as to whether building's management company's employees' nonfeasance in failing to discover alleged defect in the shelves "launched a force or instrument of harm.") (*Simmons v. Sacchetti*, 65 A.D.3d 495, 885 N.Y.S.2d 257 (1st Dept., 2009 Acosta, J., dissenting) (issues of fact as to whether the boiler contractor launched a force or instrument of harm by failing to properly inspect the hot water system); but see, *Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 878 N.E.2d 1001, 848 N.Y.S.2d 585 (2007) (no evidence inspection made instrument less safe than it was before and exacerbated a dangerous condition); *Marchetti v. Allstate Conveyor Service, Inc.*, 67 A.D.3d 748, 888 N.Y.S.2d 597 (2d Dept., 2009) (contract to perform quarterly inspections does not give rise to duty to third party); *Altinma v. East 72nd Garage Corp.*, 54 A.D.3d 978, 981, 865 N.Y.S.2d 109 (2d Dept., 2008) (failure to become 'an instrument for good' not sufficient to impose a duty of care to party not in privity to contract); see also, *Eavesbrooks Costume Co. v. Y.B.H. Realty Corp.*, *supra*; *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896, 62 A.L.R. 1199 [1928]). Assuming, *arguendo*, that it did, there is no evidence that the Albanese contract with the Dermody's required him to inspect the pool. Nor is there any evidence that the plaintiffs detrimentally relied on Albanese or that he entirely displaced the Dermody's with respect to their responsibilities for the pool. In any event, assuming, *arguendo*, that Albanese had a duty to the plaintiffs, again, the requisite notice of the defective condition was absent. (*Ellisy v. Eklecco, LLC*, 56 A.D.3d 517, 868 N.Y.S.2d 82 [2d Dept., 2008]).

In opposition to the defendants' motions and in support of their own, the plaintiffs rely on the affidavits of plaintiff Johanna Mougiannis, and her neighbors and a friend. Mougiannis and another neighbor attest that this is not the first time that the Dermody's had a pool collapse. She further represents that she had a clear view of the Dermody's pool both from her deck and as she traversed her yard and that soon after it was installed, she began to notice that the pool was not level. She regularly noticed that the water level was uneven and that it was tilted toward her yard. She explains that "[t]he side of the pool wall nearest my backyard was noticeably lower than the wall on the opposite side of the pool, and the water level was too high and higher on the side of the pool closest to my property." Mougiannis also attests that before the pool collapsed, she routinely observed the Dermody's and their guests misusing the pool, jumping from the deck, sitting and standing on the rim/edge of the pool and jumping in from the rim/edge, even shortly before the pool collapsed. And, in many instances, she observed the water level too high to the point where the water overflowed over the pool's wall. She has also submitted photographs of the collapsed pool which reveal possible rust on its walls. She further attests that once the pool was removed, she observed large tree roots protruding from the ground where the pool had been. The plaintiffs have also submitted the affidavits of two neighbors attesting to having observed the high water level

and the pool's tilted appearance as well as the rusted pool walls and tree roots after the pool collapsed. A friend of the plaintiffs has also attested to the Dermody's and their friends' alleged misuse of the pool shortly before its collapse, as well as her observation of the pool rust and tree root conditions following its collapse.

The plaintiffs have also submitted the affidavit of a previously undisclosed expert which will not be considered. (*Wartski v. C.W. Post Campus of Long Island University*, 63 A.D.3d 916, 882 N.Y.S.2d 192 (2d Dept., 2009), citing *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702 (2d Dept., 2008); *Gerry v. Commack Union Free School Dist.*, 52 A.D.3d 467, 469, 860 N.Y.S.2d 133 (2d Dept., 2008); *Gralnik v. Brighton Beach Associates, LLP*, 3 A.D.3d 518, 770 N.Y.S.2d 633 (2d Dept., 2004); *Dawson v. Cafiero*, 292 A.D.2d 488, 739 N.Y.S.2d 190 (2d Dept., 2002), lv den., 98 N.Y.2d 610 [2002]). Unlike in *Howard v. Kennedy* (60 A.D.3d 905, 875 N.Y.S.2d 271 [2d Dept., 2009]), here, there is no "factual dispute" as to whether the plaintiffs complied with CPLR §3101(d)(1).

Assuming, *arguendo*, that the plaintiffs have raised an issue of fact regarding whether or not the manner in which the pool was installed contributed to its collapse, not only does it appear that the statute of limitations would require dismissal of that claim, there is insufficient evidence that the defendant Albanese installed it. He denies having done so and neither of the Dermody's have been able to say for certain that he did. In any event, evidence that Albanese violated a duty to the plaintiffs is still lacking. The complaint against Albanese is dismissed.

With respect to the Dermody's, the plaintiffs have established the existence of a material issue of fact as to whether they had constructive notice of conditions, which gave rise to the pool's collapse. The plaintiffs, however, have not established their entitlement to summary judgment.

The doctrine of *res ipsa loquitur* provides an additional basis for denying the Dermody's motion. In order to submit a case to a trier of fact based on this theory of negligence "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (quotations omitted)." (*Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 209, 851 N.E.2d 1143, 818 N.Y.S.2d 792 (2006), quoting *Corcoran v. Banner Super Mkt.*, 19 N.Y.2d 425, 227 N.E.2d 304, 280 N.Y.S.2d 385 (1967), quoting Prosser, Torts § 39, at p. 218 [3d ed]). "[R]es ipsa loquitur does not require sole physical access to the instrumentality causing the injury and can be applied in situations where more

than one defendant could have exercised exclusive control.” (*Singh v. United Cerebral Palsy*, __ A.D.2d __, 2010 WL 653260 (1st Dept., 2010), citing *Banca Di Roma v. Mutual of Am. Life Ins. Co., Inc.*, 17 A.D.3d 119, 121, 793 N.Y.S.2d 341 [1st Dept., 2005]). And, specific acts of negligence do not preclude the application of the doctrine of *res ipsa loquitur* unless the two theories are fundamentally or inherently inconsistent. (*Torres v. Cordice*, 11 Misc.3d 23, 812 N.Y.S.2d 731 (1st Dept., 2006), citing *Abbott v. Page Airways, Inc.*, 23 N.Y.2d 502, 513-514 [1969]). *Res ipsa* applies to the situation extant. (See, *Singh v. United Cerebral Palsy of New York City, supra*; *Champagne v. Peck*, 59 A.D.3d 1130, 872 N.Y.S.2d 836 [4th Dept., 2009]; *Banca DiRoma v. Mutual of America Life Ins. Co., Inc., supra*; *Torres v. Cordice, supra*. Nevertheless, this is not an “exceptional case in which no facts are left for determination” thereby justifying summary judgment in the plaintiffs’ favor. (*Champagne v. Peck, supra*, citing *Morejon v. Rais Constr. Co., supra*).

The foregoing constitutes the Order of this Court.

Dated: March 9, 2010
 Mineola, N.Y.

Loren V. Murphy
 J. S. C.

ENTERED

APR 05 2010

**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**