Castagna v Lakeland Garden Assoc.
2010 NY Slip Op 33518(U)
December 22, 2010
Sup Ct, Suffolk County
Docket Number: 41055/2008
Judge: William B. Rebolini
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Anthony Castagna,

Plaintiff,

-against-

Lakeland Garden Associates, a limited Partnership d/b/a Lakeland Garden Apartments and SJH Consulting Inc., a General Partner of Lakeland Garden Associates,

Defendants.

Motion Sequence No.: 001; MD
Motion Date: 7/27/10
Submitted: 11/17/10

Index No.: 41055/2008

Attorney for Plaintiff:

Daniel William DeLuca, Esq.
3555 Veterans Memorial Highway,
Suite P
Ronkonkoma, New York 11779

Attorney for Defendants:

Milber Makris Plousadis & Seiden, LLP
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

Clerk of the Court

Upon the following papers numbered 1 to 42 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 21; Answering Affidavits and supporting papers, 22 - 33; Replying Affidavits and supporting papers, 34 - 42.

The complaint in this action alleges common law negligence and the failure of the defendant to provide a safe work place for the plaintiff. It alleges that on June 25, 2008, the plaintiff, Anthony Castagna, was employed by Village Court Associates and was assigned with a co-worker to Lakeland Garden Apartments , Johnson Avenue, Sayville, New York, to perform certain construction work and improvements to apartments # 72 and #74 and that while the plaintiff was working on a sliding glass door, he was caused to be struck by a projectile shot from a Toro lawn tractor being used and

operated by the defendants' employees, causing the plaintiff to sustain injury. It is claimed that the defendants had actual and constructive notice of the dangerous condition complained of in that defendants' employees, agents and servants created a dangerous condition by negligently modifying the lawn mower by removing the safety chute cover from the machine then conducting landscaping work using it in proximity to plaintiff on the premises.

The plaintiff now moves for summary judgment on liability against the defendants on the asserted basis that the inference of negligence by the defendants is inescapable and on the basis of the doctrine of *res ipsa loquitur*.

The 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. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (see, Sillman v. Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR §3212[b]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v. Aeroxon Prods., 148 AD2d 499 [2nd Dept., 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept., 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (see, Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of this motion the plaintiff has submitted, *inter alia*, an attorney's affirmation; the affidavit of Anthony Castagna; a copy of the summons and complaint and supplemental summons and amended complaint; defendants' answers and various demands; a copy of the verified bill of particulars and supplemental amended verified bill of particulars; photographs of the site and lawnmower; an unsigned copy of a transcript of an examination before trial of Aaron Rodriguez dated October 15, 2009; and a decision from an unrelated action. The unsigned deposition transcript of Aaron Rodriguez does not comport with CPLR §3212 as it is not in admissible form, nor is it accompanied by an affidavit pursuant to CPLR §3212 and therefore cannot be considered on this motion for summary judgment.

The plaintiff Anthony Castagna has set forth in his affidavit that, while performing interior renovation work and exterior landscape clean up and trimming at the subject premises, he stepped outside the apartment and was struck by two rocks which he believed were thrown from the Toro lawn tractor owned by Lakeland Garden Apartments and operated by Aaron Rodriguez, an employee of Lakeland Garden Apartments. Rodriguez was working directly outside the apartment the plaintiff was working at when the incident occurred. When Castagna saw the Toro lawn tractor that day prior to the incident, it did not have a chute flap on it. The plaintiff asserts that the chute flap is supposed to remain on the lawn tractor to prevent objects from being projected from the blade housing. He claims that, prior to the incident, Thomas DeSerio, Sr., his supervisor, asked Aaron Rodriguez to stop cutting the lawn where he and the plaintiff were working.

Thomas DeSerio testified as summarized in this paragraph. He was employed by Village Court Associates as a superintendent on the date of the incident. He takes care of the buildings at Village Court Associates. If there is a problem with the lawn mowers, they get sent out to Bay Shore Mowers for repair. During his employment, he did work at Lakeland Garden Apartments and the plaintiff worked with him for about six years in maintenance. The plaintiff cleaned windows, painted apartments and helped with repairs or renovations in the apartments. On the date of the accident, he and the plaintiff were working on a downstairs apartment facing Johnson Avenue. Aaron Rodriguez, an employee of Lakeland Garden Apartments, was operating a relatively new Toro 42 lawn mower/tractor owned by Lakeland Garden Apartments. Rodriguez was mowing the grass area between the sidewalk and the stoop of the apartment where he and the plaintiff were working. He told Rodriguez that he was going to be working there in a little bit and would be setting up saw horses and told him to hurry and cut the grass there. DeSerio testified that he heard no rocks or other objects getting caught or picked up by the lawn mower and stated, "believe it or not, there's nothing there. That's what–there is no rocks here." He saw no rocks that day, but when Castagna got hurt, they found a rock in the apartment which Castagna told him he saw fly by DeSerio's head before striking his hand. When shown rocks, he stated he believed that the one that hit Castagna was smaller. He did not remember Rodriguez being in the area when Castagna was injured. He had asked Rodriguez earlier why the chute cover was off the mower and that Rodriguez told him Warren, his supervisor from Lakeland Garden, told him to take it off because it kept getting clogged. He told Rodriguez that the tractor should not be used to cut grass with the guard cover off. However, before he and Castagna went to the hospital, he looked at the mower and observed the chute flap was on, as was the guard-that no one ever took that off. He knew that the "shield" or guard was on as, since Rodriguez went by him with the mower, stuff would have been blowing all over him if it wasn't on. Prior to this incident, he was not aware of any rocks on the lawn or problems involving rocks in the area.

In opposing this motion, the defendants have submitted, inter alia, an attorney's affirmation; the unsigned transcript of the examination before trial of Aaron Rodriguez which is not in admissible

form; the affidavit of Aaron Rodriguez dated July 20, 2010; and the transcript of the examination before trial of Thomas DeSerio.

Aaron Rodriguez averred in his affidavit as follows in this paragraph. He was employed by Lakeland Garden Associates and at the time of the accident was operating a Toro tractor riding lawn mower to cut the grass at Lakeland Garden Apartment. Prior to mowing, he spent approximately thirty minutes inspecting the lawn, looking for rocks, sticks and any kind of debris and at no time did he observe the same. While he was cutting the lawn, he did not observe any rocks, sticks or debris. The accident occurred when he ran over a rock that was not visible, causing the rock to be propelled towards the plaintiff. He heard the noise come from the mower, turned it off, and observed that the chute towards the bottom of the mower was missing. He claims that the chute had been on the mower before the accident and that apparently the chute became damaged in the accident and he found the chute/mulch kit in the bushes. He states that the "flap" referred to at his deposition was a flap that was not necessary for the safe operation of the lawn mower, and that the flapper is not the same as the chute.

The plaintiff has submitted in the reply various affidavits, including a further affidavit of the plaintiff introducing new testimony and his opinion concerning the operation of the mower, and the operator's manual for a LX425 Lawn tractor. However, upon a motion for summary judgment, failure to submit the expert affirmation with the moving papers would render the application insufficient as the affidavits are to be given no consideration by the court entertaining the motion for summary judgment when received in a reply (see, Sherrer v. Time Equities, Inc. and Emilia Grocery, Inc. v. Time Equities, Inc., 218 AD2d 116 [1st Dept., 1995]). The plaintiff has not established himself herein as an expert. Arguments advanced for the first time in reply papers are entitled to no consideration by a trial court entertaining a summary judgment motion (see, Migdol v. City of New York et al, 291 AD2d 201 [1st Dept., 2002]; Lumbermens Mutual Casualty Company v. Morse Shoe Company doing business as Fayva Shore Store and Another, 218 AD2d 624 [1st Dept., 1995]). The prohibition against accepting material in reply papers is directed at the introduction of new arguments in support of, or new grounds for the motion at a point in the proceedings when the opposing party has no opportunity to respond (see, Sanford et al v. 27-29 W. 181st Street Association Inc. et al, 300 AD2d 250 [1st Dept., 2002]). The materials presented would have been appropriately been considered with the initial moving papers and not in a reply. Additionally, the model number for the subject mower has not been previously identified, thus creating a factual issue.

Based upon the admissible evidence submitted by the plaintiff, it is determined that the plaintiff failed to discharge its initial burden, that is, plaintiff has not established *prima facie* entitlement to summary judgment on the issue of negligence as a matter of law and on the basis of *res ipsa loquitur*. There are factual issues which preclude summary judgment and the plaintiff failed

initially to submit an expert affidavit regarding the lawn tractor and any modifications and changes proximately causing the rock to be propelled.

In New York, to establish a *prima facie* case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (see, Spiegel v. Fine Paint Co. 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County, 2006]).

As set forth in Grivas et al v. Grivas, 113AD2d 264 [2nd Dept., 1985]), "[T]he duty to exercise reasonable care in the operation of the lawn mower is a duty owed to all." It is therefore determined that the defendants owed a duty to the plaintiff to exercise reasonable care in the operation of the lawn mower. However, there are factual issues concerning whether the defendants breached that duty and if that breach was the proximate cause of the plaintiff's injury. It is undisputed that the plaintiff's hand was struck by a rock propelled by the lawn mower; however, there are factual issues concerning whether the rock was propelled due to the negligence of the defendants.

While the plaintiff avers that the chute flap was removed by the defendants, and that the chute flap prevents objects from being propelled from the blade housing, he bases this opinion about the tractor mower on his eight years plus experience in apartment maintenance and personal experience; however, he has not qualified as a expert by giving background, training and experience. Nor has the plaintiff submitted an affidavit from a qualified expert on the matters at issue, leaving this court to speculate as to what a chute flap is, whether the chute flap prevents objects from being propelled from the blade housing and whether objects can be propelled from the blade housing or by other parts of the lawn tractor even when the chute flap is in place (see, LaPaglia et al v. Sears Roebuck and Company, Inc. et al, 143 AD2d 173 [2nd Dept 1988] wherein the appellant designer of the mower testified that the chute deflector was not a safety guard and therefore would not have prevented the accident wherein an object was ejected from the mower's discharge chute; see also, Wood v. Auburn Lodge No. 474, Venevolent and Protective Order of Elks, Inc., 12 Misc3d 683 [City Court of New York, Auburn 2006] citing, Jones v. St. Louis Hous. Authority, 726 SW2d 766 [Mo 1987] wherein an independent contractor was liable for the death of a child struck by a stick propelled by the contractor's lawnmower because the proof showed that the contractor was aware of the debris in the area mowed as well as being aware of the propensity of the mower for propelling objects; also citing, conversely, Cochran v. David, 378 So2nd 1100 [Ala 1979] where the claim for damages was dismissed because no evidence was presented that the lawnmower had discharged debris on previous occasions, and further, evidence was presented that the rocks and debris were cleared from the mowing area prior to work commencing).

With regard to the plaintiff's claim of *prima facie* entitlement to summary judgment on the basis of *res ipsa loquitur*, it is determined that the same factual issues preclude summary judgment as it has not been demonstrated that the subject incident would not have occurred in the absence of negligence.

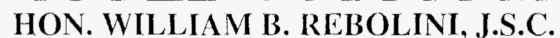
Res ipsa loquitur does not create a presumption of negligence against a defendant; rather the circumstantial evidence allows, but does not require, the jury to infer that the defendant was negligent. *Res ipsa loquitur* evidence does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted. The criteria for *res ipsa loquitur* are: (1) the event must be of a kind which ordinarily does not occur in the absence of negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (see, Morejon et al v. Rais Construction Company et al, 7 NY3d 203 [2006]). Moreover, only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict which only happens when the plaintiff's circumstantial proof is so convincing and the defendant's response is so weak that the inference of the defendant's negligence is inescapable (see, Lau v. Ky etc., et al, 63 AD3d 801 [2nd Dept., 2009]).

In the instant action, there are material questions of fact which preclude summary judgment as a matter of law and preclude summary judgment on the basis of *res ipsa loquitur* and the plaintiff failed to initially submit an expert affidavit in support of this application.

Accordingly, it is

ORDERED that this motion (001) by the plaintiff for an order pursuant to CPLR §3212 granting summary judgment on the issue of liability as against the defendants is denied.

Dated: December 22, 2010



HON. WILLIAM B. REBOLINI, J.S.C.

______ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION