

<b>Quinones v Calcagno</b>
2012 NY Slip Op 30910(U)
March 13, 2012
Supreme Court, Columbia County
Docket Number: 1991-07
Judge: George B. Ceresia Jr
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF COLUMBIA

JUAN QUINONES,

Plaintiff,

-against-

PAUL CALCAGNO, COLUMBIA  
MAINTENANCE AND GENERAL  
CONTRACTING, INC.,

Defendants.

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All Purpose Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI: 10-09-0443 Index No. 1991-07

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**DECISION/ORDER**

George B. Ceresia, Jr., Justice

The plaintiff in the above-captioned action alleges that he was injured on Sunday, September 17, 2006 in an accident which occurred on property owned by defendant Paul Calcagno (“defendant”), located at 187 Maple Lane, Kinderhook, in Columbia County, New York. He testified at a pre-trial deposition that he had been employed by the defendant to assist in constructing a large deck located on the shore of a small man-made pond behind defendant’s home. He indicated that he had worked at that location the previous weekend, on both days, and had worked there the day before the accident. According to his testimony,

he arrived at the Calcagno property on the day in question at about 10:00 a.m. and drove a truck down to the work site, approximately 200 yards from the defendant's residence. The foundation of the deck consisted of steel beams which created a frame. Pressure treated lumber (one inch by two inches) was nailed into the steel beams, and a top layer of composite deck boards was screwed into the pressure treated wood. The plaintiff testified that the deck was four to five feet above the ground; and that he and the defendant were working together. Plaintiff was carrying the boards onto the deck frame. The defendant was taking the boards, placing them down, spacing them and screwing them in. The accident occurred about an hour and one half or two hours after they started working. Plaintiff described the accident as follows:

“Q. Why don't you tell me in your own words what happened at the time you claim you were injured.

A. Okay. I was carrying composite wood on to the deck to place them where they needed to be placed, and I lost my footing and my feet had fallen through the gap in the deck, and that's when I came down and I struck (sic) my head on one of the steel beams.”

During the deposition, defense counsel had the plaintiff mark a photograph of the deck, identifying point “A” as the location where he picked up the composite deck boards and point “X”, the location where he fell. Plaintiff then gave the following testimony:

“Q. So when you stepped up from point A that you have marked the A with a circle on to the top of the decking, describe for me the manner in which you moved to point X where the injury occurred.

A. I would step from beam to beam to beam to beam.

Q. How far was each beam that you stepped on to?

A. I would like to say sixteen to twenty inches.

Q. Approximately sixteen to twenty inches?

A. Yes.

Q. Were these steel beams?

A. Yes.”

[]

“Q. Now, at the time you were injured did you trip or did you slip or did you misstep? What happened?

A. On top of that deck, the metal frame, there was a lot of sand from the area.

Q. So sand was on top of the metal beams?

A. Yes.

Q. And what happened?

A. And when I placed my footing I wasn't firmly planted on the metal beam and my foot had stepped through the hole.

Q. What foot stepped through the hole?

A. My right foot. The way I would step across the beams is I would lead with my right foot, and then I would take the next step with my right foot, because it was too large of a gap for me to go from here all the way to the third beam.

Q. Where was your left foot located at the time your right foot slipped?

A. It was located on the same beam with my right foot. Prior to the step I would step on to the next beam.

Q. And when you fell through the gap of the deck, did you

fall backwards, forwards. to the side?

A. I fell forwards.

[]

Q. When you fell did both your feet go into the same gap?

A. No. Well, they came into the same gap, but there is the metal that runs underneath and I felt that I was on a straddle, that I was going to straddle the beam as I came down, so I let go of what I was holding. I had actually fallen through the gap.

[]

Q. And did your foot or leg strike any of the beams as you fell through the gap?

A. No. I just --

Mr. Melley: It's a yes or no.

The Witness: No.

Q. Now, at the time you fell, from the waist up describe for me the movement of your body.

A. When I had fallen -- as I was falling on to the beams my face had actually -- because the size of the gap isn't very large as far as once your body falls through it, and my face had struck the beam (indicating).

Q. And you are gesturing the right side of your face (sic)?

A. This side of my face (indicating).

[]

Q. Your face hit the steel beam, correct?

A. Yes.

[]

Q. Now, where was Mr. Calcagno located at the time you were injured?

A. He was actually located right over here on the ground (indicating).

Q. So he was standing on the ground?

A. Yes.

Q. And you are indicating an area that looks to be the center of the photograph near the corner of the deck?

A. Near the corner of the deck.

Q. Did he see you fall?

A. Yes.”

The plaintiff testified that after that, the defendant brought him back to the defendant’s house and someone called 911.

The defendant’s version of the manner in which plaintiff was injured does not agree in any respect with the above, other than to concede that plaintiff was present at his house later on in the afternoon of that day, and he suffered an injury. The defendant testified as follows:

“Q. Did Mr. Quinones help you install any of those boards?

A. No.

Q. Did Mr. Quinones carry any composite material from where it was located over to the deck area that day?

A. No. Mr. Quinones was not there that day.

Q. I thought you told me he was there that day? Sunday, we’re talking about.

A. I said he was not there when I was doing that deck. He came afterwards.

Q. On the same day?

A. On that day.

Q. So it's your testimony that he wasn't there at that time on that day?

A. He was not at the deck that day.

Q. But he was on your property that day.

A. He came to my garage that day.

□

Q. When you installed the pressure-treated wood and the composite material as you described it, in the manner in which you did it, that's a one-man job?

A. Yes. That's how I did it.

Q. Who moved the composite material from its location where it was stacked or piled over to the deck?

A. Me.

□

Q. Is it possible that some person manually carried the composite material from its location where it was stored or pile over to that deck location?

A. No.

Q. For use on the deck?

A. No.

□

Q. During the process of installing the composite with the

pressure-treated, did you ever stand up and walk on that metal frame?

A. No.

Q. Did any person, that you know of?

A. Nobody. I was the only one working on that deck.

Q. And anybody that says they worked on that deck along with you would be lying or mistaken; is that correct?

A. Anybody other than my brother-in-law or Brian Burke, yes. Without my knowledge.

Q. That's true, that's a third possibility. The would either be lying, they could either be mistaken, or they would have done so without your knowledge; is that correct?

A. That's a fair assessment, without my knowledge.

Q. Back to Mr. Quinones walking towards you from the general direction of the garage and around from the house. Tell me the sum and substance of what you said and he said at that time.

A. He just told me, I fell. And I said what? He goes, I fell, and he removed his hand from his head and he started bleeding.

[]

Q. What happened next?

A. [The responding paramedics] treated – they asked him what happened.

Q. What did he say?

A. He told them that he fell in the garage.

Q. He told them that?

A. He told them that. He told the first guy there, Mike Daily, asked what happened (sic), he says I was in the

garage walking by the ramp and he showed him his sneakers, weird, and he said my sneakers are very slick, and I was on the phone and I fell.

Q. I was on the what and I fell?

A. Phone.

Q. What was he standing on?

A. He said he was standing in between the garage and the ramp going into the basement.

Q. Would you have to enter the garage in order to get to that ramp going into the basement?

A. Yes.”

Later on in the same deposition the defendant testified that plaintiff never worked for him. He repeated his testimony that plaintiff did no work in constructing or assembling the deck, and characterized plaintiff’s testimony of how the accident happened as a “fabrication”. Defendant further testified that he did not employ any subcontractors or companies to help in constructing the deck; that he made all of the decisions with regard to how the deck would be placed and assembled; and he was the only person to perform the work.

Plaintiff’s complaint contains five causes of action, sounding in negligence, violations of Labor Law §§ 200, 240 (1), 241 (6), and nuisance. The defendant served an answer, and has now made a motion for summary judgment.

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 in admissible form to demonstrate the absence of any material issues of fact (see Vega v Restani Construction Corp., \_\_\_ NY3d \_\_\_, 2012 NY Slip Op. 01148 [February 16, 2012]; Ferluckaj v Goldman

Sachs & Co., 12 NY3d 316 [2009]; Smalls v AJI Industries, Inc., 10 NY3d 733 [2008] Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (Smalls v AJI Industries, Inc., *supra*, citing Alvarez v Prospect Hosp., *supra*). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, *supra*; Alvarez v Prospect Hosp., *supra*). The Court’s function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [3rd Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 726 [3rd Dept., 1998]).

In addition, a party’s burden on a motion for summary judgment is not satisfied by merely pointing to gaps in its adversary’s proof. To succeed, there must be affirmative evidentiary proof demonstrating the movant’s right to judgment as a matter of law. Until that condition is met, the strength of the opponent’s proof is immaterial (see Antonucci v Emeco Industries, Inc., 223 AD2d 913, 914 [3rd Dept., 1996]; Rothbard v Colgate University, 235 AD2d 675, 678 [3rd Dept., 1997]; Clark v Globe Business Furniture Inc., 237 AD2d 846, 847 [3rd Dept., 1997]; Moffett v Harrison and Burrowes Bridge Contractors Inc., 266 AD2d 652, 654 [3rd Dept., 1999]). “[A] movant’s failure to satisfy his or her burden on a summary judgment motion requires denial of the motion, regardless of the sufficiency of

the opposing papers”” (Ames v Paquin, , 40 AD3d 1379 [3<sup>rd</sup> Dept., 2007], quoting Serrano v Canton, 299 AD2d 703, 705 [2002]).

Initially, in connection with all causes of action, the Court finds that there are triable issues of fact with regard to whether or not plaintiff was injured in the manner, and at the time and location that he claims he was injured, and whether or not he was employed by the defendant.

### **Negligence and/or Premises Liability**

The defendant maintains that even if the Court accepts plaintiff’s version of how the accident occurred, this is nothing more than a slip and fall case “cloaked by the plaintiff to appear as a Labor Law case so as to impose strict liability where none exists”. The defendant maintains that there was no duty to warn of an open and obvious danger upon the defendant’s premises, and that the premises was not inherently dangerous.

“It is well settled that a landowner has a duty to exercise reasonable care in maintaining his [or her] own property in a reasonably safe condition under the circumstances” (Galindo v Town of Clarkstown, 2 NY3d 633, 636 [2004]). “The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of a potential plaintiff’s presence on the property” (*id.*, citations omitted). “For defendant[] to prevail on [a] summary judgment motion, [the defendant is] “required to establish as a matter of law that [he] maintained the property in question in a reasonably safe condition and that [he]

neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof”” (Cantwell v Rondout Savings Bank, 55 AD3d 1031, 1031-1032 [3<sup>rd</sup> Dept., 2008], quoting Mokszki v Pratt, 13 AD3d 709, 710 [2004], quoting Richardson v Rotterdam Sq. Mall, 289 AD2d 679, 679 [2001]).

As noted, the plaintiff has presented evidence that he slipped on a steel beam of the deck which was then under construction. Under both plaintiff’s and defendant’s version of events, the deck was of defendant’s sole creation, and he had actual knowledge of its existence. The defendant has presented no evidence to dispel plaintiff’s claim that the exposed steel beams (and/or the presence of sand thereon) constituted a dangerous condition. With respect to defendant’s argument that the danger was open and obvious (and that therefore there was no need to warn or otherwise protect the plaintiff), the Third Department has made clear that “an injured person’s knowledge of a readily observable dangerous condition ‘does not, standing alone, necessarily obviate a landowner’s duty to maintain his or her property in a reasonably safe condition’” (Coleman v Crumb Rubber Manufacturers, \_\_\_ AD3d \_\_\_, 2012 NY Slip Op. 01174, [February 16, 2012], quoting MacDonald v City of Schenectady, 308 AD2d 125, 127 [3d Dept., 2003]). The entire case in this instance hinges upon the relative credibility of the plaintiff and the defendant with respect to how the accident occurred, which can only be accomplished at trial. In addition, plaintiff’s alleged comparative negligence (for example, in wearing worn-out shoes, as asserted by the defendant) would only serve to create another triable issue.

Viewing the evidence in a light favorable to the nonmoving party, as it must, the Court finds that there are triable issues of fact which preclude summary judgment.

**Labor Law 240 (1)**

Labor Law §§'s 240 (1) and §241 impose a nondelegable duty upon contractors, owners and their agents to comply with certain safety practices for the protection of workers engaged in various construction-related activities (see Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500). There exists, however, a specific statutory exemption to owners of one-or two-family dwellings who contract for but who do not direct or control the work (see Afri v Basch, 13 NY3d 592, 595-596 [2009]; Cannon v. Putnam, 76 NY2d 644, 649; Bartoo v Buell, 87 NY2d 362 [1996]; Truppi v Busciglio, 74 AD3d 1624, 1625 [3<sup>rd</sup> Dept., 2010]). “[W]hether a defendant's conduct amounts to direction and control depends upon the degree of supervision exercised over ‘the manner and method of the work to be performed’” (Afri v Basch, supra, at 596, quoting Duda v Rouse Constr. Corp., 32 NY2d 405, 409 [1973]). In this instance, under plaintiff’s version of the accident the defendant was working right along side the plaintiff in constructing the deck. As stated by the plaintiff during his pre-trial deposition, “Mr. Calcagno was essentially supervising me. I have never done construction before. I don’t know as far as he was telling me what to do and instructing me how to do it [sic]”. In the Court’s view, plaintiff has presented evidence sufficient to demonstrate a triable issue of fact (for purposes of both Labor Law 240 [1] and 241 [6]) that plaintiff was employed by the defendant at the time he was injured, and that the defendant was directing and controlling the work. As such, there is a triable issue with regard to whether the exemption for single family and two family dwellings has any application to the instant action.

Defendant also argues that there is no liability under Labor Law 240 (1) because the plaintiff did not fall from a height. “It is well settled that Labor Law § 240 (1) implicates those hazards that are ‘related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level’” (Yost v Quartararo, 64 AD3d 1073, 1074 [3<sup>rd</sup> Dept., 2009], quoting Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; and citing Auchampaugh v Syracuse Univ., 57 AD3d 1291, 1292 [2008]). Once again, referring to plaintiff’s version of how the accident occurred, the steel deck beams were situated some four and one half to five feet above the ground, and spaced some sixteen to twenty inches apart. Plaintiff testified that his feet fell through gap between the beams, and his face struck one of the beams. In the Court’s view the foregoing is sufficient to support a finding that the deck constituted an elevated work site, and that a safety device should have been furnished to prevent him from doing what he did, stepping from beam to beam while carrying a load, and ultimately falling between the beams. Thus, the Court finds there is sufficient evidence in the record to establish a triable issue that plaintiff was injured by reason of a violation of Labor Law 240 (1).

### **Labor Law 241 (6)**

Labor Law Section 241 (6) imposes a nondelegable duty on owners to provide “reasonable and adequate protection and safety” to employees working in construction, excavation or demolition (Labor Law Section 241 [6]; St. Louis v Town of North Elba, 16 NY3d 411, 413 [2011]; Misicki v Caradonna, 12 NY3d 511, 515 [2009]; see also Ross v.

Curtis Palmer Hydro-Elec. Co., 81 NY2d 494, 501, supra). Under Labor Law § 241 (6), plaintiff need not show that the defendant exercised supervision or control over the work site (see Ross v Curtis-Palmer, supra, p 502). Labor Law § 241 (6) is not self-executing and an action predicated upon Labor Law Section 241 (6) must refer to a violation of the specific standards set forth in the implementing regulations [12 NYCRR part 23] (see Berg v Albany Ladder Company, Inc., 40 AD3d 1282, 1285 [3<sup>rd</sup> Dept., 2007], aff'd 10 NY3d 902 [2008]; Torres v Mazzone Administrative Group, Inc., 46 AD3d 1040 [3<sup>rd</sup> Dept., 2007]; Simon v Jehovah's Witnesses, 132 AD2d 313, 317 [3<sup>rd</sup> Dept., 1987]; Ross v Curtis-Palmer, supra, at 501-503; Lawyer v Rotterdam Ventures, 204 AD2d 878 [3<sup>rd</sup> Dept., 1994]). To make out a prima facie cause of action under this section, plaintiffs must demonstrate that defendant violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a reiteration of common-law principles (see Berg v Albany Ladder Company, Inc., supra, at 1285]; White v Sperry Supply & Warehouse, 225 AD2d 130, 134 [3<sup>rd</sup> Dept., 1996]; Dombrowski v Schwartz, 217 AD2d 914, 915 [4<sup>th</sup> Dept., 1995]).

Plaintiff's bill of particulars cites two regulations in support of his complaint. The first is 12 NYCRR 23-1.7 (d) which applies to slipping hazards Said regulation recites:

“Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.”

It has been held that this regulation is sufficiently specific to impose liability under Labor Law § 241 (6) (see Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998];

Smith v Homart Development Company, 237 AD2d 77 [3d Dept., 1997]), and has been applied to a situation where an employee slipped on a muddy surface (see Fassett v Wegmans Food Markets, Inc., 66 AD3d 1274, 1277-1278 [3<sup>rd</sup> Dept., 2009]). Taking the evidence submitted as true, that plaintiff's foot slipped by reason of sand which had accumulated on the steel beam, the Court finds that there is a triable issue of fact that defendant violated Labor Law § 241 (6).

Plaintiff also relies upon 12 NYCRR 23-1.22 (c) which recites:

“Platforms. (1) Any platform used as a working area or used for the unloading of wheelbarrows, power buggies, hand carts or hand trucks shall be provided with a floor of planking at least two inches thick full size, exterior grade plywood at least three-quarters inch thick or metal of equivalent strength. Platforms used for motor trucks or heavier vehicles shall be provided with floors of planking at least three inches thick full size or metal of equivalent strength.

“(2) Every platform more than seven feet above the ground, grade, floor or equivalent surface shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on all sides except those used for loading and unloading. Such sides when used for the loading or unloading of motor trucks or heavier vehicles shall be protected by timber curbs at least 10 inches by 10 inches full size and when used for the loading or unloading of wheelbarrows, power buggies, hand carts or hand trucks such sides shall be protected by timber curbs at least two inches by eight inches full size set on edge and secured to platform.

Exception: The following platforms are exempt from the safety railing or curb requirements: platforms of needle beam scaffolds; floats and rivet heater platforms used by structural ironworkers; ladder jack scaffold platforms; and trestle and extension trestle ladder scaffold platforms.”

The Court finds that 12 NYCRR 23-1.22 (c) establishes a specific safety standard enforceable under Labor Law § 241 (6) (see Bryant v General Elec. Co., 221 AD2d 687, 689

[3d Dept., 1995]). The Court further finds that because, under plaintiff's version of the facts, the steel deck frame was being used as a platform for pedestrian traffic (to enable the plaintiff to deliver composite boards to the defendant), the regulation is applicable to plaintiff's version of the facts (see id., in a situation where the plaintiff was straddling a 20 inch pipe while performing a task, the Court held that there was a triable issue of fact that the 20 inch pipe constituted a platform under 12 NYCRR 23-1.22 [c]).

### **Labor Law § 200**

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993], at 505; Allen v Cloutier Constr. Corp. 44 NY2d 290, 299; Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877; Harrington v Fernet, 92 AD3d 1070 [3d Dept., 2012]). It is well settled that an implicit precondition to this duty is that the party to be charged with that obligation have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition (Russin v Picciano & Son, 54 NY2d 311, 317; see also, Ross v Curtis-Palmer Hydro-Elec. Co., supra, at 505-506; Lombardi v Stout, 80 NY2d 290, 295). Where the claimed defect is not in the land itself but, rather, arises out of a subcontractor's own methods or negligent acts occurring as a detail of a subcontractor's work, the duty is not breached (see Persichilli v. Triborough Bridge & Tunnel Auth., 16 NY2d 136, 145; Hess v Bernheimer & Schwartz Pilsener Brewing Co., 219 NY 415, 418-419; Whitaker v. Norman, 146 AD2d 938, 939, affd 75 NY2d 779, 782; Lagzdins v. United Welfare Fund-Security Div. Marriott Corp. 77

AD2d 585, 587). Where, however, an owner or contractor actually exercises supervisory control over a subcontractor's work, liability may nonetheless be imposed (see, Brogan v. International Business Machs. Corp. 157 AD2d 76, 80; Karian v. Anchor Motor Frgt., 144 AD2d 777, 778; cf., Lagzdins v. United Welfare, Fund-Security Div. Marriott Corp., 77 AD2d 585, 587). To establish a valid claim, a plaintiff must show that the parties to be charged with a duty under Labor Law §200 had control of the site of the injury and notice, actual or constructive, of the unsafe condition (see Harrington v Fernet, *supra*; Karian v Anchor Motor Frgt., 144 AD2d 777, 778, at 778; see also, Rapp v. Zandri Constr. Corp., 165 AD2d 639 [3d Dept., 1991]).

In this instance, and again focusing on plaintiff's version of how the accident occurred, the Court finds that there is a triable issue of fact with regard to whether the defendant had actual notice and/or created the alleged dangerous condition involving exposed steel beams being used by the plaintiff as an employee walkway in carrying out his assigned tasks. Apart from the foregoing, the defendant did not address the alleged slippery condition of the steel beams, caused by sand which had accumulated on the upper surface. In addition, under plaintiff's version of how the accident happened, defendant and only defendant had actual control and supervision of plaintiff's work methods.

Under all of the circumstances, the Court finds that there are triable issues of fact which preclude the grant of summary judgment to the defendant.

### **Nuisance**

"A nuisance is the actual invasion of interests in land'" (Haire v Bonelli, 57 AD3d

1354, 1358 [3<sup>rd</sup> Dept., 2008], quoting 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc., 96 NY2d 280, 292 [2001]). “To constitute a public nuisance, the offending party's actions must damage or infringe upon the exercise of rights common to all people, such as interfering with the public's right to use a public place” (Haire v Bonelli, *supra*, citing 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc., *supra*, and Copart Indus. v Consolidated Edison Co. of NY, 41 NY2d 564, 568 [1977]). “Liability for a private nuisance arises from conduct which invades another's interest in the private use and enjoyment of land, and the invasion is either intentional, negligent or related to abnormally dangerous activities” (Haire v Bonelli, *supra*, at 1358, citing Copart Indus. v Consolidated Edison Co. of NY, *supra*, at 569). Because plaintiff does not allege an interference with rights which belong to the general public, or an interest in public land (see Haire v Bonelli, *supra*, at 1358), or an infringement of the private use and enjoyment of land (Haire v Bonelli, *supra*, at 1358), the Court finds that plaintiff's fifth cause of action in nuisance fails to state a cause of action. There being no triable issues of fact, this cause of action must be dismissed.

In summary, defendant's motion for summary judgment must be denied with respect to all causes of action except the one sounding in nuisance.

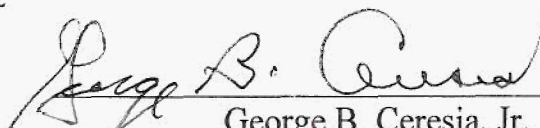
Accordingly, it is

**ORDERED**, that defendant's motion for summary judgment is denied with respect to plaintiff's first, second, third and fourth causes of action; and it is further

**ORDERED**, that defendant's motion for summary judgment is granted with respect to plaintiff's fifth cause of action, which is hereby dismissed.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the plaintiff. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: March 13, 2012  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated January 4, 2012, Supporting Papers and Exhibits
2. Combined Attorney Affirmation and Memorandum of Law of Steen M. Melley, Esq., dated February 16, 2012, Supporting Papers and Exhibits