

**Young v Singh**

2012 NY Slip Op 32237(U)

August 2, 2012

Supreme Court, Queens County

Docket Number: 24083/10

Judge: Robert J. McDonald

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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD  
Justice

IAS PART 34

- - - - - x

COURTNEY L. YOUNG,

Index No.: 24083/10

Plaintiff,

Motion Date: 7/26/12

- against -

Motion No.: 41

SURJIT SINGH, JASWINDER SINGH, FAST  
FREIGHT CARGO, INC., LONG ISLAND RAIL  
ROAD COMPANY, MARLYN WAREHOUSING  
CORP., MARTIN SHEVELL, MAR-LOS I, LP,  
MAR LOS II, LP, MARLOS I LLC, MAR-LOS  
II, LLC and WASTE MANAGEMENT OF NEW  
YORK, LLC,

Motion Seq.: 1

Defendant.

- - - - - x

MAR-LOS II, LLC s/h/a MAR-LOS II LLC  
and MAR-LOS II, LP,

Third-Party Plaintiff,

- against -

GENERAL INSULATION CO., INC.,

Third-Party Defendant.

- - - - - x

The following papers numbered 1 to 4 on this motion:

Papers  
Numbered

Defendant Waste Management of New York, LLC's  
Notice of Motion-Affirmation-Affidavit(s)-  
Service-Exhibit(s)

1-4

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Defendant, Waste Management of New York, LLC (WMNY), by  
notice of motion, seeks an order of the Court, granting them  
summary judgment, pursuant to CPLR § 3212, dismissing the

complaint and any and all cross-claims and counter-claims as to them upon the grounds that there is no genuine issue to be resolved at trial.

No opposition has been filed.

The underlying action is for personal injuries allegedly sustained from an incident that occurred on February 23, 2009 at or around 7:30 a.m. on the railroad crossing owned by defendant Long Island Railroad (LIRR) which is known as Review Avenue Crossing or Commercial Crossing.

Plaintiff is employed as a mechanic for A&L Cesspool which is located across the Review Avenue Crossing from WMNY and General Insulation. A&L has a mechanic's bay that faces out into the railroad crossing. When the plaintiff stood outside of the bay with his back to the bay, he would have a view of the railroad crossing to his left. In order to gain access to other companies, including General Insulation, a driver would have to cross Review Avenue Crossing.

On February 23, 2009, at approximately 7:30 a.m., a Freightliner truck tractor trailer, driven by defendant Surjit Singh was attempting to back into a bay belonging to General Insulation which is located next to WMNY across the railroad tracks from A&L Cesspool where plaintiff is an employee. In an attempt to back the tractor trailer into the bay owned by General Insulation and in an attempt to straighten out the tractor trailer to back into the bay, the tractor trailer became stuck on the tracks of the railroad crossing. Plaintiff maintains in his deposition that the "rungs on the tractor trailer were dug into the ground" as the driver of the tractor trailer attempted to move forward and backward in an attempt to free the truck. At that time a locomotive was traveling westbound along the railroad tracks approaching the railroad crossing at Riverview Avenue. According to the deposition of plaintiff and Surjit Singh (submitted as Exhibits B and C), the railroad lights started to blink and the railroad crossing arm came down between the tractor and the trailer. Plaintiff approached the tractor trailer and attempted to lift up the arm, and at the same time try and communicate to the driver to back the truck off the tracks and break the railroad crossing arm when the train hit the tractor trailer causing serious personal injury to plaintiff.

WMNY moves for summary judgment dismissing the complaint maintaining that it in no way caused or contributed to the happening of this accident. Defendant WMNY maintains that this accident occurred on the Commercial Avenue Railroad Crossing at

Review Avenue, however, WMNY had no responsibility for the maintenance of that crossing and had no control of that crossing.

WMNY at Review Avenue is in the business of processing Municipal Solid Waste and has a contract with the New York Department of Sanitation in which the New York City Department of Sanitation brings waste into the Review Avenue location. The primary access to Review Avenue for the New York City Department of Sanitation and the private haulers of WMNY is over the Long Island Railroad crossing located due east of the boundary of the WMNY property, which is known the Review Avenue Crossing. WMNY has an agreement with defendant Mar-Los I, LLC and Mar-Los II, LLC under which Mar-Los granted WMNY, LLC and its customers and vendors unlimited access to the Review Avenue Crossing and the small portion of land owned by Mar-Los between the Review Avenue Crossing and the entrance to WMNY's property at Review Avenue. Submitted as Exhibit D is the Agreement, dated March 14, 2001 and Modification Agreement dated December 7, 2004 between Mar-Los I, Mar-Los II and defendant Waste Management of New York, LLC; and the licensing agreement for the railroad crossing between the Long Island Rail Road and Marlyn Warehousing Corp., dated June 30, 1988.

James Vanwoert is the Senior District Manager of the facility known as Waste Management of New York, LLC located at 123 Varick Avenue, Brooklyn, New York.

Mr. Vanwoert testified that he is responsible for the operation and management of customers and contracts of several facilities within the City of New York, one of which is the Waste Management, the Review Transfer Station located at 3822 Review Avenue. Individuals report to Mr. Vanwoert regarding the day to day operations on a particular site. Mr. Vanwoert described WMNY's property boundaries as a fence running along the north side parallel to the railroad tracks, a fence with a gate on the east side, a fence with a gate on the west side and a fence with a gate on the south side by a creek. The primary access point to the facility is on the east side. Although the railroad crossing is east of WMNY's property, Mr. Vanwoert testified that it was not on WMNY's property, however the crossing would have to be used in order to access WMNY. Pursuant to an agreement (submitted as Exhibit D) between WMNY and Mar-Los I and Mar-Los II, WMNY makes an annual rental payment to Mar-Los for use of the crossing. Mr. Vanwoert maintains that the agreement allows for WMNY and its customers to come across the railroad crossing and onto a small parcel of land that is owned by Mar-Los to access the property belonging to WMNY.

Regarding the Agreement and the maintenance of the Review Avenue crossing, Mr. Vanwoert was asked the following during his deposition which took place on October 12, 2011:

"Q. With respect to the crossing, Review Avenue crossing itself that is under this agreement, does Waste Management do any physical maintenance of the crossing itself?

A. No.

Q. Does Waste management handle any snow removal of the crossing itself?

A. No.

Q. How about ice removal, does Waste management do ice melting of the crossing itself?

A. No."

(See Exhibit E, p. 13, lines 15-25).

In his affidavit in support of the motion, Mr. Vanwoerte states that "WMNY, LLC has never done any physical maintenance of any kind of the Review Avenue Crossing and the WMNY, LLC property line. Neither I or any Site Supervisor for WMNY, LLC ever directed any WMNY, LLC employee to remove snow or ice from the Review Avenue Crossing. ML (Mar-Los) has never charged WMNY, LLC for any maintenance, upkeep or repair of the Review Avenue Crossing or asked WMNY, LLC to share in any maintenance, upkeep or repair costs." In addition Mr. Vanwoerte states that defendant Fast Freight Cargo Inc. was not a customer of WMNY, LLC either before or on February 23, 2009 and the truck that was involved in the incident was not using the Review Avenue Crossing to either drop off or take out waste from the Review Avenue Crossing.

It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853; Zuckerman v City of New York, 49 NY2d 557, 562). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank v McAuliffe, 97 AD2d 607), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the

action (Alvarez v Prospect Hosp., 68 NY2d 320, 324; Zuckerman v City of New York supra, at 562).

Here, the Court finds that the evidence submitted by WMNY is sufficient to demonstrate, prima facie, that WMNY had no responsibility for the maintenance and control of the crossing in question and as such did not cause or contribute to the causation of the incident.

Inasmuch as no opposition has been submitted by any of the parties to this action, defendant WASTE MANAGEMENT OF NEW YORK, LLC'S motion is granted and the complaint, all cross-claims and counter-claims are dismissed as to WASTE MANAGEMENT OF NEW YORK, LLC only; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: Long Island City, NY  
August 2, 2012

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**ROBERT J. McDONALD**  
**J.S.C.**