

**Sigman v 330 Jay St. Assoc., LLC**

2013 NY Slip Op 33038(U)

November 26, 2013

Supreme Court, Queens County

Docket Number: 21883/11

Judge: Howard G. Lane

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& Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (see, id).

"[A]" contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." (Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]; see also, Church v. Callanan Industries, Inc., 99 NY2d 104 [2002].) The Court of Appeals, however, has identified three exceptions to this general rule in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third parties. These exceptions are as follows: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (see, Church v. Callanan Industries, Inc., supra; see also, Espinal v. Melville Snow Contractors, Inc., supra; H.R. Moch Co., Inc. v. Rensselaer Water Co., 247 NY 160 [1928]).

Moving defendant presented a prima facie case that there are no triable issues of fact. Moving defendant established its

*prima facie* entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, Rajgopaul, et. al. v. Toys "R" Us, 297 AD2d 728 [2nd Dept 2002]; Cruz v. Otis Elevator Company, 238 AD2d 540 [2nd Dept 1997]). In support of the motion, moving defendant presented, inter alia, the examination before trial transcript testimony of plaintiff herself, wherein she testified inter alia that: she tripped and fell while walking into the Criminal Court building located at 330 Jay Street, the road was "smooth" asphalt at the location where she crossed, she never looked down at the sidewalk where she was walking at any time, after she fell, and she observed what caused her to fall as rocks, gravel and pebbles under her foot; the examination before trial transcript testimony of Spiro Karolodis, who testified inter alia that: he is the president and sole owner of defendant Compac, the general contractor at the construction site, co-defendant M.A. Angeliades, Inc. rented Compac's dumpsters, Compac's duties were strictly limited to drop-off and pick-up of the dumpsters, and Compac assumed no maintenance or clean-up duties, when pick-ups were made of full dumpsters, Compac would not clean up any debris that may have fallen from the dumpsters, nobody ever notified him regarding any problems with debris removal at the 283 Adams Street location; and the examination before trial transcript testimony of Noel Hayes, the representative of the general contractor, M.A. Angeliades, Inc. who testified that: he was a senior project manager for M.A. Angeliades at the time of the accident, M.A. Angeliades's laborers were in charge of cleaning up debris at location of the dump truck delivery of dumpsters, M.A. Angeliades's laborers were responsible for cleaning up debris that fell on the streets, M.A. Angeliades was responsible for repairing any degradation of the street immediately outside of the construction site at the conclusion of the project; photographs of the accident site where the plaintiff alleges she fell; and service tickets and an invoice from Compac for the pick-up of dumpsters delivered to the construction site on March 29, 2008.

Moving defendant established that none of the three (3) exceptions apply to the case at bar, and as such, no duty of care can be imposed upon moving defendant. Without the existence of a duty, plaintiff has failed to prove a necessary element of a claim for negligence against moving defendant (Lapidus v. State of New York, 57 AD3d 83 [2d Dept 2008]).

In opposition, plaintiff raises a triable issue of fact. Plaintiff raises issues as to whether Compac affirmatively created the hazard by spilling and spreading debris when it maneuvered its trucks and dumpsters on the public street. In opposition, plaintiff presents, inter alia: plaintiff's own examination before trial transcript testimony, wherein she

testifies that: according to Compac's pick-up tickets Compac picked-up and dropped-off dumpsters on an almost daily basis in the months and days leading up to her accident, and various photographs and diagrams of the construction site and accident scene. Plaintiff established that there is a triable issue of fact as to whether Compac was negligent in the manner in which it maneuvered its trucks and dumpsters spilling and discharging construction debris on the sidewalk in front of the Courthouse.

It is well-established law that: "one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully" (Nallan v. Helmseley-Spear, Inc., 50 NY2d 507 [NY 1980]). "If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward\*\*The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good". (Id.) (internal citations omitted). Gratuitous conduct can give rise to liability only when the defendant's affirmative action negatively affected the plaintiff and the defendant failed to act reasonably (Gordon v. Muchnik, 180 AD2d 715 [2d Dept 1992]). The question of whether the defendant breached any duty is a question of fact for the jury. (Id.) (internal citations omitted).

There are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether moving defendant caused or created a defective condition and whether moving defendant acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, moving defendant's motion for summary judgment dismissing plaintiff's Complaint is denied.

Furthermore, Compac has failed to establish a prima facie case that any cross claims against it should be dismissed as Compac has failed to present any arguments in its initial moving papers in support of this branch of the motion and has failed to include a copy of any Answers with Cross Claims submitted in this matter (see, CPLR 3212).

The foregoing constitutes the decision and order of this Court.

Dated: November 26, 2013

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**Howard G. Lane, J.S.C.**