

**Hawthorne v D'Agostino Supermarkets, Inc.**

2014 NY Slip Op 33044(U)

November 24, 2014

Supreme Court, New York County

Docket Number: 101956/12

Judge: Donna M. Mills

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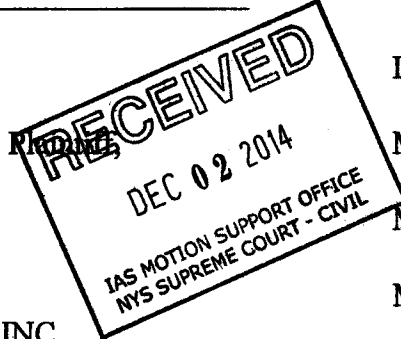
SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

SOPHIA HAWTHORNE,

INDEX No. 101956/12



MOTION DATE \_\_\_\_\_

-against-

MOTION SEQ. No. 001

D'AGOSTINO SUPERMARKETS, INC.,

MOTION CAL No. \_\_\_\_\_

Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

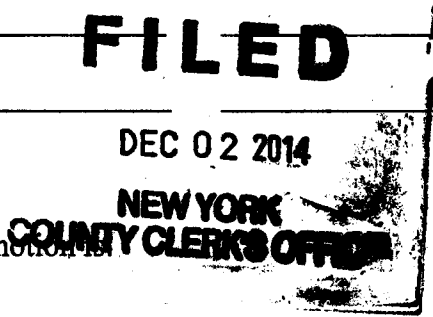
PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... \_\_\_\_\_

Answering Affidavits- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: \_\_\_\_\_ YES \_\_\_\_\_ NO



Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 11/25/12

Donna M. Mills  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION

**DONNA M. MILLS, J.S.C.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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SOPHIA HAWTHORNE,

INDEX NO.  
101956/12

Plaintiff,

- against -

D'AGOSTINO SUPERMARKETS, INC.,

DECISION/ORDER

Defendant.

**FILED**

DEC 02 2014

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DONNA M. MILLS, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this personal injury action, defendant D'Agostino Supermarkets, Inc. moves for an order pursuant to CPLR §3212, granting summary judgment on the basis that it did not owe a duty to plaintiff, Sophia Hawthorne.

It is alleged that on May 22, 2010, at approximately 7:00 p.m., plaintiff while standing on the sidewalk on the corner of 56<sup>th</sup> Street and First Avenue, Manhattan, was struck by a grocery delivery tank or cart being pushed by two unknown individuals who stole the delivery cart from defendant's grocery store several blocks from where plaintiff was struck. After the incident, plaintiff went to the D'Agostino store located at 53<sup>rd</sup> Street and First Avenue. While there, she discovered that a delivery cart that struck her had been taken from the store by two individuals who were later detained and arrested. Plaintiff alleges that defendant was negligent in leaving the delivery cart unsecured and unsupervised and that plaintiff being struck by two unknown individuals was a direct result of such negligence.

Richard Cabassa, who was the store manager of the D'Agostino store located at 83<sup>rd</sup> Street and Lexington Avenue, testified on behalf of defendant at an examination before trial on October 11, 2013. Mr. Cabassa testified that he was personally familiar with

the store from which the delivery cart was taken. At his deposition Mr. Cabassa stated that the delivery tanks are used by store delivery clerks to deliver groceries for customers who shop and purchase items at the store and request that the groceries be delivered to their destination or for orders that are sent to the store for delivery. During business hours, when they are not in use, the delivery tanks are strapped with a cable, wire or chain which is locked to prevent the tank's wheel from moving. After business hours, the tanks are brought into the store and stored there until the next day. Mr. Cabassa explained that if a tank is being used for multiple deliveries, a delivery clerk wouldn't chain or lock the tank between each delivery. In such instances, the delivery clerk would leave the delivery tank outside the store, enter the store, bring the next delivery out and load the tank. He further testified that he was unaware of any incidents in which a delivery tank was stolen prior to the date of the incident.

Defendant maintains that it is entitled to summary judgment because the incident which allegedly caused plaintiff's injury was the result of the criminal, intentional or negligent acts of unknown individuals with no relationship to the defendant. Therefore, defendant claims that plaintiff's injuries cannot be found to have been proximately caused by defendant.

Plaintiff opposes the motion and contends that the defendant did have a duty of care to the public, whether it is in front of its store or approximately three city blocks away, to control and secure its property in a reasonable condition so as not to cause injury to the public. Plaintiff maintains that defendant breached that duty of care, and that defendant's negligence furnished the direct cause for plaintiff's injuries.

### Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (*Vamattam v Thomas*, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this 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 the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

"Where third-party criminal acts intervene between defendant's negligence and plaintiff's injuries, the causal connection may be severed, precluding liability" (*Bell v. Board of Educ. of City of N.Y.*, 90 N.Y.2d 944, 946, 665 N.Y.S.2d 42, 687 N.E.2d 1325; see *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666; *Bingham v. Louco Realty, LLC*, 36 A.D.3d 845, 845–846, 829 N.Y.S.2d 194). "An intervening act will be deemed a superseding cause and will serve to relieve defendant of

liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" ( *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 462 N.Y.S.2d 831, 449 N.E.2d 725; see *Santiago v. New York City Hous. Auth.*, 63 N.Y.2d 761, 763, 480 N.Y.S.2d 321, 469 N.E.2d 839). "While foreseeability is generally an issue for the fact finder, where only one conclusion can be drawn, proximate cause may be decided as a matter of law" ( *Bell v. Board of Educ. of the City of N.Y.*, 90 N.Y.2d 944, 946, 665 N.Y.S.2d 42, 687 N.E.2d 1325).

On this record, the Court finds that the intervening and criminal act of the two individuals who struck the plaintiff with the delivery tank in this case, were not normal or foreseeable consequences of any situation created by the defendant ( *Libby v. Waldbaum's, Inc.*, 240 A.D.2d 547, 547–548, 658 N.Y.S.2d 454; *Burgess v. City of New York*, 205 A.D.2d 656, 613 N.Y.S.2d 657; *O'Britis v. Peninsula Golf Course*, 143 A.D.2d 123, 125, 531 N.Y.S.2d 364). Rather, the sequence of events leading to the plaintiff's injuries was so extraordinary and far removed from any alleged breach of the defendant's duty of care as to be unforeseeable as a matter of law ( see *Buckeridge v. Broadie*, 5 A.D.3d 298, 774 N.Y.S.2d 132; see also *Santiago v. New York City Hous. Auth.*, 63 N.Y.2d 761, 480 N.Y.S.2d 321, 469 N.E.2d 839).

Accordingly it is

ORDERED that the defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed

by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant.

Dated: 11/25/14

ENTER:

*Donna*

J.S.C.  
**DONNA M. MILLS, J.S.C.**

**FILED**  
DEC 02 2014  
NEW YORK  
COUNTY CLERK'S OFFICE