

<b>Rodriguez v City of New York</b>
2014 NY Slip Op 33650(U)
October 16, 2014
Supreme Court, New York County
Docket Number: 109444/2011
Judge: Kathryn E. Freed
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DATE: 10/10/2010  
TIME: 10:10:10

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 5

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CARLOS RODRIGUEZ,

Plaintiff,

- against-

**DECISION/ORDER**  
Index No. 109444/11  
Seq. No. 002

THE CITY OF NEW YORK,

Defendant.

----- X  
**KATHRYN E. FREED, J.:**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS

**FILED**

NUMBERED

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	OCT 22 2014	1-2 (Exs. A-K)
NOTICE OF CROSS-MOTION AND AFFIDAVITS ANNEXED.....		3 (Exs. A-D)
CARLOS RODRIGUEZ'S REPLY AFFIDAVITS.....		

**NEW YORK  
COUNTY CLERKS OFFICE**

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff Carlos Rodriguez moves, pursuant to CPLR 3212, for an order granting summary judgment on the issue of liability. Defendant The City of New York (the City) cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Upon oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are **denied**.

**Factual and Procedural Background:**

This is an action to recover damages for personal injuries suffered by plaintiff, a sanitation garage utility worker, when a sanitation collection truck backing into a service bay braked hard and skidded on some ice into a sanitation supervisor's parked automobile, propelling the automobile into plaintiff, pinning him between the automobile and a pile of tires. At the time of the accident, plaintiff was engaged in the task of "dressing" sanitation collection trucks by fitting them with tire chains and snow plows.

**Contentions of the Parties:**

In support of his motion, plaintiff argues that the undisputed evidence demonstrates that defendant was negligent as a matter of law.

In opposition to plaintiff's motion and in support of its cross motion, the City argues that a property owner's duty to employees working at the site does not extend to hazards which are inherent in the work which the employee was hired to perform, and that plaintiff has not demonstrated that he was free from comparative fault.<sup>1</sup>

**Legal Conclusions:**

"[T]he 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 issue of fact from the case. *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008)

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<sup>1</sup> The parties agree that this action is not barred by the Workers' Compensation Law (Workers' Compensation Law § 3 [group 17], and § 11).

(*internal quotation marks and citation omitted*). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, however, 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. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

Even where the facts are uncontradicted, it is uncommon to grant summary judgment in a negligence action. See *Ugarriza v Schmieder*, 46 NY2d 471 (1979). "[T]he instant matter does not present one of those rare situations in which summary judgment is warranted since the record herein does not demonstrate the absence of any disputed questions of fact." *Permuy v City of New York*, 156 AD2d 174 (1<sup>st</sup> Dept 1989). However, the existence and scope of an alleged tortfeasor's duty is a question of law. See *Fernandez v Otis El. Co.*, 4 AD3d 69, 72 (1<sup>st</sup> Dept 2004). "'When a worker confronts the ordinary and obvious hazards of his employment, and has at his disposal the time and other resources ... to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself.'" *Bombero v NAB Constr. Corp.*, 10 AD3d 170, 172 (1<sup>st</sup> Dept 2004), quoting *Marin v San Martin Rest., Inc.*, 287 AD2d 441, 442 (2<sup>d</sup> Dept 2001).

### **The City's Cross Motion**

Initially, this Court denies the City's cross motion. The City failed to establish its prima facie entitlement to summary judgment dismissing the complaint because it did not prove that it owed no duty to plaintiff to protect him from the type of harm which caused his injuries. *See Meyers v City of New York*, 230 AD2d 691 (1<sup>st</sup> Dept 1996), *appeal dismissed*, 89 NY2d 1085 (1997), *reargument denied* 90 NY2d 889 (1997).

In *Marin v San Martin Rest., supra*, plaintiff was barred from recovering from his employer for injuries he suffered while lifting a heavy garbage bag into the back of the sanitation truck. The court held that “[t]he hazard of being injured as a result of lifting a heavy garbage bag and loading it into a sanitation truck is inherent in the work of a sanitation worker.”

In *Wagner v Wody*, 98 AD3d 965, 966 (2d Dept 2012), the court held that homeowners cannot “be made to answer to a jury because a sanitation worker is injured by a one-half inch by three-inch piece of glass contained in a 30-to-40-gallon waste bag that he was throwing into a garbage truck”. The court found that the hazard of being injured by the contents of a garbage bag was inherent to plaintiff's duties as a sanitation worker.

In *Steiner v Benroal Realty Assocs.*, (290 AD2d 551 [2d Dept 2002]) the plaintiff sanitation worker twisted his knee when he stepped on a garbage bag as he was attempting to help his partner hook a dumpster onto their sanitation truck. The action against the property owner and the manager of the site where the dumpsters were located was dismissed because the plaintiff was injured by an ordinary and obvious hazard of his employment and performed the job so incautiously as to be injured.

In contrast to the foregoing cases, plaintiff herein was the victim of a pedestrian

knockdown while merely walking behind a parked automobile. Contrary to the City's assertion, the danger of being knocked down by a skidding sanitation vehicle is not an ordinary and obvious hazard of plaintiff's employment, and is not inherent in the work of a sanitation worker "dressing" sanitation collection trucks with chains. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 507 (2012). Although sanitation workers are generally subject to the risk of being struck by motor vehicles, the inherent risk of the work does not relieve the City of liability for breach of the duties it owed as plaintiff's employer. *See Gasper v Ford Motor Co.*, 13 NY2d 104, 110 (1963). Therefore, the City's cross motion for summary judgment dismissing the complaint is denied.

### **Plaintiff's Motion**

With respect to plaintiff's motion, this Court finds that there are triable issues of fact concerning causation, comparative negligence, and foreseeability. Foreseeability questions are generally left for the fact finder to resolve (*see Derdiarian v Felix Constr. Corp.*, 51 NY2d 308, 315 [1980]), and this Court cannot state that the collision was unforeseeable as a matter of law.

As to causation, the City asserts that the collision would have been prevented by tire chains, and that to hold the City liable would be to place it in the untenable position of having to hire someone to place tire chains on its trucks before it directed its own employees to install the chains. However, a material issue of fact exists as to whether tire chains would have prevented the accident. There are also issues of fact regarding the speed of the truck which struck plaintiff and whether the City worker guiding the truck was negligent.

Finally, even assuming that the evidence submitted in connection with plaintiff's motion

established the City's negligence, plaintiff would not be not entitled to summary judgment as to liability since the question of his comparative fault must be resolved at trial. *See Thoma v Ronai*, 82 NY2d 736, 737 (1993).

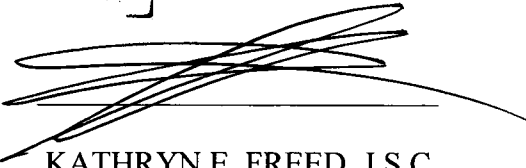
Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion and defendant's cross motion for summary judgment are denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: October 16, 2014  
OCT 16 2014

**FILED**  
OCT 22 2014  
NEW YORK  
COUNTY CLERK'S OFFICE



KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT