Prophet v Gonzalez
2015 NY Slip Op 31973(U)
October 7, 2015
Supreme Court, Suffolk County
Docket Number: 10-6791
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

INDEX No. 10-6791

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1-14-15
ADJ. DATE 5-7-15
Mot. Seq. # 009 - MG

LaCHELE PROPHET,

Plaintiff,

- against -

JUAN GONZALEZ, CLAUDIA BRUNO a/k/a CLAUDIA GONZALEZ, DAVID SALEMI, MARIO'S PIZZERIA, ROBERT BUCHAKIAN (TRUST), GRACE PINAJIAN AND LYNN PINAJIAN BEYLERIAN TRUSTS, ROCK MANAGEMENT, INC., IDA PROPHET, CATHERINE MAIMAN and QUINTANILLO GAMEZ, ACME CONSTRUCTION DESIGN CO., (the last name being fictitious and intended to represent individuals and/or entities that constructed the mall located at 301 Walt Whitman Road, Huntington Station, New York 11746),

Defendants.

RAWLINS LAW FIRM, PLLC
Attorney for Plaintiff
80 Broad Street, 5th Floor
New York, New York 10004

GIALLEONARDO FRANKINI & GRAMMATICO
Attorney for Defendant Gonzalez
330 Old Country Road, Suite 200
Mineola, New York 11501

SCHONDEBARE & KORCZ, LLP
Attorney for Defendant Salemi
3555 Veterans Memorial Highway
Ronkonkoma, New York 11779

NANCY L. ISSERLIS, ESQ.
Attorney for Defendant Mario's Pizza
36-01 43rd Avenue
Long Island City, New York 11101

MONTFORT, HEALY, MCGUIRE & SALLEY
Attorney for Defendant Ida Prophet
840 Franklin Avenue, P.O. Box 7677
Garden City, New York 11530

TROMELLO MCDONNELL & KEHOE
Attorney for Defendants Buchakian (Trust), Pinajians Beylerian Trusts and Rock Mgmt.
P.O. Box 9038
Melville, New York 11747

RUSSO, APOZNANSKI & TAMBASCO
Attorney for Defendant Catherine Maiman
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 20-23, 24-25 ; Replying Affidavits and supporting papers 26-28 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Robert Buchakian (Trust), Grace Pinajian and Lynn Pinajian Beylerian, Trustees of the Robert Buchakian Trust (incorrectly sued herein as Grace Pinajian and Lynn Pinajian Beylerian Trusts) and Rock Management for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted.

This is an action to recover damages allegedly suffered by the plaintiff Lachelle Prophet as a result of a motor vehicle accident which occurred at approximately 3:00 p.m. on September 7, 2009 on Route 110, in Huntington Station, Town of Huntington, State of New York. Plaintiff alleges that the accident occurred as a result of the negligence of multiple parties, including the moving defendants.

The defendants Trust, Grace Pinajian, Lynn Pinajian Beylerian and Rock Management ("moving defendants") now move for summary judgment dismissing the complaint and any cross-claims. In support of the motion, defendants submit, *inter alia*, their attorney's affirmation; copies of the pleadings; plaintiff's verified bills of particulars; the deposition transcript of the plaintiff; the deposition transcript of defendant David Salemi; an accident diagram prepared by Vanson Investigations, sworn to December 4, 2014; four photographs; the affidavit of Paul Pinajian, sworn to on November 24, 2014; and the affidavit of Scott E. Derector, P.E., sworn to December 4, 2014. In opposition, plaintiff submits, *inter alia*, her attorney's affirmation; the deposition transcript of Paul Pinajian, as a witness for the defendant Trust; and an Inspection Report prepared by Yaakov Stern, P.E., sworn to March 26, 2015. Counsel for the defendants John Gonzalez and Claudia Bruno a/k/a Claudia Gonzalez submitted an affirmation which joins in the opposition filed by the plaintiff.

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 to eliminate any material issues of fact from the case (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Plaintiff testified that the accident occurred on September 7, 2009. Prior to the accident, plaintiff and her mother drove to the strip mall owned by the moving defendant Robert Buchakian Trust, located on Route 110 in Huntington Station. Other vehicles were parked along the passenger side of her

mother's car. After they completed their shopping and exited the store, plaintiff walked to the passenger side of her mother's car, waiting for her to unlock it. She heard a loud crash and turned and saw a pickup truck "barreling" into the parking lot. The truck was going "really fast". She ran toward the store front, heard a boom and a crash and then she was on the ground. When she woke up and she was pinned to the storefront.

Defendant Davis Salemi testified that just prior to the accident, he was driving his pickup truck southbound in the right-hand lane on Route 110. As he was approaching the intersection, he had a green light. As he was doing so, a vehicle (operated by defendant Claudia Bruno a/k/a Gonzalez), which had been traveling northbound, was beginning to make a left hand turn into his lane. As defendant Salemi was approaching the intersection, he assumed that the Gonzalez vehicle would not make the turn until he had passed, but it suddenly began to do so. He took evasive action by moving his vehicle to the right. At this time his attention was on avoiding the Gonzalez vehicle, regaining control of his car, and avoiding hitting anyone else. He mounted the curb at an angle, the car was jolted when he did so. He avoided a silver pole and a telephone pole south of it. At the time he went over the curb, he estimated that his car was traveling at 40 miles per hour. He testified that his foot was on the brake all of this time, and attempting to straighten out, but the car would not stop. When he first struck a parked vehicle, he estimated that he was going 20 to 30 miles per hour. The force of the crash pushed the first parked car into a second car, which was then pushed out of its parking spot, and into a third vehicle. The record establishes that this third vehicle struck the plaintiff.

The affidavit of Paul Pinajian alleges that he is the president of defendant Rock Management, Inc. He has been managing the subject strip mall since 1988. The parking lot in the strip mall is routinely maintained and he visits the property once every two weeks to two months. To his knowledge, prior to the accident, there has never been an accident in the parking lot. He has not received any complaints from the local municipality or any of his tenants as to any defects which might have contributed to this accident.

The affidavit of the moving defendants' expert, Scott Derector, P.E., sets forth that he inspected the accident site in April of 2013, and also reviewed the pleadings, bills of particulars, deposition transcript and photographs of the accident and the accident site. Based upon this review, he opined to a reasonable degree of engineering certainty that the design and configuration of the storefronts and parking lot in which the accident occurred were in compliance with applicable codes and industry standards and said configuration and design were safe for their intended use, and did not cause or contribute to the plaintiff's accident. He further notes that the plaintiff has never identified any specific ordinances that were violated by any of the moving defendants. The plaintiff's expert, Yaakov Stern, P.E., opined, based on a review of photographs of the site and accident, that the pickup truck passed through a pothole in the parking lot and struck the cars, pinning the plaintiff. He further concluded that if the parking lot had been properly maintained, the accident may have been greatly mitigated.

"A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all circumstances, including the likelihood of injury to others, the seriousness of injury and the burden of avoiding risk", and the likelihood of plaintiff's presence is a primary independent factor in determining the foreseeability of injury (***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564, 568 [1976]; citing ***Smith v Arbaugh's Rest.***, 469 F2d 97, 100; *see also* ***Kranenberg v***

TKRS Pub, Inc., 99 AD3d 767, 952 NYS2d 215 [2d Dept 2012]; ***Afanador v Coney Bath LLC***, 91 AD3d 683, 936 NYS2d 312 [2d Dept 2012]). An owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control (***Browne v GMRI, Inc.***, 6 AD3d 640, 775 NYS2d 184 [2d Dept 2004]; *see also* ***D'Amico v Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]). To carry the burden of proving a prima facie case, plaintiff must generally show that defendant's negligence was a substantial cause of the events which produced the injury, although plaintiff need not demonstrate that the precise manner in which the accident happened, or extent of the injuries, was foreseeable ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166,169 [1980]). Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (***Derdiarian v Felix Contr. Corp.***, *id.*). "Foreseeable" means that "in terms of past experience 'that there is a likelihood of conduct on the part of third persons ... which is likely to endanger the safety of the visitor' " (***Jacqueline S. v City of New York***, 81 NY2d 288, 294, 598 NYS2d 160 [1993], quoting ***Nallan v Helmdley Spear, Inc.***, 50 NY2d 507, 519, 429 NYS2d 606 [1980]).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). Furthermore, mere speculation about causation is not adequate to sustain a cause of action for negligence (***Capasso v Capasso***, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; ***Patrick v Costco Wholesale Corp.***, 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]; ***Louman v Town of Greenburgh***, 60 AD3d 915, 876 NYS2d 112 [2d Dept 2009]).

Here, the moving defendants have shown their entitlement to summary judgement by establishing that they were not responsible for the occurrence of the accident which led to plaintiff's injuries. The accident was not reasonably foreseeable, since there is no evidence that there were any previous accidents in the parking lot. Nor is there any evidence that the condition of the parking lot caused the accident, the moving defendants having established that the design and configuration of the storefronts and parking lot in which the accident occurred were in compliance with applicable codes and industry standards, and that said configuration and design were safe for their intended use

In response, the plaintiff has failed to raise an issue of fact. The plaintiff's expert bases his opinion upon there being a pothole in the parking lot which, it is alleged, the defendant Salemi's pickup truck struck prior to the accident, and that certain changes of design would have mitigated the damage. There is, however no evidence in the record that said defendant's pickup ever struck the pothole and no proof that such design changes were required by law or in fact, would have prevented or changed the outcome. This speculative, conclusory affidavit of plaintiff's expert is insufficient to raise an issue of fact (*see* ***Roman v Cabrera***, *supra;* ***Lescenski v Williams***, 90 AD3d 1705, 935 NYS2d 828 [4th Dept 2011]; ***Brennan v Gagliano***, 71 AD3d 620, 896 NYS2d 398 [3d Dept 2010]; *see also* ***Castillo v Wil-Cor Realty Co., Inc.***, 109 AD3d 863, 972 NYS2d 578 [2d Dept 2013]; ***Martin v Village of Tupper***

Lake, 282 AD2d 975, 723 NYS2d 715 [3d Dept 2001).

It is further noted that liability may not be imposed upon a party who "merely furnished the condition or occasion for the occurrence of the event" but was not one of its causes (*see* ***Lee v D. Daniels Contracting, Ltd.***, 113 AD3d 824, 978 NYS2d 908 [2d Dept. 2014]; ***Roman v Cabrera***, 113 AD3d 541, 979 NYS2d 310 [1st Dept 2014]; ***Rattray v City of New York***, 123 AD3d 688, 997 NYS2d 707 [2d Dept 2014]; ***Batista v City of New York***, 101 AD3d 773, 778, 956 NYS2d 85 [2d Dept 2012]). In essence, the accident herein occurred as a result of the driver's inability to control his vehicle. The premises "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes" (***Sheehan v City of New York***, 40 NY2d 496, 503, 387 NYS2d 92 [1976]).

Accordingly, the motion by the defendants Trust, Grace Pinajian, Lynn Pinajian Beylerian, and Rock Management for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against them and any cross-claims is granted.

Dated: OCT 07 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**