

**Castellanos v Arbabzadeh**

2015 NY Slip Op 32195(U)

November 9, 2015

Supreme Court, Suffolk County

Docket Number: 0082/2015

Judge: James Hudson

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**Supreme Court of the County of Suffolk  
State of New York - Part XL**

**PRESENT:**

**HON. JAMES HUDSON**

*Acting Justice of the Supreme Court*

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EMMA CASTELLANOS,  
as ADMINISTRATRIX of the ESTATE of  
JULIAN CASTELLANOS and  
EMMA CASTELLANOS,

Plaintiffs,

- against -

SHOHREH ARBABZADEH A/K/A  
SHERRI ARBABZADEH &  
MAY ALEM A/K/A  
MOHABOOBEH M. ALEMZADEH,

Defendants.

x-----x

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**SEQ. NOS.: 001-MD  
002-MD**

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Upon the following papers numbered 1 to 17 read on this motion to Strike (001); Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers 18-2 (002); Answering Affidavits and supporting papers 26-29; Replying Affidavits and supporting papers 30-33; Other; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED**, that Plaintiff's, motion to strike Defendant May Alem's answer is denied without prejudice (CPLR § 3126). It is further

**ORDERED**, that Defendant May Alem is directed to comply with all outstanding disclosure demands in accordance with the prior Order of the Court within forty-five (45) days from service of a copy of this Order with notice of entry. It is further

**ORDERED**, that Defendant May Alem's motion for summary judgment and for sanctions is denied (CPLR Rule 3212, 22 NYCRR § 130-1.1).

The case at bar is a wrongful death action sounding in negligence and statutory liability under the New York State Labor Law. It is averred that the decedent Julian Castellanos was employed by Defendants to convert the basement of the home owned by Shohreh Arbabzadeh into an apartment. During the course of the construction project, Mr. Castellanos was killed by a falling retaining wall he had installed in preparation of building steps to lead to an entrance to the basement apartment. Plaintiffs assert that Defendant May Alem was acting as the general contractor for the owner and supervised the project. The claims against Ms. Alem sound in: (1) negligence [fifth cause of action]; and (2) failure to provide a safe workplace under Labor Law §§ 240, 241[6], and 200 [sixth through eighth causes of action]. Additionally, Mr. Castellanos' widow has set forth a claim for loss of consortium [ninth cause of action].

Plaintiffs have made a motion to strike Defendant May Alem's answer on the basis of her failing to provide disclosure and be deposed in accordance with the preliminary conference order of April 9, 2015 (CPLR §3126). Defendant May Alem has cross-moved for summary judgment (CPLR Rule 3212). The Court will initially consider the propriety of summary relief.

"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." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 487 N.Y.S.2d 316 [1985]; *Andre v. Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). If the movant has sustained this burden, the court then turns its attentions to the respondent who must produce admissible proof which rises to the level of creating a triable (and material) issue of fact (*Graces v Karabelas*, 17 AD3d 633, 794 NYS2d 75 [2d Dept 2005]).

In the oft cited case of *Ugarriza v. Schmieder* 46 N.Y.2d 471, 414 N.Y.S.2d 304 [1979], Judge Gabrielli, of happy memory, wrote for a unanimous Court "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination." (Id. at 474).

In the case at bar, both counsel have commendably argued for their respective cause. Ultimately, however, Defendant has not demonstrated entitlement to the relief afforded by CPLR Rule 3212.

The elements of a cause of action alleging negligence are the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach proximately caused the injury (*see Turcotte v. Fell*, 68 N.Y.2d 432, 437, 510 N.Y.S.2d 49; *Kraut v. City of New York*, 85 A.D.3d 979, 980, 925 N.Y.S.2d 624; *Ruiz v. Griffin*, 71 A.D.3d 1112, 1114, 898 N.Y.S.2d 590; *Ingrassia v. Lividikos*, 54 A.D.3d 721, 724, 864 N.Y.S.2d 449). “[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property” (*Nappi v. Incorporated Vil. of Lynbrook*, 19 A.D.3d 565, 566, 796 N.Y.S.2d 537, quoting *Warren v. Wilmorite, Inc.*, 211 A.D.2d 904, 905, 621 N.Y.S.2d 184; *see Irizarry v. Heller*, 95 A.D.3d 951, 953, 943 N.Y.S.2d 606; *Quick v. G.G.'s Pizza & Pasta, Inc.*, 53 A.D.3d 535, 536, 861 N.Y.S.2d 762). In the absence of these factors “...a party cannot be held liable for injuries caused by the allegedly defective condition” (*Mitchell v. Icolari*, 108 A.D.3d 600, 601-602, 969 N.Y.S.2d 503, 505 (2<sup>nd</sup> Dept. 2013), quoting *Gover v. Mastic Beach Prop. Owners Assn.*, 57 A.D.3d 729, 730, 869 N.Y.S.2d 593; citing *Cerrato v. Rapistan Demag Corp.*, 84 A.D.3d 714, 716, 921 N.Y.S.2d 648; *Sanchez v. 1710 Broadway, Inc.*, 79 A.D.3d 845, 846, 915 N.Y.S.2d 272; *Kydd v. Daarta Realty Corp.*, 60 A.D.3d 997, 998, 877 N.Y.S.2d 352; *Dugue v. 1818 Newkirk Mgt. Corp.*, 301 A.D.2d 561, 562, 756 N.Y.S.2d 51; *Aversano v. City of New York*, 265 A.D.2d 437, 696 N.Y.S.2d 233).

In support of her cross-motion for summary judgment Defendant May Alem contends that she held no ownership interest in the *locus in quo* nor exerted any control over the premises. In her affidavit, Ms. Alem details that she was the real estate agent who oversaw the purchase of the premises by Defendant Shohreh Arbabzadeh. As a courtesy to her client, she referred the decedent to the owner for the purposes of constructing a basement apartment. Her sole activity thereafter was to take photographs of the work in progress to send to the owner in Buffalo, remit some payment to the decedent and transfer cash to Mr. Castellanos at a Home Depot to purchase materials. In sum, Ms. Alem states “I in no way maintained, managed, possessed, controlled or supervised any project related to the subject premises nor was I present at the job site on a daily basis.” (Affidavit dated August 13, 2015).

The essential question before the Court is whether Plaintiff has succeeded in showing its entitlement to summary judgment by sufficient evidence. We remind the parties that “This burden is a heavy one and on a motion for summary judgment, ‘facts must be viewed in the light most favourable to the non-moving party.’” (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475, 982 N.Y.S.2d 813, [2013]). “Where the moving party fails to meet this burden, summary judgment cannot be

granted, and the non-moving party bears no burden to otherwise persuade the court against summary judgment.” (Id.).

Once the burden has been met, respondent cannot escape summary judgment “unless its opposing papers [raise] genuine factual issues” *Badische Bank v. Ronel Systems Inc.*, 36 A.D.2d 763, 321 N.Y.S.2d 320 [2<sup>nd</sup> Dept.1971]; *Leumi Fin. Corp. v. Richter*, 24 A.D.2d 855, 264 N.Y.S.2d 707, affd. 17 N.Y.2d 166, 269 N.Y.S.2d 409, 216 N.E.2d 579; *Stagg Tool & Die Corp. v. Weisman*, 12 A.D.2d 99, 102, 208 N.Y.S.2d 585, 588).

Based upon the sworn proof of Ms. Alem, we find that she has sustained her initial burden and it is incumbent upon Plaintiff to rebut her averments.

In opposition to Defendant’s cross-motion, Plaintiff has offered that affidavit of Mr. Edwin Osmin Rivera Gochez which states, *inter alia*, that he worked with the decedent at 1 Crabapple Court, Huntington Station when Mr. Castellanos was hired to construct the basement apartment. Specifically, Mr. Gochez states that:

“Ms. Alem is the person who hired Julian...Ms. Alem would not let him [Mr. Castellanos] speak with the owner.... We started working at 1 Crabapple Court approximately three weeks prior to November 10, 2014, which is the date Julian died in a work related accident at the job site...Ms. Alem provided Julian with the scope of the work to be performed at 1 Crabapple, i.e. the # and size of the rooms, layout of the rooms, bathroom location, type and size of windows, basement entrance location, materials to be used and design etc....Ms. Alem was present at the job site every day we were working at the project. When she was present, Ms. Alem would give instructions to Julian...Ms. Alem was actively supervising the project as it progressed and giving orders to Julian. Ms. Alem also accompanied Julian and I to Home Depot on more than one occasion where she purchased materials for the Crabapple project.”

Regarding the construction of the entrance way to the basement apartment, Mr. Gochez adds that:

“Ms. Alem inspected the work and told Julian that the entrance was too steep. This was before the steps leading into the basement entrance had been built. This meant we were going to have to add more steps than were originally planned. Based upon Ms. Alem’s direction to Julian, I was instructed by Julian to remove a walkway near the retaining walls because we needed additional space to build the additional space.” (Affidavit dated October 7, 2015).

Shortly after this was done, Mr. Castellanos was killed when the retaining wall collapsed on him.

Under the circumstances presented, the Court finds that the affidavit of Mr. Gochez sufficiently creates an issue of fact warranting a denial of summary judgment (*Graces v. Karabelas, supra*).

We now address Plaintiff's motion to strike Defendant's answer (CPLR § 3126).

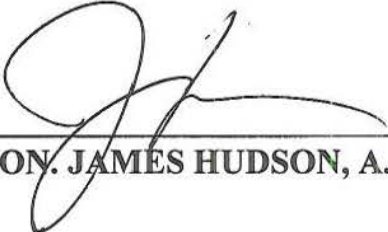
Sanctions for failure to provide discovery will only be imposed when it is demonstrated that the non-movant has acted willfully or contumaciously (*Caballero v. Montefiore Medical Center*, 167 A.D.2d 219 [1st Dept 1990]). In the case at bar, Plaintiffs have failed to show such behavior on the part of Defendant. It is always preferable to have actions decided on their merits (*Sieden v. Copen*, 170 AD2d 262 [1st Dept 1991]). In the matter at hand Defendant proceeded, in good faith, to make a dispositive motion which occasioned some delays. Since that issue has been disposed of, however, Defendant must comply-expeditiously-with the preliminary conference Order of April 9, 2015. Further delays in this case caused by the actions of Defendant will unfortunately oblige the Court to find that her conduct constitutes a willful failure to comply with discovery (*see Gonzalez v. Paniccioli*, 174 AD2d 709 [2d Dept 1991]).

Accordingly, Defendant Ms. Alem will be afforded an opportunity to fully comply with the Court's prior Order before we consider the drastic sanction of dismissal.

Therefore, Defendant is directed to supply Plaintiffs with outstanding disclosure within 45 (forty-five) days of service of a copy of this Order with notice of entry.

The foregoing constitutes the decision and Order of the Court.

**DATED: NOVEMBER 9, 2015**  
**RIVERHEAD, NY**



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HON. JAMES HUDSON, A.J.S.C.