Laluna v Verrastro
2017 NY Slip Op 32851(U)
January 17, 2017
Supreme Court, Dutchess County
Docket Number: 51381/2015
Judge: James D. Pagones
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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LOUIS LALUNA,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 51381/2015

NICOLE VERRASTRO AND WILLIAM VERRASTRO,

Defendants.

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PAGONES, J.D., A.J.S.C.

Defendants move for an order, pursuant to CPLR 3212, granting them summary judgment and dismissing the plaintiff's complaint.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-E-Affidavit of Service	1-8
Affirmation in Opposition-Exhibits 1-4-Affidavit of Service	9-14
Reply Affirmation-Affidavit of Service	15-16

Upon the foregoing papers, the motion is decided as follows:

By way of background, plaintiff brings this action seeking damages for alleged injuries sustained as a result of a slip-and-fall on ice on February 20, 2014 at the defendants' premises located at 36 Scenic Hills Drive, Poughkeepsie, New York. At the time the accident, plaintiff was employed by LoveEffron, 47

Patrick Lane, Poughkeepsie, New York. Plaintiff was allegedly delivering oil to the defendants' premises when the accident occurred.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movants must set forth a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movants set forth a prima facie case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of their motion for summary judgment, defendants initially argue that the complaint must be dismissed as plaintiff has failed to establish that the alleged incident occurred on their premises. In support of this allegation, defendants offer the deposition testimony of the plaintiff. Plaintiff states that the accident occurred in a driveway of a home (*see* Deposition of Plaintiff at p 15 lines 14-17). Plaintiff testified that he had pulled the hose up from the oil truck around the side of the house, filled the oil tank and was on his way back to the truck

when he stepped off the snow onto ice and fell (*see* Deposition of Plaintiff at p 16 lines 11-19). He additionally testified, after being shown two pictures of the defendants' home, that one of the pictures looked familiar and that he fell when coming around in front of the door pictured (*see* Deposition of Plaintiff at p 20-21 lines 18-25, lines 1-18). Further, defendant William Verrastro testified that a receipt was left on his door handle indicating that an oil delivery was made on the 20th of February (*see* Deposition of Defendant W. Verrastro p 13 lines 18-25).

Accordingly, defendants' allegation that the plaintiff has failed to "corroborate any evidence that the alleged incident actually occurred on Defendants' premises" is without merit in fact.

Next, defendants allege that the plaintiff has failed to establish defendants had notice of the alleged ice/snow condition.

A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof (*see Moore v. Great Atl. & Pac. Tea Co., Inc.*, 117 AD3d 695 [2nd Dept 2014]).

Plaintiff testified that the incident occurred after a snowstorm, but then indicated that he couldn't recall and didn't know (*see* Deposition of Plaintiff at p 17 lines 7-17). He

further stated that the area where he fell was iced over (*see* Deposition of Plaintiff at p 18-19 line 25, lines 1-2).

Defendant William Verrastro testified that in the winter when it snows, he snowblows and then applies rock salt to his driveway so he can make it up his driveway, which has a pretty steep incline (*see* Deposition of Defendant W. Verrastro p 10 lines 4-16). Mr. Verrastro stated that his contract with LoveEffron requires him to maintain a clear path to the oil fill (*see* Deposition of Defendant W. Verrastro p 15 lines 4-6). He ensures compliance by snowblowing the path and putting rock salt down (*see* Deposition of Defendant W. Verrastro p 15 lines 7-10). However, Mr. Verrastro could not recall the weather conditions on the 20th, he could not recall if he had to snowblow or shovel the driveway and he could not recall if he had to put salt on his driveway (*see* Deposition of Defendant W. Verrastro p 9 lines 13-16, p 14 lines 6-9, p 14 lines 10-12).

In this instance, the Court is bound by the decision of the Appellate Division Second Department in *Heck v. Regula*, 123 AD3d 665 [2nd Dept 2014]). The Court in *Heck* held "[t]o meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*id. quoting Birnbaum v. New York Racing Ass'n, Inc.*, 57 AD3d 598 [2nd Dept 2008]). Defendants offer

absolutely no evidence in this regard. Accordingly, as defendants have tendered no evidence as to when the area in question was last inspected, shoveled or salted before the time when plaintiff allegedly fell, they have failed to meet their initial burden (*id.*).

Based upon the foregoing, the motion for summary judgment is denied in its entirety. This matter is scheduled for a further Pre-Trial Conference on February 28, 2017 at 9:30 a.m. Adjournments are only granted with leave of the Court.

The foregoing constitutes the decision and order of the Court. This decision and order has been filed electronically.

Dated: January 17, 2017
Poughkeepsie, New York

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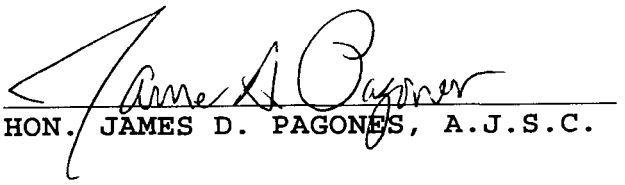

HON. JAMES D. PAGONES, A.J.S.C.

TO: AMIT SONDHI, ESQ.
MORGAN, LEVINE & DOLAN, P.C.
Attorneys for Plaintiff
18 East 41st Street, 6th Floor
New York, New York 10017
jlevine@morganlevinelaw.com

JAYNE L. BRAYER, ESQ.
LAW OFFICE OF BURKE, CONWAY, LOCCISANO & DILLON
Attorneys for Defendants
Ten Bank Street, Suite 1200
White Plains, New York 10606
e-filingunit@mcblaw.com

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