

**Pozzulo v Botta**

2019 NY Slip Op 34611(U)

July 9, 2019

Supreme Court, Nassau County

Docket Number: Index No. 605876/2017

Judge: Anna R. Anzalone

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: Honorable Anna R. Anzalone  
Justice of the Supreme Court**

\_\_\_\_\_  
**IRENE POZZULO and ROCCO POZZULO,**

**TRIAL/IAS, PART 18**

**NASSAU COUNTY**

**Plaintiff,**

**- against -**

**Motion Seq# 1**

**CHRISTOPHER BOTTA and CATHERINE D.  
BOTTA,**

**Index No. 605876/2017**

**Defendants.**

*mg*

\_\_\_\_\_  
**CHRISTOPHER BOTTA and CATHERINE D. BOTTA,**  
**Third-Party Plaintiffs,**

**-against-**

**ROCKVILLE CENTRE UNION FREE SCHOOL  
DISTRICT and SOUTH SIDE MIDDLE SCHOOL,**  
**Third-Party Defendants.**

\_\_\_\_\_  
**ROCKVILLE CENTRE UNION FREE SCHOOL  
DISTRICT, sued herein as ROCKVILLE CENTRE UNION  
FREE SCHOOL and SOUTH SIDE MIDDLE  
SCHOOL,**

**Second Third-Party Plaintiff,**

**-against-**

**INCORPORATED VILLAGE OF ROCKVILLE  
CENTRE,**  
**Second Third-Party Defendant,**

\_\_\_\_\_  
**CHRISTOPHER BOTTA and CATHERINE D. BOTTA,**  
**Third Third-Party Plaintiffs,**

**-against-**

**INCORPORATED VILLAGE OF ROCKVILLE  
CENTRE,**

**Third Third-Party Defendants.**

**X**

**The following papers read on this motion:**

Rockville Centre Union Free School District, sued herein as Rockville Centre Union Free School District and South Side Middle School’s Notice of Motion.....1

Incorporated Village of Rockville Centre’s Affirmation in Opposition.....2

Rockville Centre Union School District’s Affirmation in Reply.....3

This instant action is one of negligence. Plaintiff Irene Pozzulo (“Irene”) alleges that on February 10, 2017 she slipped and fell on an accumulation of snow and ice situated on the driveway apron located at 29 Milford Place, Rockville Centre, New York (“Accident”). The driveway apron is part of the defendant/third-party plaintiffs’ Christopher Botta and Catherine D. Botta (“Botta”) private residence, which adjoins/abuts South Side Middle School.

Plaintiff filed a summons and verified complaint against defendant Botta, and issue was joined on July 6, 2017 when Botta filed an answer. On September 28, 2017, Botta commenced a third-party action against Rockville Centre Union Free School District and South Side Middle School (“School District”), and issue was joined on October 19, 2017 when the School District filed an answer. On April 5, 2018, the School District commenced a second third party action against the Incorporated Village of Rockville Centre (“Village”) and issued was joined when the Village filed an answer on June 1, 2018. On April 19, 2018, Botta further commenced a third third party action against the Village and issue was joined on June 1, 2018 when the Village answered.

The Original Summons and Complaint that plaintiff filed against Botta alleged that as homeowners of the premises, Botta had a duty and obligation to keep their driveway apron free and clear of snow and ice. At the time of her accident, Irene was employed full-time as a teacher’s aide by the School District.

The School District submits an affidavit of Vincent Mistretta, an authorized agent and Workers Compensation Claims Examiner for Wright Risk Management, insurer for the School

District which states that Irene filed a Workers' Compensation claim with regard to the Accident. Specifically, Irene alleges that while walking from the parking lot to the Middle school, the snow and ice on the sidewalk prevented her from continuing on the sidewalk. Irene walked down the apron of the last house on Milford Place next to the school, (Botta's private residence) slipped on the ice, fell and broke her left ankle. To date, Wright Risk Management has paid out Workers Compensation benefits to Irene in the amount of \$25,000.00 (indemnity and medical) in direct relation to the February 10, 2017 accident. Additionally, Mr. Mistretta affirms that it is his understanding and belief that there has never been any written contract between either Wright Risk Management, NYSIR or the School District and Botta wherein either Wright Risk Management, NYSIR, or the School District expressly agreed to contribution or indemnification to Botta for any reason, including but not limited to snow removal conducted at or within the vicinity of the School District's premises.

The School District also submitted the sworn affidavit of Assistant Superintendent for Business for the School District, Robert Bartels. Mr. Bartels affirms that there has never been any written contract between the School District and Botta wherein the School District expressly agreed to contribution or indemnification to Botta for any reason.

Rockville Centre Union Free School District moves for an Order pursuant to CPLR §3212 and § 11 of the Worker's Compensation law, dismissing the third-party plaintiffs' complaint, together with any and all cross-claims, and granting summary judgment to third-party defendant, Rockville Centre Union Free School District; and pursuant to CPLR §3025 (b) granting the third-party defendant Rockville Centre Union School District leave to amend its answer to include that the affirmative defense that any action herein against the school district is barred by the provisions of the Workers' Compensation Law.

The School District submits that Irene was and still is an employee of the School District who was acting within the scope of her employment with the School District at the time of the accident and had collected Workers Compensation benefits from the School District's Workers Compensation carrier, and hence the School District is immune from this lawsuit. The School District argues that the plaintiff did not sustain a grave injury under the Workers Compensation Law, and the School District never entered into any written agreement with the Bottas with relation to any work being performed at the time of the accident.

The Village's opposition papers submit that the School District may not avail itself of the Worker's compensation defense since the School District did not plead it as an affirmative defense in their answer, and the plaintiff was not actually working at the time of her alleged incident, and arguably, the plaintiff did not injure herself during the course of her employment. This Court disagrees. Failure to raise issue of exclusive remedy of worker's compensation law by affirmative defense in answer to a personal injury action does not constitute waiver of the defendant's right to assert the exclusive remedy afforded under the Workers Compensation Law as to bar to the action to recover damages for personal injuries. *Lunsford v. Schaffner*, 184 AD2d 625, 584 NYS2d 909 (1992). Additionally, it is undisputed that plaintiff was an employee of the School District and has been collecting workers compensation benefits from their insured. The issue of whether a plaintiff was acting as an employee of a defendant at the time of the injury is a question of fact to be resolved by the Worker's Compensation Board which has primary jurisdiction over the issue of the availability of coverage. *Suarez Alfonso v. Lopez*, 149 AD3rd 1535, 52 NYS3rd 780 (2017),

The Workers Compensation Law §11 provides in pertinent part:

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For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

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The Court of Appeals has long held that, “as to an employer, where workmen's compensation provides a remedy, the remedy that it provides, save for the rare case, is exclusive. Where liability is imposed upon an employer to provide workmen's compensation and compensation is provided, that liability is exclusive and in the stead of any other employer liability whatsoever” Suarez, supra. Thus, the issue whether a plaintiff was acting as an employee of a defendant at the time of the injury is a question of fact to be resolved by the Workers' Compensation Board Alfonso, citing *Besaw v. St. Lawrence County Assn. for Retarded Children*, 301 A.D.2d 949.

Defendant may implead plaintiff's employer only if: (1) it can be shown that Plaintiff suffered a “grave” injury in the accident, as defined by statute, or (2) if there is a “written contract entered into prior to the accident or occurrence by to which the employer had expressly agreed to contribution to or indemnification of defendant. *New York Practice, Sixth Edition, §155; Worker Compensation Law §11*.

The Court of Appeals had held that the common-law indemnity and contribution claims are sustainable only where the plaintiff has sustained one of the injuries enumerated in Workers compensation law §11. *Meis v. Elo Org, LLC* 97 NYS2nd 713, 740 NYS 2nd 689 (2002). The Court of Appeals has also held that the grave injuries listed are deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action. *Castro v. United Container*, 96 NY2nd 398, 761 NY 2nd 1014, 736 NYS2nd 287. The submission of plaintiff's verified bill of particulars standing alone is sufficient to establish, prima facie, that plaintiff did not suffer a grave injury loss of within the meaning of Workers' Compensation Law § 11. *Fleischman v. Peacock Water Company*, 51 AD3rd 1203, 858 NYS 2nd 421 (2008).

The bill of particulars allege that the plaintiff fractured her left ankle. This injury is clearly not specifically listed in the statute, to wit: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability. This Court agrees

with the School District in that in order to bring a third-party action against the School District it must be established that the injuries which plaintiff sustained to her ankle rise to the level of "permanent and total loss". Plaintiff was able to walk not long after the incident and was able to return to work approximately 7 months after said incident.

The papers are void of an evidence that the school district entered into any written agreement with the Bottas with relation to any work being performed at the time of the accident and therefore does not meet the exception carved out in Workers compensation law §11 regarding the "written contract" ground for impleader of plaintiff's employer.

Therefore, the evidence does not show that Plaintiff suffered a "grave" injury in the accident, as defined by statue, or that there was a written contract entered into prior to the accident or occurrence by to which the employer had expressly agreed to contribution to or indemnification to the Bottas.

Accordingly, Rockville Centre Union Free School District motion for an Order pursuant to CPLR §3212 and § 11 of the Worker's Compensation law, dismissing the third-party plaintiffs' complaint, together with any and all cross-claims, and granting summary judgment to third-party defendant, Rockville Centre Union Free School District is granted. The caption shall be amended to reflect the following:

\_\_\_\_\_ X  
IRENE POZZULO and ROCCO POZZULO,  
Plaintiffs,

-against-

CHRISTOPHER BOTTA and CATHERINE D. BOTTA,  
Defendants.  
\_\_\_\_\_ X

CHRISTOPHER BOTTA and CATHERINE D. BOTTA,  
Third Third-Party Plaintiffs,

-against-

INCORPORATED VILLAGE OF ROCKVILLE CENTRE,  
Third Third-Party Defendants.

X

Counsel for defendant School District shall file and serve a copy of the within order with notice of entry upon all parties within twenty (20) days from the date of this Order.

The foregoing constitutes the Decision and Order of the Court.

DATED: July 9, 2019  
Mineola, New York

ENTER

*Anna R. Anzalone*

HON. ANNA R. ANZALONE

**ENTERED**  
JUL 15 2019  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE