

**Greenwood v Nicola Design Studio, Inc.**

2019 NY Slip Op 34681(U)

December 23, 2019

Supreme Court, Nassau County

Docket Number: Index No. 616236/18

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT - STATE OF NEW YORK**

**PRESENT:**

*Honorable James P. McCormack*  
**Justice**

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**TRIAL/IAS, PART 21  
NASSAU COUNTY**

**MARCIA GREENWOOD,**

**Index No.: 616236/18**

**Plaintiff(s),**

**Motion Seq. No.: 001  
Motion Submitted: 10/31/19**

**-against-**

**NICOLA DESIGN STUDIO, INC,  
individually and d/b/a NICOLA DESIGN  
STUDIO,**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X  
Affirmation in Opposition.....X

Plaintiff, Marcia Greenwood (Greenwood), moves this court for an order, pursuant to CPLR §3212, granting her summary judgment on the issue of liability, and dismissing the affirmative defenses alleging Greenwood was comparatively negligent. Defendant, Nicola Design Studio, Inc., individually and d/b/a Nicola Design Studio (Nicola), opposes the motion.

Plaintiff commenced this action, sounding in negligence, by service of a summons and complaint, dated December 5, 2018. Issue was joined by service of an answer dated

January 29, 2019.

On September 13, 2018, Greenwood went to Nicola to purchase some marble for a countertop in her new home. The marble she was interested in was located in an outside area in the back of the store. In support of her motion, Greenwood submits two photos of the outside area where the marble was kept. The pictures are taken facing the backdoor to the building. To the right, there are slabs of marble standing upright, probably in some kind of holder. To the left, there are slabs of marble leaning up against a dumpster, and some other slabs leaning up against something that cannot be seen. Greenwood was being assisted by Vinny Fraduli, the owner of Nicola, and an unnamed helper. Mr. Fraduli was going to show Greenwood some marble from the left side, where the slabs were leaning up against each other, and up against either the dumpster or another unseen object. The slab of marble Mr. Fraduli was going to show Greenwood was behind some other slabs of marble. As Mr. Fraduli and his helper were trying to access the slab Greenwood wanted to see, the first slab fell and hit her in the left foot. Greenwood now seeks summary judgment on liability, arguing she was not at all responsible for the happening of this accident.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v.*

*City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [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 (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

A finding of negligence requires a showing that the defendant owed the plaintiff a duty of care, the defendants breached that duty, the breach was the proximate cause of the the injury and that there were damages as a result. (*Abbot v Johnson*, 152 AD3d 730 [2d Dept 2017]).

In support of her motion, other than the pictures, Greenwood offers her own affidavit. In her affidavit, Greenwood explains in detail how Mr. Fraduli and the helper were maneuvering the slabs in an attempt to access the one she wanted to see. She was standing within a few feet of them when a slab she estimates was six feel long fell on her foot. While she offers some speculation as to why the slab fell, it is clear she was in that area of the building with Mr. Fraduli's consent, and that she was simply standing still when the slab hit her. Based upon her affidavit and the photos, the court finds Greenwood has established entitlement to summary judgment as matter of law. The

burden shifts to Nicola to raise a material issue of fact requiring a trial of the action.

In opposition, Nicola offers the affidavit of Mr. Fraduli. He states that when Greenwood told him what she was looking for, he brought her to the outside area in the rear of the store. He claims that this area is off limits to customers unless there is an employee present, and that there is a sign indicating as much. Prior to he and his helper looking for the slab they wanted to show Greenwood, Mr. Fraduli directed Greenwood to stand near the shed, which was eight to 10 feet away from where the marble slabs were. She obeyed, but when he was trying to access the slab, she walked over to where they were. He was unaware of this because his back was to her. When the slab fell and hit her in the foot, he was surprised she had moved closer.

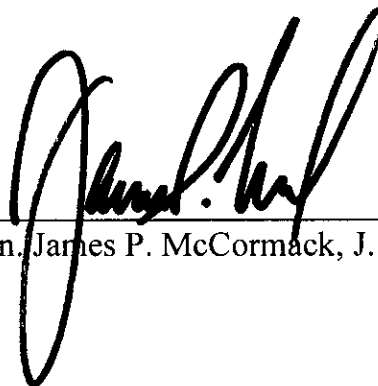
The court finds Mr. Fraduli's affidavit raises an issue of fact. While it is clear Nicola owed Greenwood a duty, and while it is likely that duty was breached when the slab fell, there is an issue of fact whether that breach was the proximate cause of the injury. Put another way, when Greenwood ignored the command to remain eight to 10 feet away and came closer, her actions were an intervening cause. Had she remained where Mr. Fraduli told her to stay, there is an issue of fact whether there would have been an injury when the slab fell. While an intervening act requires an element of foreseeability, the issue of whether the act was foreseeable is generally left to the factfinder. (*Lapidus v State*, 57 AD3d 83 (2d Dept 2008)).

Accordingly, it is hereby

**ORDERED**, that Greenwood's motion for summary judgment is DENIED.

This foregoing constitutes the Decision and Order of the Court.

Dated: December 23, 2019  
Mineola, N.Y.



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Hon. James P. McCormack, J. S. C.

**ENTERED**  
JAN 02 2020  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE