

Sclafani v Bellerose Plaza, LLC
2019 NY Slip Op 34733(U)
October 4, 2019
Supreme Court, Nassau County
Docket Number: Index No. 600529/2016
Judge: Robert A. Bruno
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

LUZ SCLAFANI,

Plaintiff,

TRIAL/IAS PART 12

-against-

Index No.: 600529-16
Submission Date: 6/25/19
Motion Sequence: 003, 004

BELLEROSE PLAZA, LLC, NEW WASHING
SQUARE II, INC. d/b/a LAUNDRY WORLD and
250-36 JERICHO TURNPKE LAUNDROMAT, LLC.,

Defendants.

DECISION & ORDER

Papers Numbered

Table listing document sequences and page numbers: Sequence #003 (Notice of Motion, Affirmation & Exhibits, Affirmation in Opposition, etc.) and Sequence #004 (Notice of Motion, Affirmation & Exhibits, Affirmation in Opposition, etc.).

Upon the foregoing papers, the following motions are determined as set forth below:

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Sequence #003. Motion by defendant 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC. for an Order pursuant to CPLR §3212, granting summary judgment to said defendant; (1) dismissing plaintiff's complaint and all common law cross-claims against 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC.; (2) dismissing defendant BELLEROSE PLAZA, LLC's cross-claims against 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC.; (3) granting 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC., summary judgment on its cross-claims against BELLEROSE PLAZA, LLC.; (4) dismissing NEW WASHING SQUARE II, INC.'s cross-claims against 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC.; and (5) granting 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC. summary judgment on its cross-claims against NEW WASHING SQUARE II, INC.

Sequence #004. Motion by defendant BELLEROSE PLAZA, LLC. for an Order pursuant to CPLR §3212, granting the moving defendant summary judgment, and dismissing plaintiff's action in its entirety on the basis of a minimal defect, and that same was not caused or created by the moving defendant; and granting the moving defendant summary judgment on its cross-claims against co-defendants 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC., and NEW WASHING SQUARE II, INC., d/b/a LAUNDRY WORLD, and dismissing all cross-claims against it.

This is an action to recover damages for personal injuries allegedly sustained in a trip and fall accident that occurred on December 3, 2014 in the parking lot of the property located at 250-66 and 250-70 Jericho Turnpike, in the Village of Bellerose, Nassau County, New York (the "Property"). The Property is owned by defendant BELLEROSE PLAZA, LLC. ("BELLEROSE"). One of the stores located on the Property is leased to defendant 250-36 JERICHO TURNPIKE LAUNDROMAT, LLC. ("JERICHO"), and subleased to defendant NEW WASHING SQUARE II, INC., d/b/a LAUNDRY WORLD ("NEW WASHING"), for the operation of a laundromat. Plaintiff alleges that she was caused to trip and fall when her foot stepped in a puddle over a depressed area of the parking lot adjacent to the laundromat.

Each of JERICHO and BELLEROSE now moves for summary judgment dismissing the Complaint and all cross-claims against it, and for summary judgment in its favor on its cross-claims against co-defendants, on the basis that it has no liability for the subject occurrence. Essentially, each moving defendant makes the same arguments: (i) that the alleged defect in the parking lot was trivial and non-actionable; or, alternatively, (ii) that the moving defendant owed no duty to plaintiff insofar as it had no obligation under the applicable agreement to remedy the alleged defective condition, nor did it create or have notice of such condition. Further, each moving defendant argues that it had no obligation under the applicable agreement or at common

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law to indemnify the co-defendants, but rather, the co-defendants had an obligation to indemnify the moving defendant.

Accordingly, the issues raised on these motions include: (1) whether or not an actionable hazardous condition existed on the Property; and, if so, (2) which of the defendants were responsible for remediating the condition; and (3) what were the respective rights and obligations of the defendants with respect to indemnification.

Existence of a Hazardous Condition.

In support of their bid for dismissal based upon the trivial nature of the defect, each of the moving defendants relies upon the testimony of plaintiff taken at her deposition on February 1, 2018 (*NYSCEF Doc. 80*), as well as the color photographs marked as Exhibits at plaintiff's deposition (*NYSCEF Docs. 81 & 82*).

Plaintiff testified that, on the date and time of the accident, she parked her car in a handicapped parking space immediately adjacent to the laundromat. In the two years that she frequented this laundromat, she typically parked in the same spot, when it was available. She got out of her car on the driver's side, and was walking around the back of the vehicle to get her laundry bag and detergent in the front passenger side. When she reached the back passenger door, she stepped into a hole with her right foot. The hole was covered with water, a puddle about 3 feet in diameter. She estimated the hole to be about 3-4 inches deep. When she stepped into the hole, she twisted her foot and fell down on the right side, causing the injuries complained of in this action. She had never before noticed a depression or hole or any other defect in the surface of the parking lot, had never complained about the lot, and was unaware of any other falls or complaints about the lot (pp. 14 - 24).

Plaintiff testified further that the photographs of the accident site were taken by her attorney's investigator, in her presence, on the day after the accident (pp. 32). In one photograph, she circled the precise location of her fall. In the other photograph, a ruler inserted into the puddle, presumably at the site of the subject depression or hole, showed a depth of approximately 3/4 of an inch.

Although plaintiff testified that the photographs fairly and accurately showed the general condition of the lot as it existed on the day of the accident (p.32), she noted differences (other than the fact that it was raining on the day of the accident, and not on the following day when the photographs were taken).

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- Q. Is there anything that looks and I understand this is a little bit zoomed out. Defendant's Exhibit A, is there anything different about the puddle or the photographs then it was on the date of the accident?
- A. It is different.
- Q. In what way it is different?
- A. The lot was all wet and it was not so clear like it looks here. All wet.
- Q. You are pointing to Exhibit D.
- A. Yes.
- Q. It is in a different angle of what we are looking at?
- A. Yes, not so clear.
- Q. When you say it is not so clear, what do you mean it what was not so clear?
- A. I think. I couldn't see the puddle this deep. It looked all wet. I couldn't see the puddle because of all of the rain.
- Q. On the date of the accident at the time that you stepped into the puddle, did you know a puddle was there?
- A. No.

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- Q. On the date of the accident, December 3rd, you testified that the parking lot was kind of all wet?
- A. Yes.
- Q. Were there puddles everywhere? Was it just wet ground or actually a little bit of water. You know a centimeter or an inch?
- A. A little bit.
- Q. A little bit of water in the entire lot?
- A. Yes, all wet.
- Q. Would you characterize it as flooded?
- A. No.
- Q. Did this one particular puddle that we are talking about here today, did you notice that puddle prior to eventually falling?
- A. I don't understand.
- Q. The lot was not flooded? Correct? It is just wet?
- A. Yes.
- Q. And there is a body of water that you observed right there?
- A. Yes, there was a lot of -- I couldn't see and that was puddle that was deep.
- Q. Okay.
- A. It all looked the same.
- Q. The entire parking lot looks like that? How it looks in Defendant's Exhibit B?
- A. Right.

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- Q. When you say 3 feet of puddle, is that something you learned the next day?
A. Yes. I couldn't see the puddle. I didn't see it as a deep puddle. I just saw it as wet ground.
Q. The next day you went back and it was not raining, is that correct?
A. It was not. It was dry. You can see things were dry.
Q. You can see in photographs that-
A. You can see it's a puddle, a deep puddle.
Q. As you look at the photographs you said it was dry, the area around the puddle was dry but you see a puddle that was left there?
A. The next day?
Q. Yes.
A. The day that I had the accident it was not like that. It was not dry.
Q. The whole ground was wet?
A. Yes.

Steven Louros, the witness for BELLEROSE, also testified generally as to the condition of the parking lot. At his deposition conducted on February 7, 2019 (*NYSCEF Doc. 83*), Mr. Louros testified that he was unaware of any potholes in the parking lot, and had received no complaints about potholes (pp. 78-79). Mr. Loudes did not observe any abrupt elevation changes in the parking lot. As will be discussed below, however, he did observe in 2014 a "slight settling" of the blacktop where excavation had been performed by co-defendant JERICH0 (pp. 35, 72, 74-75).

"Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury. Property owners may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip. There is no minimal dimension test or per se rule that the condition must be of a certain height or depth to be actionable. In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury." *Martyniak v Charleston Enterprises, LLC*, 118 AD3d 679, 680 (2d Dept. 2014) (internal citations and quotation marks omitted). See also *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997). "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable." *Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 984 (2d Dept. 2011).

"A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a pedestrian." *Hutchinson v Sheridan Hill House Corp.*, 26

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NY3d 66, 78 (2016) (internal citations and quotation marks omitted). A defect may present a significant hazard, notwithstanding its minimal dimension, by reason of location, adverse weather, lighting conditions, or other circumstances making it difficult for a pedestrian to see the defect or identify it as a hazard. *Hutchinson*, 26 NY3d at 79; *Cassizzi v Fordham University*, 101 AD3d 645 (1st Dept. 2012); *Gaud v Markham*, 307 AD2d 845 (1st Dept. 2003). “A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured...” *Tesoriero v Brinckerhoff Park, LLC*, 126 AD3d 782 (2d Dept. 2015).

“A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.” *Hutchinson*, 26 NY3d at 79.

At bar, the Court finds that the moving defendants have failed to meet their initial burden to demonstrate that the defect was trivial as a matter of law. They argue that the alleged defect, measuring only 3/4 inch deep, had none of the characteristics of a trap or snare because there were no jagged edges or rough irregular surfaces, and its slope was gradual. Moreover, they note, the accident occurred in daylight. Their argument ignores plaintiff’s testimony and the photographic evidence demonstrating that, at the time of the accident and even one day later, the alleged defect was covered by a puddle of rainwater. Thus, the intrinsic nature of the alleged defect was not visible in the photographs for purposes of supporting defendant’s *prima facie* showing. More importantly, however, as plaintiff testified, the existence and nature of the alleged defect was not visible to plaintiff as she was walking around her car on the day of the accident. Viewing the evidence in the light most favorable to the plaintiff (see *Schaffe v SimmsParris*, 82 A.D.3d 867 [2d Dept. 2011]), the Court finds that defendants have failed to eliminate issues of fact as to whether the alleged depression or hole in the parking lot presented an unreasonable hazard when filled with and/or obscured by rainwater. See *Tesoriero*, 126 AD3d 782 (2d Dept. 2015).

Responsibility for the Alleged Defect.

Each of the moving defendants claims that it owed no duty to plaintiff, as a matter of law and pursuant to the Agreements among the parties. The respective rights and obligations as between BELLEROSE (“Landlord”) and JERICHO (“Tenant”) are governed by the Agreement of Lease entered into as of October 8, 2009 (the “Lease”) (*NYSCEF Doc. 86*). The respective

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rights and obligations as between JERICHO (“Owner”) and NEW WASHING (“Manager”) are governed by the Management Agreement dated as of March 16, 2011 (the “Management Agreement”) (*NYSCEF Doc. 87*), which functions as a sublease.

In support of its motion, JERICHO maintains that it was not responsible for the repair of the parking lot, and thus cannot be held liable for any defect thereon. It did not own the parking lot, and the parking lot was not part of the demised Premises under the Lease. Moreover, the Lease expressly assigned responsibility for maintenance and repair of the parking lot to the Landlord. Section 1(c) of the Lease provides, in relevant part:

“Landlord agrees to maintain the common areas and the other stores comprising the Property in a neat, clean condition and in good condition and repair, or to require other tenants to perform such maintenance, repair, and shall clean, remove snow and ice and maintain, pave, re-stripe and light the Parking Lot and the 7-11 Parking Lot (subject to Section 16 hereof), or shall cause such obligations to be performed by another tenant.”

Further, JERICHO maintains, any obligations that it may have had under the Lease were assumed by NEW WASHING when it entered into the Management Agreement. Pursuant to the Management Agreement, NEW WASHING was required to maintain and repair the demised premises to the full extent that JERICHO was required to do so under the Lease. See Management Agreement, ¶¶ 3.2, 3.12, 3.13 and 15.2. Further, Section 3 provides:

Manager hereby assumes and agrees to timely pay and discharge any and all expenses in connection with the operation and maintenance of the Business and any and all liabilities arising out of the Business, from on and after the M.A. Commencement Date.

BELLEROSE opposes JERICHO’s motion. To the extent that there was a defect in the surface of the parking lot, BELLEROSE argues, it was created by JERICHO.

BELLEROSE relies largely upon the deposition testimony of Steven Louros (*NYSCEF Doc. 83*). Mr. Louros testified that sometime between October of 2009 (when the Lease was signed) and May of 2010 (when the work was completed), JERICHO excavated and repaved the parking lot, in order to run special pipes and sewer lines necessary for the operation of a laundromat (pp. 16-17). According to BELLEROSE’s counsel, this was part of the Initial Alterations, as defined in the Lease, that were undertaken to convert the premises from a deli to a laundromat. Mr. Louros testified further that in March 2011, JERICHO had to reopen a portion of the parking lot to repair a leaking pipe (pp. 23, 26). Mr. Louros states that he came to see the work both times, but he did not recall any communication with JERICHO about it (pp. 28-29).

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In the summer of 2014, however, he observed a “slight settling” in the parking lot area where JERICHO had performed the excavation and where it had installed a new sidewalk (pp. 35-36, 72, 75). Mr. Louros sent a written complaint to JERICHO about the conditions observed. *Id.* See also *NYSCEF Doc. 98*. The letter requested only that JERICHO repair the sidewalk, and JERICHO did so (p. 39). Mr. Louros believed that there were further discussions about the settling of the parking lot, but he did not recall any request to repair the parking lot (pp. 40, 65).

BELLEROSE refers to the provisions in the Lease regarding Initial Alterations, of which the excavation and repaving were a part. Section 7(c) of the Lease requires that all Alterations be done in a “good and workmanlike manner” and in compliance with all applicable law, regulations and codes. Section 10(c) requires the Landlord to maintain and repair the structural and exterior portions of the Premises and the Building “except for damage or repairs caused by Tenant's negligence or actual damage by Tenant or its contractor or invitees or caused by improper performance of Tenant's Initial Alterations.” In BELLEROSE's view, this places the responsibility upon JERICHO for the repair of the “settling” defect caused by JERICHO's negligent re-paving work.

In support of its own motion, BELLEROSE asserts that it owed no duty to plaintiff because BELLEROSE did not create the hazardous condition alleged by plaintiff. The alleged defect was created by JERICHO. In addition, BELLEROSE cites Section 4.2(c) of the Management Agreement for the proposition that NEW WASHING undertook the obligation to maintain and repair the Parking Lot. Section 4.2 (c) provides:

Manager shall be responsible to maintain and repair all of the parking area and should not reduce the size of the parking area or number of parking spaces offered to customers.

As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property. . . . Where none of these factors are present, a party cannot be held liable for injuries caused by the allegedly defective condition. . . . Liability can be imposed upon a landowner or a lessee who creates a defective condition on the property, or had actual or constructive notice of the allegedly defective condition.” *Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845 (2d Dept. 2010) (internal citations and quotation marks omitted). See also *O'Toole v Vollmer*, 130 AD3d 597 (2d Dept. 2015); *Garcia v Town of Babylon Industrial Development Agency*, 120 AD3d 546 (2d Dept. 2014); *Suero-Sosa v Cardona*, 112 AD3d 706 (2d Dept. 2013).

At bar, JERICHO has established that it did not own or lease the area of the parking lot in which plaintiff allegedly fell, and that it had no contractual obligation to maintain or repair it.

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Nonetheless, the Court finds that JERICHO has failed to establish as a matter of law, that it cannot be held liable to plaintiff based upon the creation of the alleged defective condition. To the extent that a defective condition existed, JERICHO has produced no admissible proof that the “settling” observed by Mr. Louros and felt by plaintiff was not the result of negligent repaving work performed by or on behalf of JERICHO. A party moving for summary judgment must affirmatively demonstrate the merits of its cause of action or defense, and does not meet its burden by noting gaps in its opponent’s proof. *Deutsche Bank Nat. Trust Co. v Spanos*, 102 A.D.3d 909, 911 (2d Dept. 2013); *Fernandez v Festival Fun Parks, LLC*, 122 A.D.3d 794 (2d Dept. 2014); *Atkins v United Ref. Holdings, Inc.*, 71 AD3d 1459 (4th Dept. 2010); *Fromme v. Lamour*, 292 AD2d 417 (2d Dept. 2002).

Nothing in the Management Agreement relieves JERICHO of liability to third parties for its own negligence in creating a hazardous condition. See Management Agreement, ¶¶ 3, 3.2, 3.12, 3.13 and 15.2. See also General Obligations Law § 5-321. At most, Section 3 is an agreement, as between JERICHO and NEW WASHING, to allocate payment of the liabilities arising out of the business. In any event, it does not apply to liabilities arising prior to the commencement of the Management Agreement.¹

Similarly, the Court finds that BELLEROSE fails to meet its *prima facie* burden. BELLEROSE’s duty to plaintiff derives from the common law obligation of a landowner to maintain its property in a reasonably safe condition (see *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Barron v Eastern Athletic, Inc.*, 150 AD3d 654, 655 [2d Dept. 2017]). The landowner’s duty to persons injured on the property is not dependent on its having created the dangerous condition.

In addition, BELLEROSE’s obligation to maintain and repair the parking lot derives from the express allocation of responsibility set forth in Section 1(c) of the Lease. Nothing in the Lease relieves BELLEROSE of this obligation. Section 7(c) provides only that Alterations by the Tenant shall be done in a workmanlike manner. It does not relieve the Landlord of any of its own obligations. Section 10(c) pertains to the Landlord’s duty to maintain and repair the structural and exterior portions of the leased premises and building. It has nothing to do with the parking lot. Thus, the exception contained in Section 10(c) – relieving the Landlord of responsibility for repairs or maintenance necessitated by Tenant’s negligence – does not apply to repairs or maintenance of the parking lot.

¹ According to the testimony of Steven Louros, the first excavation and repaving work was performed prior to May 2010, and there was a second excavation and re-paving performed in March of 2011. The record is not clear as to whether the negligence (if any) that gave rise to the allegedly defective condition (if any) occurred prior to NEW WASHING’s assumption of liability.

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To the extent that Section 4.2(c) of the Management Agreement cited by BELLEROSE imposes a responsibility upon NEW WASHING to maintain and repair the parking area, BELLEROSE cites no authority for the proposition that such provision relieves BELLEROSE of its own common law duty to plaintiff to maintain its property in a reasonably safe condition. BELLEROSE neither argues nor demonstrates that it is an out-of-possession landlord that has relinquished control over the parking lot to NEW WASHING (see, e.g., *Singh v 405 Sixth, LLC*, 134 AD3d 1094 [2d Dept. 2015]). In any event, to the extent that BELLEROSE reads this provision as exempting it from liability to third persons, such reading renders the provision unenforceable. See General Obligations Law §5-321.

The Court finds further that BELLEROSE has failed to make a *prima facie* showing as to the absence of notice of the alleged defect. Its own witness testified as to having observed a “settling” of certain areas of the parking lot in 2014, and having complained about it, in writing, to JERICHO. BELLEROSE’s argument that it did not have notice of the puddle is unavailing. BELLEROSE fails to establish, as a matter of the law, that notice of the depression is not tantamount to notice of the foreseeable risk that rainwater would fill and hide the depression.

Indemnification.

Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence. *Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483 (1st Dept. 2010). See also *Cunningham v North Shore University Hosp. at Glen Cove Housing, Inc.*, 123 AD3d 650, 651 (2d Dept. 2014). In view of the above determination that neither of the moving defendants has established its freedom from negligence as a matter of law, the Court finds that neither of the moving defendants has established a right to dismissal of any cross-claims seeking common law indemnification from it, nor a right to common law indemnification from any other defendant.

Entitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify. *Martins*, 72 AD3d at 484. At bar, as between JERICHO and BELLEROSE, each of the indemnity provisions set forth in the Lease (Sections 11[a] and [b]), providing for indemnification of claims arising from the proposed indemnitor’s acts or omissions,² contains an exception for loss or damage resulting from the negligence of the

² Section 11(a) also provides for indemnification of the Landlord for claims arising out the Tenant’s use of the Premises and/or operation of its business at the Property.

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party seeking indemnification. Insofar as neither BELLEROSE nor JERICHO has demonstrated freedom from negligence as a matter of law, neither has established a right to dismissal of the other's claim for contractual indemnification under the provisions of the Lease, nor a right to contractual indemnification from the other.

As between JERICHO and NEW WASHING, the indemnity provision (wherein NEW WASHING agrees to indemnify JERICHO for all personal injury claims against JERICHO arising in or about the Premises during the term of the Management Agreement) contains an exception for claims arising from affirmative acts of negligence on the part of JERICHO. See Management Agreement § 8.1. Thus, insofar as JERICHO has not demonstrated that the alleged defect did not arise from an affirmative act of negligence on JERICHO's part, JERICHO has not shown entitlement to judgment on its cross-claim against NEW WASHING.

* * *

The Court has considered the remaining contentions of the parties, and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that JERICHO's motion for summary judgment: (1) dismissing plaintiff's complaint and all common law cross-claims against JERICHO; (2) dismissing BELLEROSE's cross-claims JERICHO; (3) granting JERICHO summary judgment on its cross-claims against BELLEROSE; (4) dismissing NEW WASHING's cross-claims against JERICHO; and (5) granting JERICHO summary judgment on its cross-claims against NEW WASHING (*Sequence #003*) is *denied*; and it is further

ORDERED, that BELLEROSE's motion for summary judgment dismissing plaintiff's action in its entirety, granting BELLEROSE summary judgment on its cross-claims against co-defendants JERICHO and NEW WASHING; and dismissing all cross-claims against BELLEROSE (*Sequence #004*) is *denied*.

All matters not decided herein are denied.

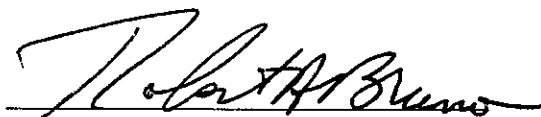
This constitutes the Decision and Order of this Court.

Dated: October 4, 2019

Mineola, New York

ENTERED
OCT 09 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:


Hon. Robert A. Bruno, J.S.C.