

Palumbo v Phil's Rest. & Sports Bar
2019 NY Slip Op 34780(U)
May 17, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 614985/16
Judge: Carmen Victoria St. George
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

BREYANA PALUMBO and EUGENE PALUMBO,

Index No. 614985/16

Plaintiffs,

-against-

**Motion Seq: 001 MD
DECISION/ORDER**

**PHIL'S RESTAURANT AND SPORTS BAR, 1856
WADING RIVER MANOR ROAD, LLC and JODINA
DEVELOPMENT, INC.,**

Defendants.

x

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	14-23
Answering Papers.....	29
Reply.....	31
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendants Phil's Restaurant and Sports' Bar (Phil's Restaurant) and 1856 Wading River Manor Road, LLC (1856 LLC) move this Court for an Order dismissing the complaint pursuant to CPLR § 3212. Plaintiffs oppose the requested relief.¹

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*). The Court's analysis of the evidence must be viewed in the light most favorable to the

¹ Co-defendant Jodina Development, Inc. has never appeared in this action despite having been served via New York's Secretary of State, pursuant to Business Corporation Law § 306, on October 6, 2016, and no default was ever taken against Jodina Development, Inc.

non-moving party, herein the plaintiffs (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

In support of their motion, the moving defendants submit the pleadings, the affidavit of Philip Marcario, president of 1856 LLC, Marcario's deposition testimony, the plaintiffs' deposition testimony, and a deed transferring the property upon which the restaurant is located from Philip Marcario to 1856 LLC.

Defendants contend that they are entitled to summary judgment dismissal of the complaint because the injured plaintiff (Breyana Palumbo) did not fall on defendants' property. Specifically, defendants contend that "the parking lot where [Breyana Palumbo] turned her ankle on a loose piece of asphalt (or gravel) was *neither owned nor controlled* by the defendants. . ." (emphasis added) (Affirmation in Support, ¶ 19).

This Court recognizes that "[t]he law imposes a duty to maintain property free and clear of dangerous or defective conditions only upon those who own, occupy, or control property, or who put the property to a special use or derive a special benefit from it" (*Guzov v. Manor Lodge Holding Corp.*, 13 AD3d 482, 483 [2d Dept 2004]; *see also Riccardi v. County of Suffolk*, 110 AD3d 864 [2d Dept 2013]). "The existence of one or more of these elements is sufficient to give rise to a duty of care" (*Balsam v. Delma Engineering Corporation*, 139 D2d 292, 296 [1st Dept 1988]). Ownership of the subject land "is not determinative in assessing the issue of duty, as issues of control and maintenance of the property must also be considered" (*Riccardi, supra* at 865).

Co-plaintiff Eugene Palumbo's testimony establishes that he parked their car in the parking lot located on the north side of Phil's Restaurant and that the plaintiffs accessed Phil's Restaurant at approximately 6:00 p.m., through its rear entrance accessible from that parking lot. There are other buildings aside from Phil's Restaurant located at the corner of Route 25 A and Wading River Road, configured in a strip mall type of arrangement, and there are various other parking lots that are all connected to one another. When the plaintiffs exited Phil's Restaurant approximately two hours later, they used Phil's Restaurant's rear entrance that leads to the subject parking lot on the north side thereof.

It is established by the injured plaintiff's testimony that a chunk of asphalt the size of an eight-fluid ounce Poland Spring water bottle caused her right ankle to roll outward when she stepped on it, in turn causing her to fall and become injured. The injured plaintiffs' testimony also establishes that this chunk of asphalt was on the surface of the parking lot onto which she stepped. After the plaintiffs dined at Phil's Restaurant, Breyana Palumbo, who was approximately nine months pregnant on the date of her accident, was waiting for her husband to retrieve their car from the north parking lot. She was waiting on the curb and decided to step down into the parking lot to sit on the curb and wait for her husband. As soon as she stepped down from the curb, her right foot contacted the asphalt chunk. Plaintiff was able to stop herself from falling completely to the ground by bracing herself against a car parked to her right side.

Defendant Philip Marcario's affidavit and deposition testimony establish that neither Phil's Restaurant nor 1856 LLC own the parking lot where the asphalt chunk was located.² Marcario testified that, "the north side of my building [housing the restaurant] is just about right on the property line, right on my property line." In his May 31, 2018 affidavit, Marcario states that "[t]he curb and parking lot to the north is at least twenty feet north of the property described in the [submitted] deed. The adjoining property, as far as I know, and as I testified to in my deposition of December 4, 2017, was and is owned by Jodina Development and not by me or any of my entities."

Marcario was not present at the restaurant on the evening when the injured plaintiff fell, but his son, an employee of the restaurant, was at the restaurant that night. Marcario's son did not witness the accident; however, Marcario understood from his son that Eugene Palumbo re-entered the restaurant after the accident to tell Marcario's son that Breyana fell.

When asked at deposition "[w]ho was responsible for the maintenance of that north side of the building where the parking lot is," Marcario responded, "I don't know." Later in the deposition, Marcario was asked if "[t]he area where the accident occurred, that property, does Wading River have any control over it?" Marcario answered that he did not understand what was meant by "Wading River." The next question asked was whether the area is privately owned or is it considered a public access. Marcario answered that he believed that it is privately owned. Marcario's answers do not conclusively establish that the moving defendants do not exercise any control over the parking lot area where Breyana Palumbo was injured, and no further exploration of the issues of maintenance or control were broached during the deposition.

Eugene Palumbo's deposition testimony, combined with his sworn errata sheet, raise issues of credibility and of fact that cannot be resolved on a motion for summary judgment. At his deposition, Eugene Palumbo testified that he told Marcario's son after the accident that, "we were leaving; we walked out the side entrance and walked down to the parking lot and my wife fell and really hurt her ankle bad. Took her to the hospital. She's hurt very bad. I am on my way home to drop her off and then I am on my way back to make a police report. That's it" (Tr. p. 43, lines 7-14). When asked what Marcario's son said in response, Eugene Palumbo testified that "[h]e said I guess okay. I don't really remember." Eugene Palumbo signed and swore to his deposition transcript and the errata sheet annexed thereto on April 19, 2018.

Eugene Palumbo's errata sheet makes a correction to his testimony on page 43, line 14 by adding the following: "I asked him [Marcario's son] if they owned the parking lot he said no, but they maintained it in exchange of using the parking lot" (sic).³ Marcario's affidavit sworn to on May 31, 2018 fails to address the issue raised by Eugene Palumbo's April 19, 2018 errata sheet correction.

² Marcario states that he is the owner of 1856 LLC and the sole shareholder of P.M. Restaurant Enterprises, Inc., the entity that operates Phil's Restaurant.

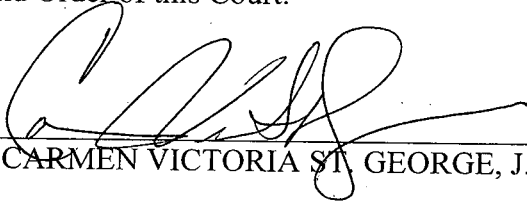
³ Defendants have never moved this Court pursuant to CPLR 3116 (a) to strike the errata sheet but have in fact submitted it without objection. Approximately two months after the errata sheet was sworn to by Eugene Palumbo, defendants filed the instant motion.

Accordingly, defendants have not only failed to demonstrate the absence any material issue of fact, but they have raised the issue of credibility that may not be resolved upon a summary judgment motion (see *Natale v. Woodcock*, 35 AD3d 1128 [3d Dept 2006]; *Singh v. Rosenberg*, 32 AD3d 840 [2d Dept 2006]; *Williams v. O & Y Concord 60 Broad Street Company*, 304 AD2d 570 [2d Dept 2003]; *Binh v. Bagland, USA, Inc.*, 286 AD2d 613 [1st Dept 2001]).

Having failed to establish their prima facie entitlement to summary judgment as a matter of law, defendants' summary judgment motion is denied, and it is unnecessary to determine whether the plaintiffs' papers submitted in opposition are sufficient to raise a triable issue of fact (see *Levin v Khan*, 73 AD3d 991 [2d Dept 2010]; *Kjono v Fenning*, 69 AD3d 581[2d Dept 2010]).

The foregoing constitutes the Decision and Order of this Court.

Dated: May 17, 2019
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]