

Vanygurt v Amalgamated Warbasses Houses, Inc.
2020 NY Slip Op 31508(U)
May 18, 2020
Supreme Court, Kings County
Docket Number: 517270/17
Judge: Kathy J. King
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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of May, 2020.

PRESENT:
HON. KATHY J. KING,

Justice.

-----X
POLYA VANYGURT,

Plaintiff,

- against -

AMALGAMATED WARBASSES HOUSES, INC.,

Defendant,

-----X
AMALGAMATED WARBASSES HOUSES, INC.,

Third-Party Plaintiffs,

- against -

GREGORY VANYGURT,

Third-Party Defendant.

-----X

The following papers number 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-2, 3-4

5, 6

7, 8

Based on the foregoing papers, defendant, Amalgamated Warbasses Houses, Inc. (“AWH”), moves for summary judgment dismissing plaintiff’s complaint against defendant, pursuant to CPLR §3212 (Mot. Seq. #1). Third-party defendant, Gregory Vanygurt (“Vanygurt”) moves for an order,

pursuant to CPLR 3211 and 3212, dismissing the complaint of third-party plaintiff, AWH, and granting summary judgment for third-party defendant (Mot. Seq. #2). Plaintiff, Polya Vanygurt, opposes defendant's motion and third party plaintiff, AWH, opposes Vanygurt's motion.

Plaintiff seeks to recover monetary damages for personal injuries allegedly sustained on May 9, 2017. Plaintiff claims that she slipped and fell in a pothole that was located in a parking lot, adjacent to an apartment complex at 2765 West 5th Street, Brooklyn, New York. Defendant AWH is the owner of the parking lot. At the time of the accident, plaintiff was visiting her grandson, Vanygurt, who was helping her walk across the parking lot of the apartment complex when she fell. Plaintiff then commenced this action against defendant to recover damages for personal injuries based upon premises liability. Upon commencement of the instant action, defendant AWH interposed an answer with a cross-claim. Subsequently, defendant AWH commenced a third-party action against Vanygurt, who, interposed an answer with cross-claims. The instant motions for summary judgment followed.

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562; *Graffeo*, 46 AD3d at 615).

A landowner owes a duty to maintain his property in a reasonably safe condition (*see* *Witkowski v Island Trees Public Library*, 125 AD3d 768, 769 [2d Dept 2015]). "In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the

condition or had actual or constructive notice of its existence” (*Lezama v 34-15 Parsons Boulevard, LLC*, 16 AD3d 560, 560 [2d Dept 2005] [internal citations omitted]). Generally, the question of whether a defective condition existed is a question for the jury and depends on the facts of the case (*see Witkowski* 125 AD3d at 769). However, summary judgment may be granted in a defendant’s favor where plaintiff has failed to submit evidence of a defective condition (*see id.*).

First, defendant argues that it is entitled to summary judgment because plaintiff could not identify what caused her accident. The Court disagrees. A review of plaintiff’s EBT, in opposition, indicates that she fell in the parking lot, and upon falling, noticed that her foot was in a hole. Thus, plaintiff’s opposition raises a triable issue of fact regarding whether she tripped and fell in a pothole located on defendant’s property.

Further, defendant argues that even if plaintiff slipped and fell in a pothole, defendant did not cause or create the pothole and did not have notice of the defective condition. Defendant relies on the respective depositions of its employees Phyllis Dugan, Assistant Property Manager, Thomas Auletti, General Property Manager, Joe Loscalzo, Director of Maintenance and Thomas Cesca, Project Manager, to establish that it never received any complaints regarding a pothole and that none of their employees knew of or saw the alleged defective condition. In opposition, plaintiff submits photographs of the pothole which raises a triable issue of fact as to whether defendant had constructive notice of the alleged defective condition (*see Salvia v Happaugue 111 Associates*, 47 AD3d 791, 791 [2d Dept 2008]). Further, during his deposition testimony, Vanygurt claimed to have reported the alleged pothole to defendant around 1-2 months prior to the accident. Here, defendant has failed to meet its prima facie burden of demonstrating its entitlement to summary judgment since it failed to make a showing that the parking lot in question was maintained in a reasonably safe condition.

As to Vanygurt's motion for summary judgment against AWH, the Court finds that contrary to AWH's arguments in opposition, Vanygurt has made a prima facie showing for entitlement to summary judgment since the record shows that he was merely helping plaintiff, his grandmother, walk across the parking lot. The record shows that Vayngurt owed no duty to plaintiff to keep the parking lot in a reasonably safe condition and was not negligent since his conduct did not contribute to the accident. As a result, no triable issue of fact exists as to whether Vanygurt owed a duty to his grandmother or defendant. Thus, Vanygurt's motion for an order pursuant to CPLR 3211 and 3212 dismissing the complaint of third-party plaintiff granting summary judgment is granted.

Based on the foregoing, it is hereby,

ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint is denied in its entirety (Mot. Seq. #1); and it is further,

ORDERED that third-party defendant's motion for summary judgment dismissing the third-party plaintiff's complaint is granted (Mot. Seq. #2), and third-party defendant Gregory Vanygurt shall be severed from the action.

This constitutes the decision/order of the court.

ENTER,



HON. KATHY J. KING
J.S.C