

**Masongsong v Eklecco Newco LLC**

2020 NY Slip Op 34644(U)

August 13, 2020

Supreme Court, Rockland County

Docket Number: Index No. 033787/2018

Judge: Sherri L. Eisenpress

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
EDWIN B. MASONGSONG, Deceased, by and through  
ALVIN MASONGSONG and JOHNATHAN MASONGSONG,  
as co-Administrators, of the Estate of EDWIN B.  
MASONGSONG,

*Plaintiff,*

**DECISION AND ORDER  
(Motions # 1 and #2)**

*-against-*

Index No.: 033787/2018

EKLECCO NEWCO LLC and PYRAMID MANAGEMENT  
GROUP, LLC,

*Defendants.*

-----X  
*Sherri L. Eisenpress, A.J.S.C.*

The following papers, numbered 1 to 6, were considered in connection with (i) Plaintiffs' Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting partial summary judgment in their favor, and (ii) Defendant Eklecco Newco LLC and Pyramid Management Group, LLC's ("Defendants") Notice of Cross-Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment and dismissal of the Complaint:

<b><u>PAPERS</u></b>	<b><u>NUMBERED</u></b>
NOTICE OF MOTION (#1)/AFFIRMATION IN SUPPORT/EXHIBITS A-M	1-2
NOTICE OF CROSS-MOTION (#2)/AFFIRMATION IN SUPPORT AND IN OPPOSITION TO MOTION/EXHIBITS A-G	3-4
AFFIRMATION IN REPLY(#1)	5
AFFIRMATION IN OPPOSITION TO CROSS-MOTION/EXHIBITS A-C	6

Upon the foregoing papers, the Court now rules as follows:

This action, commenced by Plaintiff with the filing of the Summons and Complaint on July 3, 2018, sounds in personal injury and wrongful death as a result of a trip and fall on January 23, 2018, in the underground parking garage of the Palisades Center Mall, in West Nyack, New York. More specifically, it is claimed that decedent Edwin Masongsong,

was caused to trip and fall due to an improperly and excessively sloped ramp which contained a divot located on the floor of said parking lot. At the time of incident, decedent was with his son, John Masongsong, returning to their parked car after walking around the mall. As John Masongsong opened the passenger side door and placed a package inside the car, he heard his father screaming from behind him. When he turned around, he observed decedent in mid-fall. John Masongsong did not see what caused his father to trip but noted that the alleged defective condition was located in close proximity to where he fell. Edwin Masongsong died during surgery occasioned as a result of his fall.

Plaintiffs filed the instant Notice of Motion seeking an Order granting partial summary judgment as to liability. In support of their motion, they submit the expert report of Frederick G. Bremer, who reviewed depositions, photographs and applicable codes and industry standards. Mr. Bremer opines that decedent's accident was caused by the failure to maintain safe premises as required by the Property Maintenance Code of New York State; failure to maintain a safe path of travel, and means of egress as required by the Fire Code of New York State; failure to provide a safe walking surface; failure to inspect and maintain a safe walking surface; and the failure to eliminate guard or warn of a hazardous misstep condition.

Defendants oppose Plaintiffs' motion for summary judgment and cross-move for summary judgment in their favor and dismissal of the Complaint. They argue that they are entitled to summary judgment, or in the alternative that Plaintiff's motion requires denial, because Plaintiffs cannot state what caused decedent to fall. More specifically, they note that decedent was in poor health at the time of the accident, including diabetic neuropathy and heart problems. More significantly, they argue that John Masongsong did not see what caused his father to actually trip, but rather first turned around during mid-fall. Nor did decedent tell his son what caused him to fall. John Masongsong testified "I guess he was trying to get into the car and misstepped himself—by that area." Defendants argue that the contention that the condition of the parking lot caused decedent to fall is speculative at best. Lastly,

Defendants move to dismiss the punitive damages claim as the conduct alleged does not rise to the level of malicious, wanton or reckless.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

"A landowner has a duty to maintain his or her property in a reasonably safe condition under the existing circumstances, and may be liable in tort if the plaintiff can establish that the landowner either affirmatively created or had actual or constructive notice of a hazardous condition." Austin v. Town of Southampton, 113 A.D.3d 711, 712, 979 N.Y.S.2d 127 (2d Dept. 2014); Walsh v. Super Value, Inc., 76 A.D.3d 371, 375, 904 N.Y.S.2d 121 (2d Dept. 2010). "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." Perez v. 655 Montauk, LLC, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011).

With respect to liability, there are triable issues of fact as to the cause of the accident, thus requiring denial of both motions for summary judgment. A plaintiff with no

recollection of an accident or who cannot testify exactly as to how an accident occurred, can establish negligence wholly through circumstantial evidence. Timmins v. Benjamin, 77 A.D.3d 1254, 1256, 910 N.Y.S.2d 584 (3d Dept. 2010); Patrikis v. Arniotis, 129 A.D.3d 928, 12 N.Y.S.3d 174 (2d Dept. 2015). A case of negligence based wholly on circumstantial evidence may be established if the plaintiffs "show facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." Seelinger v. Town of Middletown, 79 A.D.3d 1227, 1229, 913 N.Y.S.2d 376 (3d Dept. 2010).

Moreover, plaintiff is not required to rule out all plausible variables and factors that could have caused or contributed to the accident, but need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other causes. Timmins, 77 A.D.3d at 1256. The law does not require that plaintiff's proof positively exclude every other possible cause of the accident but defendant's negligence." Hernandez v. Alstom Transp. Inc., 130 A.D.3d 681, 13 N.Y.S.3d 232 (2d Dept. 2015). Rather, the proof must render other causes sufficiently remote such that the jury can base its verdict on logical inferences drawn from the evidence, not merely on speculation. Timmins, 77 A.D.3d at 1256. Here, there is circumstantial evidence upon which a jury could reasonably conclude that decedent was caused to fall due to the presence of a defective condition located on the floor of the parking lot. Conversely, as decedent's son did not observe the cause of his father's trip, a jury could conclude that it is more likely than not that the defective condition was not the cause of the fall. As such, summary judgment must be denied to both parties.

Defendants are, however, entitled to dismissal of the punitive damage claim. Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from

indulging in similar conduct in the future. Walker v. Sheldon, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488 (1961). Here, the allegations of negligence in the maintenance of the parking lot simply do not rise to a level where such damages would be recoverable. As such, the punitive damage claim is dismissed.

Accordingly, it is hereby

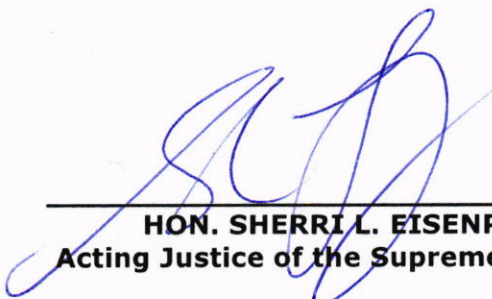
**ORDERED** that the Notice of Motion (#1) filed by Plaintiffs is DENIED in its entirety; and it is further

**ORDERED** that the Notice of Motion (#2) filed by Defendants is DENIED in part and GRANTED in part but only to the extent that only the punitive damage claim is dismissed.

**ORDERED** that all parties are to appear for a pre-trial conference on OCTOBER 7, 2020, at 10:00 a.m. via Skype for Business. Link to be provided by the Court prior to the conference.

The foregoing constitutes the Decision and Order of this Court on Motions #1 and #2.

Dated: New City, New York  
August 13, 2020



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**HON. SHERRIL L. EISENPRESS**  
**Acting Justice of the Supreme Court**

TO: All parties via NYSCEF