

<b>McCloat v SCC Constr. Mgt. Group</b>
2020 NY Slip Op 34862(U)
July 6, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 618370/2017
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 618370/2017

CAL No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI  
Justice of the Supreme CourtMOTION DATE 8-23-19  
SUBMIT DATE 6-18-2020  
Mot. Seq. # 04 - MD  
Mot. Seq. # 05 - MD-----X  
KATHLEEN MCCLOAT,  
  
Plaintiff,

-against-

SCC CONSTRUCTION MANAGEMENT  
GROUP d/b/a SCHOOL CONSTRUCTION  
CONSULTANTS, PALACE ELECTRICAL  
CONTRACTORS, INC., RENU  
CONTRACTING & RESTORATION, INC.,  
and HIRSCH & CO., LLC,

Defendants.

**SALENGER, SACK, KIMMEL & BAVARO,  
LLP***Attys for Plaintiff*  
180 FROEHLICH FARM BLVD  
WOODBURY, NY 11797**L'ABBATE, BALKAN, COLAVITA &  
CONTINI, LLP***Attys. for Defendant SCC Construction*  
1001 FRANKLIN AVE  
GARDEN CITY, NY 11530**JOHN C. LEDDY, ESQ.***Attys. for Defendant Hirsch & Co.*  
150 EAST 42<sup>ND</sup> ST  
NEW YORK, NY 10017**LW OFFICES OF KEVIN P. WESTERMAN***Attys. for Defendant Palace Electrical*  
990 STEWART AVE, STE 400  
GARDEN CITY, NY 11530**KENNEDY CMK, LLP***Attys. for Defendant RENU Contracting*  
570 LEXINGTON AVE, 8<sup>TH</sup> FLOOR  
NEW YORK, NY 10022-----X  
Upon the following papers numbered 1 to 82 read on this motion for summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers 1 - 13 (#04) & 41 - 51 (#05); Notice of Cross Motion and supporting papers  
---; Answering Affidavits and supporting papers 14 - 16 & 17 - 32 (#04), 52 - 67 & 68 - 71 (#05); Replying Affidavits  
and supporting papers 33 - 40 (#04) & 72 - 82 (#05); Other --- (and after hearing counsel in support and opposed to the  
motion) it is,Defendant, Hirsch & Co, LLC, hereinafter referred to as "Hirsch", moves for an order granting  
summary judgment dismissing all claims and cross claims against it. Defendant, Renu Contracting

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& Restoration, Inc., hereinafter referred to as "Renu", separately moves for an order granting summary judgment dismissing all claims and cross claims against it. The plaintiff opposes both motions arguing that the motions are premature because discovery has not been completed and that questions of fact remain as to the exact location where work was being done by these defendants. Defendant SCC Construction Management Group d/b/a School Construction Consultants, hereinafter referred to as "SCC", filed opposition to both motions arguing that the motions are premature because they were made prior to meaningful discovery being exchanged.

The plaintiff seeks the recovery of damages for personal injuries allegedly sustained as a result of an accident on April 11, 2016 when a "dangerous wooden object" fell on her head while she was at work at Wellington C. Mepham High School located at 2401 Camp Avenue, Bellmore, New York. "At approximately 11:50 am while Plaintiff was having lunch with her colleagues, a wooden object sharply fell on the Plaintiff's head due to construction work being performed by defendants." The plaintiff claims that while she was sitting in the guidance office the object fell due to ongoing construction within the bathrooms adjacent to the guidance office. SCC claims that meaningful discovery has not been exchanged that is in the possession of the moving defendants and is necessary to the defense of this action.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1<sup>st</sup> Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2<sup>nd</sup> Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice Sec.* 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

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On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer, supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In *Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 715 [2d Dept 2005], the Court held that

Summary judgment should be denied as premature where, as here, the party opposing the motion has not had an adequate opportunity to conduct discovery (see CPLR 3212 [f]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 506, 618 NE2d 82, 601 NYS2d 49 [1993]; *OK Petroleum Distrib. Corp. v Nassau/Suffolk Fuel Oil Corp.*, 17 AD3d 551, 793 NYS2d 152 [2005]; *Mazzola v Kelly*, 291 AD2d 535, 738 NYS2d 246 [2002]).

The Court in *Gardner v Cason, Inc.*, 82 AD3d 930, 931-932 [2d Dept 2011], held

It was premature to award summary judgment at this stage of the case. "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 793, 533 NYS2d 143 [1988]). The plaintiff and the defendant Grumbly submitted, among other things, affidavits containing discrepancies pertaining to the circumstances of the accident, including as to the decedent's culpability. Furthermore, no depositions have been conducted, including any depositions of key eyewitnesses identified in the police accident report. Accordingly, the Supreme Court should have denied the plaintiff's motion for summary judgment on the issue of liability with leave to renew after the completion of discovery (see *Gruenfeld v City of New Rochelle*, 72 AD3d 1025, 900 NYS2d 144 [2010]; *Aurora Loan Servs., LLC v LaMattina & Assoc., Inc.*, 59 AD3d 578, 872 NYS2d 724 [2009]; *Martinez v Ashley Apts. Co., LLC*, 44 AD3d 830, 842 NYS2d 918 [2007]; *Tyme v City of New York*, 22 AD3d 571, 801 NYS2d 744 [2005]; see generally CPLR 3212 [f]).

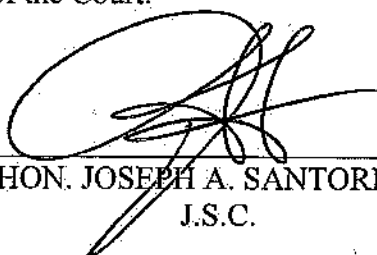
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Based upon a review of the motion papers the Court concludes that the plaintiff and SCC have not had an adequate opportunity to conduct discovery into issues within the knowledge of defendants Hirsch and Renu as to the whether they were performing work in the area where the plaintiff was sitting when the wooden object fell. Thus the motions for summary judgment are denied with leave to renew after the completion of discovery; and it is further

**ORDERED** that a compliance conference is scheduled for August 13, 2020. All attorneys shall appear on **August 13, 2020 at 12:00 p.m.** for a telephone conference as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in the matter being dismissed or a default being granted. Please call in at the above referenced date and time to (347) 378-4143, access code 969774992#.

The foregoing constitutes the decision and Order of the Court.

Dated: July 6, 2020



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HON. JOSEPH A. SANTORELLI  
J.S.C.