

Kellar v Nyack Union Free Sch. Dist.
2020 NY Slip Op 34939(U)
May 1, 2020
Supreme Court, Rockland County
Docket Number: Index No. 035913/2017
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MARSHA LYNN KELLAR, AS THE
ADMINISTRATRIX OF THE ESTATE OF JEROME
D. MUHLENBERG AND MARSHA LYNN KELLAR,
INDIVIDUALLY,

Plaintiffs,

-against-

NYACK UNION FREE SCHOOL DISTRICT, NYACK
PUBLIC SCHOOLS, UPPER NYACK ELEMENTARY
SCHOOL AND ROCKLAND TREE EXPERT CO., INC,

Defendants.

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NYACK UNION FREE SCHOOL DISTRICT,

Third-Party Plaintiff,

-against-

ORANGE AND ROCKLAND UTILITIES, INC
AND VILLAGE OF UPPER NYACK,

Third-Party Defendants.

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

The following papers, were considered in connection with third-party defendant Village of Upper Nyack’s Notice of Motion for an Order, pursuant to CPLR §3212, granting summary judgment in favor of third-party defendant Village of Upper Nyack and dismissing the third-party complaint against it, and cross-claims as against third-party defendant on the grounds that the Village of Upper Nyack does not own, maintain, repair, inspect or control the accident location; the Village of Upper Nyack did not cause or create the dangerous condition; nor did the Village of Upper Nyack have the requisite notice of the alleged dangerous condition:

Notice of Motion, Affirmation in Support by Lily A. Ockert, Esq., Exhibits A-D

Affirmation of Paula Pavlides, Esq., in Opposition, Exhibits A-C

Affirmation of Lily A. Ockert, Esq., in Reply, Exhibits A-C

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

HISTORY

Plaintiff commenced this personal injury action on December 5, 2017 (Exhibit A, NYSCEF Doc. 39). Through counsel, defendants Nyack Union Free School District, Nyack Public Schools and Upper Nyack Elementary School (NUFSD) answered on January 16, 2018. (NYSCEF Doc. 2). Through counsel, defendant Rockland Tree Expert Co, Inc, answered on February 6, 2018. (NYSCEF Doc. 3). An amended complaint was filed on May 3, 2018 (NYSCEF Doc. 7). Through counsel, defendants NUFSD answered the amended complaint (NYSCEF Doc. 8). Through counsel, defendant Rockland Tree Expert Co answered the amended complaint (NYSCEF Doc. 10).

Plaintiff alleges that on May 18, 2017, on the public thoroughfare of North Broadway, at or about 336 N. Broadway, Upper Nyack, New York, while the decedent Jerome D. Muhlenberg was driving, a tree and/or parts thereof fell from its location on defendants' premises, adjacent to and/or abutting the public sidewalk onto the public thoroughfare, striking the decedent's motor vehicle causing serious injuries, resulting in his death on May 18, 2017, as a result of defendants' or their agents and/or employees ownership, maintenance, and/or control of their premises and the ownership, maintenance or control of the subject tree.

Third-Party Plaintiff, NUFSD commenced the third-party action on February 7, 2019 (NYSCEF Doc. 16). Through counsel, third-party defendant, Village of Upper Nyack answered (NYSCEF Doc. 22). Through counsel, third-party defendant, Orange and Rockland Utilities, Inc., answered (NYSCEF Doc. 26).

INSTANT MOTION

Third-Party Defendant Village of Upper Nyack (Village) moves for summary judgment and dismissal of the third-party complaint and cross-claims arguing that the Village does not own, maintain, repair, inspect or control the accident location, the Village did not cause the alleged defective condition and the Village did not have notice of the alleged dangerous condition.

In opposition, NUFSD argues that the Village's motion is premature due to ongoing discovery. NUFSD contends that while minimal discovery has taken place – the deposition of a

Village witness after the Village's instant motion, NUFSD has made post deposition demands and discovery is not complete. According to NUFSD, they have demonstrated that discovery might lead to relevant evidence which is sufficient to warrant denial of the Village's motion for summary judgment. A note of issue has not been filed to date.

In reply, the Village argues that NUFSD's contentions of outstanding discovery to support opposition are mere speculation and insufficient to defeat the Village's motion for summary judgment. According to the Village, the served post-deposition demands have been responded to. The Village argues that there is no evidence that the Village owned, maintained, caused, created or had notice of the alleged defective condition that caused plaintiff's injuries.

DISCUSSION

The proponent of a summary judgment motion must sufficiently establish his or her claim or defense 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 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986). Admissible evidence sufficient to support that prima facie showing may include "affidavits by persons having knowledge of the facts [and] reciting the material facts" GTF Mktg. v. Colonial Aluminum Sales, 66 N.Y.2d 695, 697 (1985). 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 (2d Dept 2003). In determining such motion, this Court must "view the evidence in the light most favorable to the nonmoving party" Stukas v. Streiter, 83 A.D.3d 18, 22 (2d Dept 2011). 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 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Here the Village moves on the issue of liability prior to discovery being conducted and completed. NUFSD submitted a reasonable argument that discovery might lead to relevant

evidence pertaining to the Village's actions and/or role in the creation or maintenance of the cause of the subject accident. While as NUFSD concedes, the Village may be entitled to the requested relief at a later time, a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment. See CPLR §3212(f); Hawana v. Carbuccia, 164 A.D.3d 563 (2nd Dept 2018). Therefore, the Village's motion for summary judgment is denied with leave to renew at the conclusion of discovery.

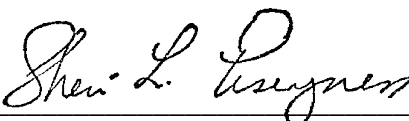
Accordingly, it is hereby

ORDERED the Notice of Motion filed by third-party defendant Village of Upper Nyack is denied, with leave to renew upon the completion of discovery; and it is further

ORDERED that the parties shall appear for a compliance conference on **WEDNESDAY, JUNE 3, 2020, at 9:45 a.m.**¹

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
May 1, 2020



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO: All counsel via NYSCEF

¹ In the event the compliance conference will need to be virtual, the parties will be notified of same.