

<b>Shumway v Miller Realty Assoc.</b>
2020 NY Slip Op 34946(U)
October 8, 2020
Supreme Court, Nassau County
Docket Number: Index No. 605948/2018
Judge: Helen Voutsinas
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - IAS/TRIAL PART 25  
Present: Hon. Helen Voutsinas, J.S.C.**

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**MATTHEW S. SHUMWAY,**

*Plaintiff,*

-against-

**MILLER REALTY ASSOCIATES and MRA REALTY  
LLC,**

*Defendants.*

Index No.: 605948/2018  
Motion Seq. Nos.: 003

**Short Form Order**

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The following papers have been read on these motions:

Notice of Motion, Affirmation in Support, Exhibits.....	1
Affirmation in Opposition, Exhibits.....	2
Reply Affirmation.....	3

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Upon the foregoing papers, the motion of defendant Miller Realty Associates (“Miller Realty”) for an Order pursuant to CPLR 3212, granting summary judgment dismissing the complaint as to said defendant, is decided as hereinafter provided.

This is an action to recover for personal injuries alleged to have been suffered by plaintiff as a result of slip and fall accident on snow/ice in a parking lot adjacent and to the rear of a building located at 3305 Jerusalem Avenue, Wantagh, New York. The accident is alleged to have occurred on December 30, 2017. Plaintiff was employed by a company located inside the 3305 Jerusalem Avenue building, and was walking in the rear parking lot heading towards the building when he fell.

Defendant Miller Realty contends that it is entitled to summary judgment because it does not own the parking lot in which plaintiff fell. Miller Realty asserts that the subject parking lot is owned by the Town of Hempstead (“the Town”).

In support of its motion Miller Realty submits, *inter alia*, the deposition testimony of plaintiff, taken on September 13, 2019, the deposition testimony of Miller Realty, by Andrew John Murphy, taken on January 17, 2020, copies of three (3) deeds purportedly pertaining to the property owned by Miller Associates, and a copy of Google Maps image printout.

It is well established that a proponent of a summary judgment motion must make a prima facie case of entitlement to judgment as a matter of law when there are no material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Summary judgment is a drastic remedy that is

awarded only when it is clear that no triable issue of fact exists. (Id. at 325; *Andre v. Pomeroy*, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446 [1st Dept 1992]). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Gervasio v. Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v. United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]). On such a motion the court must draw all reasonable inferences in favor of the nonmoving party (*Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]). In deciding a summary judgment motion, the evidence must be construed in a light most favorable to the party opposing the motion (*Benincasa v. Garrubbo*, 141 AD2d 618 [2d Dept 1988])).

The movant, in this matter the defendant, has the initial burden of proving entitlement to summary judgment, and failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*See Winegrad v. N.Y.U. Medical Center*, 64 NY2d 851 [1985]).

The deeds presented by Miller Associates appear to be successive deeds for premises 3305 Jerusalem Avenue, and defendant especially relies on the first in the chain, a deed dated December 1, 1966, and made by Martin Kane and Ruth Schwatz, as grantors, to Jerome Miller, Ira Miller, Leon Miller and Harold Sherman, as grantees. (Defendant's Exhibit "L"). Plaintiff asserts that this deed "demonstrates the existence of a 200 car parking easement on the property, indicating that [Miller Realty] is not the owner of the parking lot." Defendant reaches this conclusion from language in this deed that refers to an easement created by a declaration made on the same date and recorded simultaneously with the deed. A copy of the declaration of easement is not provided. Defendant argues that, since "[the] deed demonstrates that an easement was obtained for use of the 200 car parking area, by definition, Defendants cannot be the owners of the parking area".

The Court has reviewed the December 1, 1966 deed (Defendant's Exhibit "L") and finds that this deed does not relate to 3305 Jerusalem Avenue. Rather, the deed is for property located in the Town of Babylon, in Suffolk County, as is readily discernible from the metes and bounds description set forth in the deed.

There is a second deed attached as part of defendant's Exhibit "L", following the December 1, 1966 deed. This second deed is dated July 31, 1959, and is made by Jerry Holding Corp., as grantor, to JIHL Associates, as grantee. The deed attached as defendant's Exhibit "M" is dated January 1, 1985 and is made by JIHL Associates, as grantor, to defendant Miller Realty Associates, as grantee. The deed attached as defendant's Exhibit "N" is dated December 14, 2016 and is made by defendant Miller Associates Realty, as grantor, and Wantagh Realty LLC, as grantee.

The 1959, 1985 and 2016 deeds all relate to property located in the Town of Hempstead, in Nassau County, and the metes and bounds descriptions contained in each deed appear to describe the same property. Presumably these deeds are for the property known as 3305 Jerusalem Avenue, on which Miller Realty's building is located. However, there is no reference to any address in the deeds. Also, there is no reference to any car parking area easement in any of these deeds.

Crucially missing from defendant's submission is any survey or tax map depicting defendant's property, or its boundary lines. The deeds' metes and bounds description alone, without a corresponding survey or tax map with which to identify the boundary lines, is insufficient for the Court to be able to ascertain whether the accident site falls within or without the boundary lines of defendant's property.

Miller Associates also submits a Google Maps image (Defendant's Exhibit "K") which its counsel states "upon information and belief, depicts the municipal parking sign displayed at the entrance of the subject parking lot." Counsel opines that the sign states that the parking lot is a Town of Hempstead parking lot. The sign in the image is at such an angle so as to be barely legible. In reviewing the image, the Court is unable to discern the whereabouts of the location without proper testimony.

The Court, having carefully reviewed and considered the evidence submitted by Miller Associates, does not provide sufficient evidence to support entitlement to summary judgment.

Defendant also argues that plaintiff has acknowledged that the Town of Hempstead is the owner of the parking lot and that plaintiff is collaterally estopped from litigating the issue.

Shortly after commencing this action, plaintiff filed a petition in this Court, under Index No. 606634/2018, seeking leave to file a late notice of claim against the Town of Hempstead. In his affidavit in support of the petition, sworn to May 9, 2018, plaintiff alleged that he had originally believed that the parking lot behind the building located at 3305 Jerusalem Avenue was owned by the building's owners (Miller Associates), but after returning to work, he was informed by co-workers that the Town of Hempstead owned the lot. Accordingly, in his petition, he alleged that "[u]pon information and belief, the parking lot is owned by the Town of Hempstead commenced this action on April 30, 2018."

Plaintiff's petition for leave to file a late notice of claim was denied by the Court by Order dated October 18, 2018 (Hon. Robert A. Bruno). The Court held that plaintiff's lack of knowledge regarding the ownership of the parking lot did not constitute a reasonable excuse for the delay in filing a notice of claim, and that plaintiff had not met his initial burden to demonstrate that the delay would not prejudice the Town.<sup>1</sup>

The Court disagrees with defendant's argument that the doctrine of collateral estoppel applies here, in regard to the issue of ownership of the subject parking lot. As explained by the Court of Appeals in *Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]:

Collateral estoppel comes into play when four conditions are fulfilled: "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior

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<sup>1</sup> Plaintiff has taken an appeal from the Court's October 18, 2018 Order. Neither party has advised the Court of the status of that appeal.

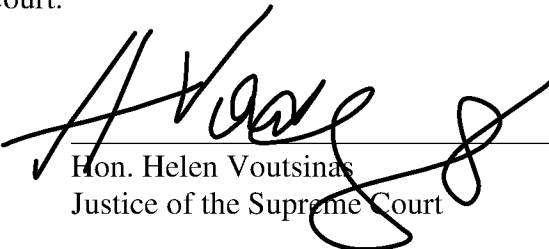
proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits” (*Alamo v McDaniel*, 44 AD3d 149, 153 [1st Dept 2007], citing *Ryan v New York Tel. Co.*, 62 NY2d 494 [1984], and *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481 [1979]).

Here, the issue actually and necessarily decided by the Court in regard to plaintiff’s related petition for leave to file a notice of claim was whether plaintiff had a reasonable excuse in failing to timely file a notice of claim against the Town, and if the Town was substantially prejudiced by the delay. The Court was not asked to and did not make any determination as to the ownership of the accident site.

Based upon all of the foregoing, defendant Miller Realty Associate’s motion for summary judgment is **DENIED**.

Any relief requested and not specifically granted is denied.

This constitutes the decision and order of the Court.



Hon. Helen Voutsinas  
Justice of the Supreme Court

Dated: October 8, 2020  
Mineola, NY

**ENTERED**

**Oct 19 2020**

NASSAU COUNTY  
COUNTY CLERK’S OFFICE