

Kennell v Silvercup Scaffolding I LLC

2021 NY Slip Op 30821(U)

March 15, 2021

Supreme Court, Kings County

Docket Number: 515218/2019

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 15 day of MARCH , 2021

P R E S E N T :

Hon. Richard Velasquez

Justice

LINDE KENNEL,

Plaintiff(s)

Index No. 515218/2019

-against-

SILVERCUP SCAFFOLDING I LLC, SILVERCUP SCAFFOLDING 1 LLC, 243 DEVELOPMENT LLC, MISSION DOLORES, 249-251 4TH AVENUE PROPERTY LLC, WERIZE, INC., BRODMORE MANAGEMENT, INC., and BRODMORE MANAGEMENT GROUP LLC.

Defendant(s)

The following *papers* NYSCEF Doc #'s 30 to 142 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed_____	30-43; 97-106
Opposing Affidavits (Affirmations)_____	128-137
Reply Affidavits (Affirmations)_____	142

After having heard oral argument on March 15, 2021, and upon review of the foregoing papers the court finds as follows:

Plaintiff moves pursuant to CPLR 3025(b) for an order (1) allowing plaintiff to file a supplemental summons and second amended complaint; (2) amend the caption. (MS#1).

Plaintiff also moves pursuant to CPLR 3212 for summary judgment on the basis of Res

Ipsa Loquitur. (MS#5) Defendants, SILVERCUP SCAFFOLDING I LLC, SILVERCUP SCAFFOLDING 1 LLC oppose the same.

Plaintiff's motion to file a supplemental summons and second amended complaint amend the caption is hereby granted, without opposition. The caption shall be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

LINDE KENNELL,

Plaintiff(s)

Index No. 515218/2019

-against-

SILVERCUP SCAFFOLDING I LLC, SILVERCUP SCAFFOLDING 1 LLC, 243 DEVELOPMENT LLC, MISSION DOLORES, 249-251 4TH AVENUE PROPERTY LLC, WERIZE, INC., BRODMORE MANAGEMENT, INC., and BRODMORE MANAGEMENT GROUP LLC., MASTER ROOFING & SIDING CONS., INC., MASTER ROOFING & SIDING, INC., VADEM BRODSKY, and C & L STUCCO CORP.

Defendant(s)

Next the court shall address plaintiffs motion for summary judgment. It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where

the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Id. A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh*, 45 Misc2d 93 [Sup Ct, Albany County], aff'd 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2d 557 [1990]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is **no doubt** as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment

must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010]).

The criteria for *res ipsa loquitur*, and relying on Prosser, the Court listed these criteria in *Corcoran v. Banner Super Mkt.*, 19 NY2d 425, 280 NYS2d 385, 227 NE2d 304 [1967]: “(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.” *Id.* Additionally, this Court notes the Court of Appeals has time and time again stated “only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable.” *Quoting Morejon v. Rais Const. Co.*, 7 NY3d 203, 209, 851 NE2d 1143, 1146–47 (Court of Appeals 2006). In the present case, at this pre-discovery stage there are numerous issues of fact including but not limited to who had exclusive control over the scaffolding from June 12, 2019 to June 30, 2019 (the date of the accident).; the plaintiff has failed to demonstrate that the defendants had exclusive control over the scaffolding from June 12, 2019 to June 30, 2019 (the date of the accident).; nor has the plaintiff established what happened at the worksite, or who was at the worksite from June 12, 2019 to June 30, 2019 (the date of the accident). As such, plaintiff motion for summary judgment on the basis is *Res Ipsa Loquitur* must be denied.

Accordingly, plaintiff motion to amend is hereby granted, for the reasons stated above. Plaintiff's motion for summary judgment is hereby denied, for the reasons stated above.

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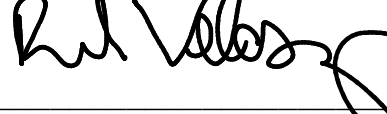
MG _____

MD _____

Motion Seq.#

1, 5

ENTER FORTHWITH:



RICHARD VELASQUEZ, J.S.C.