Fernandez v Mt. Ivy Enters., Inc.
2021 NY Slip Op 33498(U)
March 1, 2021
Supreme Court, Rockland County
Docket Number: Index No. 030645/2019
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
FERNANDO FERNANDEZ,

Plaintiffs,

DECISION AND ORDER
(Motion # 1)

-against-

Index No.: 030645/2019

MT. IVY ENTERPRISES, INC. and JOHN PIPERATO as project/property manager

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

The following papers, numbered 1 to 6, were considered in connection Defendants' Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, for summary judgment dismissing Plaintiff's Complaint:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-E/AFFIDAVIT OF JOHN PIPERATO/MEMORANDUM OF LAW	1-4
AFFIRMATION IN OPPOSITION	5
AFFIRMATION IN REPLY	6

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

Defendant Mt. Ivy Enterprises Inc. ("Mt. Ivy") is the owner of a mobile home park located on Old Route 22 in Haverstraw, New York, where the alleged accident took place. Defendant John Piperato, prior to his retirement, was the owner/manager of Mt. Ivy. Plaintiff, Fernando Fernandez, was a long-time resident of the mobile home park, who in the past had been employed by Mt. Ivy for a period of approximately two years doing small repairs including minor plumbing and roof repairs.

Plaintiff testified that on December 6, 2016, plumbing repairs were being done in the mobile home park, about 100 feet away from his mobile home, because there was no water in the mobile home park for several days. Mt. Ivy employed a repair/maintenance worker named "Jose" and another young man known to Plaintiff as "Cordero." Mr. Fernandez

testified that in the afternoon, Mr. Piperato knocked on his mobile home park door and asked him if he could explain to the maintenance workers where the plumbing was located so that repairs could be made because the workers could not find the pipes.

Mr. Fernandez testified that in response to Mr. Piperato's request, and as a favor, he walked over to where the work was being done. He observed a hole about two feet wide, eight feet long, and three feet deep, with dirt around it, and a machine of top of it. There were no cones in the area where the work was taking place. Plaintiff testified that at some point he had to straddle the hole for a few minutes in order to explain to Jose, who was in the hole, where the "tube" or pipes were. The earth then "gave way" where his left foot was, causing him to slide down into the hole and sustain injury. Plaintiff believes that the earth gave way because of the presence of water in the hole that was coming from a pipe leaking water.

Defendants move for summary judgment and dismissal of Plaintiff's Complaint. With respect to Defendant Piperato, they note that he did not personally own, occupy, control or make a special use of the premises and there is no reason to pierce the corporate veil. Defendants also assert that the action must be dismissed because there is no evidence of negligence or that they had notice of a dangerous condition. In opposition thereto, Plaintiff asserts that Defendants had a duty to use reasonable care to keep the premises in a safe condition, which they did not do. Mr. Fernandez further contends that he was asked to come to an area of work being done by defendants and received no warnings, equipment or instructions regarding the hole. With respect to notice, Plaintiff alleges that the hole was created by Defendants. Plaintiff also claims the applicability of the res ipsa loquitur doctrine.

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).

"It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care." Forbes v. Aaron, 81 A.D.3d 876, 877, 918 N.Y.S.2d 188 (2d Dept. 2011). "As a general rule, liability for a dangerous or defective condition on property is predicated upon ownership, occupancy, control, or special use of the property." Tilford v. Greenburgh Hous. Auth. 170 A.D.3d 1233, 1235, 97 N.Y.S.2d 278 (2d Dept. 2019). "The existence of one or more of these elements is sufficient to give rise to a duty of care." Micek v. Greek Orthodox Church of Our Savior, 139 A.D.3d 830, 831, 31 N.Y.S.3d 189 (2d Dept. 2016). Liability can also be imposed upon a party that creates a dangerous condition on the property. Id.

As an initial matter, the action must be dismissed as against "John Piperato as project/property manager" (as identified in the caption of the action) as there is no basis to pierce the corporate veil. "As a general rule, a court will pierce the corporate veil or disregard the corporate form whenever necessary to prevent fraud or to achieve equity." Hyland Meat Co., Inc. v. Tsagarakis, 202 A.D.2d 552, 609 N.Y.S.2d 625 (2d Dept. 1994). "Piercing the corporate veil requires a showing that: '(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury.'" Id. "The party seeking to pierce the corporate veil must further establish that the owners, through

their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." Id. Here, there has been no showing that Defendant Piperato, who is the owner/manager of Mt. Ivy, was acting outside his role as it relates to the corporate defendant or that a fraud was being committed. As such, there is no basis upon which to pierce the corporate veil and the action must be dismissed against him.

"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).

Accepting Plaintiff's version of the occurrence as the Court must on a summary judgment motion, there exist triable issues of fact as to Defendant Mt. Ivy's negligence in, among other things, asking Plaintiff to go to a recently excavated area and whether the area was properly guarded, safe and/or protected. Moreover, there are triable issues of fact as to whether Defendants' employees created a hazardous condition so as to raise triable issues of fact as to notice. Lastly, given the existence of triable issues of fact as to notice, the Court need not address the issue of the applicability of res ipsa loquitur doctrine at this time.

Accordingly, it is hereby

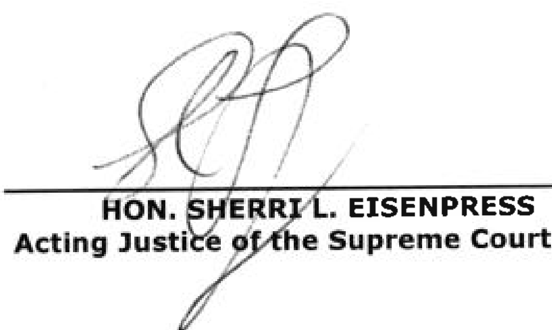
ORDERED the Notice of Motion (#1) filed by Defendants Mr. Ivy Enterprises, Inc. and John Piperato for summary judgment dismissing the Complaint is DENIED as to Defendant Mt. Ivy Enterprises Inc. and GRANTED as to Defendant John Piperato; and it is further

ORDERED that the action against Defendant John Piperato is dismissed; and it is further

ORDERED that the parties are to appear for a settlement conference on **April 2, 2021 at 10:30 a.m.** via Microsoft Teams. Counsel participating in the settlement conference must have knowledge of the matter, as well as authority, and must arrange to be able to speak to their clients with respect to settlement offers, if necessary.

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

Dated: New City, New York
March 1, 2021



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

TO: (All parties via NYSCEF)