

Sparacino v Biancardi
2021 NY Slip Op 33587(U)
September 21, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 620584/19
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

JOAN SPARACINO,

**Index No.
620584/19**

Plaintiff,

**Motion Seq:
004 MG
005 Mot D**

-against-

Decision/Order

**KIRSTY BIANCARDI as Executrix of the Estate of
MIKE BIANCARDI, SANDY WHITE and MR.
BARGAIN CESSPOOL SEWER & DRAIN,**

Defendants.

x

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	82-92; 105-114
Answering Papers.....	94-101; 102; 116-118
Reply.....	103; 119-120

Defendant Sandy White and Mr. Bargain Cesspool Sewer & Drain (the Mr. Bargain defendants) move this Court for an Order granting summary judgment dismissal of the complaint. Plaintiff opposes the requested relief, and co-defendant Kirsty Biancardi as Executrix of the Estate of Mike Biancardi opposes the motion “to the extent that it relies on conversations with Mike Biancardi who did not provide testimony” prior to his death.

The incident giving rise to this action occurred on July 24, 2019, at approximately 5:00 p.m., at 88 Week Road, North Babylon, New York. On that date, at that time and place, the plaintiff traversed the cover of an overflow cesspool basin that apparently collapsed under her, causing her to fall straight down into the cesspool. The cesspool was located in plaintiff’s backyard. As a result of her fall into the cesspool, the plaintiff suffered various injuries, including a fracture of her left leg.

Mr. Bargain Defendants' Motion (004)

It is well settled that, “[i]n order to establish a prima facie case of negligence, a plaintiff must demonstrate (1) the existence of a duty on the defendant’s part as to the plaintiff, (2) a breach of this duty, and (3) an injury to the plaintiff as a result thereof” (*Gaeta v City of New York*, 213 AD2d 509, 510 [2d Dept 1995], citing *Akins v Glens Falls City School District*, 53 NY2d 325, 333 [1981]; see also *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565 [2011]; *Kevin Kerveng Tung, P.C. v JP Morgan Chase & Co.*, 105 AD3d 709 [2d Dept 2013]).

“It is well established that before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to plaintiff (*Palsgraf v. Long Island Railroad Co.*, 248 NY 339, 342). In the absence of duty, there can be no breach of duty and without a breach there is no liability” (*Purdy v Public Administrator of the County of Westchester*, 127 AD2d 285, 288 [2d Dept 1987]). Moreover, the determination of whether a defendant owed a duty to the plaintiff is a question of law to be determined by the court (*Id.*).

Here, the Mr. Bargain defendants submit, *inter alia*, the deposition transcripts of plaintiff and of Ray White, and a service ticket for the subject cesspool dated July 28, 2016. Ray White is responsible for the entirety of the service aspects of the cesspool company although Mr. Bargain is owned by his wife, defendant Sandy White.

The submitted evidence establishes without question that Mr. Bargain was called to the residence on three occasions prior to the collapse of the cesspool. According to the plaintiff’s own testimony and that of Ray White, Mike Biancardi, who also resided at the premises, was the individual who called Mr. Bargain. Further according to plaintiff, Mike Biancardi was her domestic partner. The first date that Mr. Bargain responded to the residence as a result of Mike Biancardi’s call was July 28, 2016. The second date that Mr. Bargain responded to Mr. Biancardi’s call was on July 7, 2018, and the third such instance occurred on May 15, 2019.

It is further established without controversy that neither the plaintiff nor Mike Biancardi had entered into a service contract with Mr. Bargain. Mr. Bargain responded to the residence only when summoned by Mike Biancardi.

“In the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects” (*Daniels v. Kromo Lenox Assocs.*, 16 AD3d 111, 1112 [1st Dept 2005]). “Further, absent such a duty, or proof of negligence with regard to the performance of the repairs the independent repairer/contractor was hired to do, the independent repairer/contractor cannot be held liable for damages caused by the malfunction of the mechanism it had been hired to repair” (*Merchants Mut. Ins. Co. v. Quality Signs of Middletown*, 110 AD3d 1042, 1043-1044 [2d Dept 2013]).

Ray White also testified that he did not do anything during the three occasions that he was called to the premises that would have disrupted the structural integrity of the overflow cesspool. On each of the occasions that he was called to the premises, he performed a process

that he referred to as hydro-jetting and the application of chemicals to the overflow cesspool. Mr. White explained the hydro-jetting process in detail, and he further testified that the process was completed within fifteen minutes. He did not have to enter the cesspool, but performed the processes through the existing hole in the cement cover of the cesspool. As explained by Mr. White, the subject cesspool was, in his opinion, based on his own observations, a very old cesspool (at or about or pre-1970) that was formed with blocks. According to Mr. White, with block cesspools, “waste creates gases. These gases deteriorate the blocks of the cesspool, making the concrete porous and leaving most of them blocks to turn to sand, and this is why we have a collapse.”

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361[1974]), and that the Court’s analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

In this case, the Mr. Bargain defendants have established their *prima facie* entitlement to summary judgment as a matter of law by demonstrating that White/Mr. Bargain was/were an independent repairer/contractor that never entered into a contract with either the plaintiff or Mike Biancardi to provide routine inspection or maintenance of the cesspool, and that Mr. Bargain only performed work on the cesspool on an as-needed basis. Plaintiff herself testified that Mr. Bargain only came to the premises when Mike Biancardi called the company; plaintiff herself did not summon Mr. Bargain. Mr. Bargain has also established through the testimony of Ray White, who had been in the cesspool business for twenty-five years at the time of his deposition on August 20, 2020, that he had not negligently performed any work on the cesspool prior to the accident (see *Rampersaud v. Hsieh Hsu Machinery Co., Ltd.*, 196 AD3d 612 [2d Dept 2021] [machine manufacturer demonstrated that it worked on the corrugator machine that injured plaintiff’s hand on an as-needed basis, without any service contract, warranting summary judgment dismissal of the claims against it]).

The Court notes that, although Mr. Bargain has demonstrated that it was an independent repairer/contractor that did not owe a duty to the plaintiff or to Mike Biancardi, Ray White’s testimony establishes that he not only verbally warned plaintiff of the danger of this cesspool collapsing on the very first occasion that he was called to the premises in 2016, but Ray White put that warning in writing on the July 28, 2016 invoice for the services rendered: “Note: Looks like a very old block pool. Customer should replace ASAP. Animals all around cesspool.”¹ This invoice was undisputedly signed by plaintiff, Joan Sparacino although she testified at her deposition that she had very little to no recall of the three occasions when Mr. Bargain reported to the premises. The fact that the Mr. Bargain defendants warned plaintiff does not create a duty where none exists in the first place; however, it merits recognizing that the plaintiff was on notice of the danger of cesspool collapse almost three years to the day of the collapse.

¹ Plaintiff and Mike Biancardi kept large tortoises in their backyard, in a fenced area. In order to enter the fenced area to feed and care for the tortoises, plaintiff and Biancardi had to open the gate, walking directly on top of the cover to the overflow cesspool.

The burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In opposition, the plaintiff has failed to raise a material issue of fact sufficient to defeat the Mr. Bargain defendants’ motion. Aside from the deposition transcripts of the plaintiff and Ray White, the plaintiff submits all three service tickets, none of which controvert the fact that Mr. Bargain never entered into a service/maintenance/inspection contract with the plaintiff or with Mike Biancardi. Plaintiff also submits photographs of her rescue from the cesspool by first responders. While the incident was undoubtedly unpleasant and frightening to the plaintiff, and caused her physical injury as alleged in her Bill of Particulars, the photographs are not germane to Mr. Bargain defendants’ contention that it is entitled to summary judgment dismissal of the complaint because Mr. Bargain acted as an independent repairer/contractor that did not owe a duty to the plaintiff and which did not negligently perform any work on the cesspool prior to the accident.

Plaintiff fails to submit an affidavit from any expert concerning whether the process of hydro-jetting and/or the application of chemicals to the cesspool could have affected the structural integrity of the cesspool. Moreover, counsel’s assertion that Mr. Bargain “should have refused to do any work on the cesspool and advised Mr. Biancardi that it could not service the cesspool and it must be replaced” is unsupported by any competent evidence. Notably, the Mr. Bargain defendants did advise not only Mike Biancardi that the cesspool should be replaced “ASAP,” but plaintiff signed the written invoice making that very recommendation. Counsel’s affirmation is not evidence, nor is counsel qualified to speak to these matters. Counsel’s affirmation is nothing more rampant speculation containing unwarranted vituperative accusations and language.

The opposition of the co-defendant is likewise unavailing. Mr. White on behalf of Mr. Bargain was competent to testify that he did not have a service/maintenance/inspection contract with either the plaintiff or Mike Biancardi without any reference to anything that Mike Biancardi may have said, inasmuch as White/Mr. Bargain, as the vendor, would have personal knowledge of the business arrangement relative to the subject premises. Accordingly, that testimony as to the Mr. Bargain defendants’ personal knowledge of the type of business arrangement is sufficient to establish that those defendants did not owe a duty to the plaintiff in this case.

Plaintiff has failed to raise a triable issue of fact, as has the co-defendant; therefore, the Mr. Bargain defendants’ summary judgment motion is granted, and the complaint is dismissed as asserted against them.

The Estate’s Motion (005)

Kirsty Biancardi, as Executrix of the Estate of Mike Biancardi (the Estate) moves this Court for summary judgment dismissal of the complaint and all cross-claims asserted against the deceased. Plaintiff opposes the motion, but the Mr. Bargain defendants have not opposed it.

When plaintiff commenced this action on October 16, 2019, she named her domestic partner, Mike Biancardi, as a defendant.² Mike Biancardi died on April 16, 2020 and his personal representative, Kirsty Biancardi was thereafter appointed executrix by the Surrogate's Court of Suffolk County. The caption of this action was amended to accomplish the substitution via court-ordered stipulation uploaded to NYSCEF on March 29, 2021.

The Estate asserts that it is entitled to summary judgment because Mike Biancardi did not own the property on the date of the accident: July 24, 2019, "and thus owed no duty to plaintiff who was the actual owner of the property." In support of its argument, the Estate submits a deed recorded in the Suffolk County Clerk's Office on June 19, 2019. This deed is denominated by the Clerk as a "deed with life estate." The deed itself, dated June 18, 2019, reflects that Michael Biancardi is the grantor, and that the grantee is Joan H. Sparacino as Trustee of the Michael Biancardi 2018 Trust. The deed also appears to permit Michael Biancardi to retain a life estate in the subject property (88 Weeks Road) and to give Joan H. Sparacino a life estate relative to that same property. The relevant language reads as follows:

The Grantor herein, MICHAEL BIANCARDI, retains and JOAN H. SPARACINO shall have the right to the exclusive use and occupancy of the premises including the furniture and furnishings therein, during his, her or their lifetime. Grantor and JOAN H. SPARACINO shall be responsible to pay for all maintenance, repairs, water and sewer charges, insurance charges, and taxes relating to said premises. Said life use shall be personal to said Grantor and JOAN H. SPARACINO, and shall not be subject to assignment or lease, except as otherwise provided in the MICHAEL BIANCARDI 2018 TRUST dated June 18, 2018.

This is the sum total of the relevant evidence submitted on this issue. Critically, the Estate does not submit any trust documents on its motion. For this reason alone, the Estate defendant has failed to establish its *prima facie* entitlement to summary judgment as a matter of law by failing to include what is an important document referenced in the deed that the Estate asserts settles the issue of ownership.

Even if the Estate had submitted the trust documents, which the plaintiff has done in opposition, a question of fact sufficient to defeat the motion would have been raised. The original trust indenture was made on March 20, 1995 between Michael Biancardi as grantor and Michael Biancardi as Trustee, for the benefit of Michael Biancardi and all other beneficiaries. In an amendment to the trust dated June 18, 2018, which is the same day that the aforementioned deed was executed, the amended trust indenture "known as the Michael Biancardi Asset Trust" revoked Articles II through XVIII and included the amended Articles II through XX. The amendment continued to make the trust revocable. At the outset the Court notes that, in the

² The affidavit of service upon Mike Biancardi asserts that he was served pursuant to CPLR § 308 (2), by service upon a person of suitable age and discretion identified by "Jane Doe-Refused Name, cotenant." "Jane Doe" is described by the process server as being a white female, blonde hair, approximately 75-79 years old, 5' 1" to 5' 5" tall, weighing 125 to 135 pounds, in a wheelchair.

deed, Michael Biancardi purports to convey his interest in the subject premises as an individual; yet the trust from 1995 and the 2018 amendment lists the grantor as the Michael Biancardi Asset Trust; therefore, there is a question raised as to whether Michael Biancardi owned the subject premises as an individual on the date that the deed was executed.

Furthermore, by the terms of the 2018 Trust, Michael Biancardi “shall serve as Trustee. The Alternate Trustee named herein shall assume office upon the demise, resignation or incapacitation of Trustee. Joan H. Sparacino is hereby designated to serve as Alternate Trustee.” Accordingly, plaintiff could not become trustee until defendant Mike Biancardi died. Inasmuch as Mike Biancardi was still alive on the date of the cesspool collapse, Mike Biancardi was still the trustee of the revocable trust affecting the subject premises, or he owned the premises individually.

In view of the fact that this Court has dismissed the complaint against the Mr. Bargain defendants, the Estate’s request for dismissal of the cross-claim asserted by the Mr. Bargain defendants is granted as academic.

The Mr. Bargain defendants’ summary judgment motion (Sequence 004) is granted in its entirety.

The Estate’s summary judgment motion is denied as to dismissal of the complaint, but the cross-claim asserted against the Estate by the Mr. Bargain defendants is hereby dismissed (005).

The foregoing constitutes the Decision and Order of this Court.

Dated: September 21, 2021
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]