

Franco v Calabrese

2021 NY Slip Op 33724(U)

June 1, 2021

Supreme Court, Nassau County

Docket Number: Index No. 609955/19

Judge: James P. McCormack

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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

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DEBRA FRANCO,

TRIAL/IAS, PART 12
NASSAU COUNTY

Plaintiff(s),

Index No.: 609955/19

-against-

Motion Seq. No.: 002
Motion Submitted: 4/5/21

JUSTIN CALABRESE, KERRY BOPP,
JAMES HUNT and CATHERINE
HUNT,

Defendant(s).

-----X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....XX
Supplemental Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant, Catherine Hunt¹ (Hunt), moves this court for an order, pursuant to CPLR §3212, granting her summary judgment and dismissing the complaint against her.

¹Defendant James Hunt was previously let out of the case.

Plaintiff, Debra Franco (Franco), and Co-Defendants Justin Calabrese (Calabrese) and Kerry Bopp (Bopp), opposes the motion.

The procedural and factual history of this matter have been recounted in a prior order and need be restated herein. For the purposes of this motion, it is relevant to know that Franco alleges she tripped and fell on an uneven sidewalk in between the Hunt property and the Calabrese/Bopp property. On the prior motion, Franco moved for summary judgment on liability against all Defendants, and this court granted the motion as to Calabrese and Bopp and denied it as to Hunt. The court found an issue of fact existed as to whether the uneven sidewalk was in any way connected to the Hunt property.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, 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 (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 NY2d 361 [1974]).

“A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk” (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

“To impose liability upon a defendant landowner for a plaintiff’s injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Morrison v. Apolistic Faith Mission of*

Portland, 111 AD3d 684 [2d Dept 2013]; see *Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

The crux of this motion, and the only issue to be decided, if possible, is whether there is any evidence that the sidewalk can be considered to be part of Hunt's property. It appeared clear to the court on the prior motion that there was evidence that the sidewalk was a part of the Calabrese/Bopp property.

In support of her motion, Hunt offers, *inter alia*, a land survey performed by Frank S. Ferrantello of Ferrantello Land Surveying P.C. Mr. Ferrantello, a licensed land surveyor, submits an affidavit wherein he states, based upon the land survey, to a reasonable degree of land surveyor certainty, that the area where Franco alleges she fell was completely within the boundary of the Calabrese/Bopp property, and not contained anywhere within the Hunt property. The court is also swayed by the fact that after the accident, the village cited Calabrese, but not Hunt, and put Calabrese on notice of needing to correct the sidewalk defect. Calabrese did so without ever raising an objection to the village that the sidewalk was not on his property, or not completely on his property. Further, he never asked Hunt to share in the cost of fixing the defect. Based upon the survey and the expert affidavit, and the other evidence submitted, the court finds Hunt has established entitlement to summary judgment as a matter of law. The burden shifts to Franco, Calabrese and Bopp to raise an issue of fact requiring a trial of the action.

In her opposition, Franco argues the court should not consider the expert affidavit because Mr. Ferrantello did not submit a copy of his license and also because the land survey is unclear. Regarding the license, this court is unaware of any requirement that an expert provide a copy of his actual license, nor did Franco offer any authority for such a position. Mr. Ferrantello testified under oath, in his affidavit, that he was a licensed land surveyor, and he provided the license number in his CV. Nor does the court agree the survey is unclear. The court is satisfied that the land survey, together with affidavit, clearly show the area of the fall was contained within the Calabrese/Bopp property.

Franco also addresses an affidavit that Hunt submits in support of the within motion. The court agrees that the affidavit could be seen as inconsistent with Hunt's deposition testimony, but most of the inconsistencies have to do with sidewalk work performed 20 years ago that this court finds irrelevant to this motion. There is plenty of evidence, including from Franco's own expert, that establishes that the uneven sidewalk was caused by tree roots, and not some work performed 20 years ago.

In their opposition, Calabrese and Bopp initially focus on the deposition testimony of the parties, particularly Hunt, who testified to not knowing exactly where the boundaries of her property were. However, this issue is rendered moot by her expert's affidavit and land survey. Calabrese and Bopp then submit a "supplemental affirmation in opposition", three weeks after the original affirmation. Annexed to the supplemental affirmation is a land survey that Calabrese and Bopp argue raise an issue of fact. The

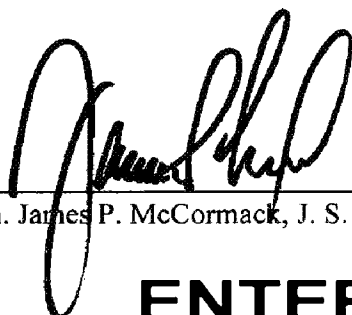
problem is that, unlike Hunt, Calabrese and Bopp offer no foundation for who completed this land survey or from where it was acquired. While there is a firm name on the land survey, there is no affidavit from anyone from that firm. It is well known that evidence in support of or in opposition to a summary judgment motion must be in admissible form. This land survey is not. The court therefore finds that neither Franco nor Calabrese and Bopp are able to raise an issue of fact.

Accordingly, it is hereby

ORDERED, that Hunt's motion for summary judgment is GRANTED. The complaint is dismissed as against Hunt.

The foregoing constitutes the Decision and Order of the Court. The court has considered the remaining arguments of the parties and finds them to be without merit.

Dated: June 1, 2021
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

Jun 03 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE