Ruffus v City of New York

2021 NY Slip Op 33894(U)

March 23, 2021

Supreme Court, Queens County

Docket Number: Index No. 715824/2017

Judge: Tracy Catapano-Fox

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
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ROSE RUFFUS and GEORGE RUFFUS,

Plaintiffs,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, AQUIFER DRILLING & TESTING, INC., MING FAN TSANG, JOANNE TSANG, AND RACHEL TSANG and CDM SMITH, INC.,

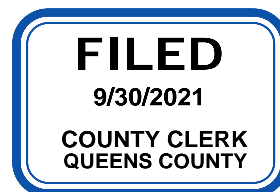
Defendants.
---X

Index No. 715824/2017

Part 6
Motion Date: January 25, 2021

Calendar No. 66

Sequence No. 3



The following papers numbered 1 to 13 read on this motion by defendant AQUIFER DRILLING & TESTING, INC. for summary judgment and dismissal of plaintiffs' Complaint and cross-claims against it pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits..................................	1-4
City's Affirmation in Opposition.……………………………..	5-6
Plaintiffs' Affirmation in Opposition, Exhibits………………..	9-11
Reply Affirmation………………………….…………………...	12-13

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant Aquifer Drilling & Testing, Inc.'s (hereinafter referred to as "Aquifer") motion for summary judgment and dismissal of plaintiffs' Complaint and all cross-claims against it pursuant to CPLR §3212 is denied, as there are issues of fact with regard to whether defendant Aquifer caused or created the defective condition. However, defendant Aquifer's motion for summary judgment to dismiss plaintiffs' claim of *res ipsa loquitor* and gross negligence is granted, as the evidence failed to sufficiently establish either of these claims.

Plaintiffs commenced this action for personal injuries sustained on November 14, 2014, when plaintiff Rose Ruffus stepped into a leaf covered hole in the sidewalk in front of 21-22 146th Street. Plaintiffs filed their Summons and Complaint on November 13, 2017, and issue was joined by defendants on March 17, 2020.

Pursuant to CPLR 3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 NY3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824 [2014]; *Brill v City of New York*, 2 NY3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 NY3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

In a premises liability case, a defendant real property owner, or a party in possession or control of real property who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon Enters., Inc.*, 172 AD3d 678-679 [2nd Dept. 2019].)

The doctrine of *res ipsa loquitor* requires a plaintiff to show that the event is of the kind that ordinarily does not occur in the absence of someone's negligence, the instrumentality that cause the injury is within the defendant's exclusive control, and the injury is not the result of any voluntary action by the plaintiff. (*Giantomaso v. T. Weiss Realty Corp.*, 142 AD3d 950, 952 [2nd Dept. 2016]; *McCarthy v. Northern Westchester Hosp.*, 139 AD3d 825, 827 [2nd Dept. 2016].)

Defendant Aquifer established a prima facie entitlement to summary judgment, as it established it did not own or have control over the property where plaintiff fell, nor did it cause or create the hole in the property. (*See Billordo v. E.P. Realty Assocs.*, 300 AD2d 523 [2nd Dept. 2002].) Defendant CDM presented the pleadings, plaintiffs' deposition testimony, the deposition testimony of Anatoliy Kholodilin, deposition testimony of Eralde Allajbe, deposition testimony of Ming Fan Tsang, the boring log, and field inspection report in support of its motion. Plaintiff Rose Ruffus testified that she had never seen a hole prior to the day of the accident and had no idea how long the hole was there or how it was created. Plaintiff George Ruffus testified that the last time he had walked by the area of plaintiff's fall was about three or four months prior to plaintiff's accident, and he did not observe a hole there. Mr. Kholodilin testified that he worked for

defendant Aquifer as a driller and identified his daily boring log that showed he worked at the corner of 22nd Avenue and 146th Street on July 17, 2014. He also testified that he wrote "clean up" in his log, which meant the area was cleaned and left in the same environmental condition as before the drilling was performed. Ms. Allajbe testified that she was one of the field inspectors for defendant CDM Smith Inc. and defendant Aquifer was the driller at the location on or near plaintiffs' accident. She also testified that her records show the drilling was backfilled and returned to good or better condition. Ms. Tsang testified that she was the owner of the home located at 21-22 146th Street, and never observed the hole in the grass area prior to plaintiff's accident. She further testified that she only learned about the accident when she received a letter from plaintiff's counsel, after which she observed a five-inch-wide, half inch-deep hole in the grass area. It further argued that any defect in the area was trivial and insufficient to warrant liability. Defendant Aquifer further argues that plaintiff's claim of *res ipsa loquitor* is without merit, as she fell in a publicly accessible area that was not in defendant's exclusive possession or control. Further, defendant Aquifer argues that plaintiff's claims are insufficient to establish gross negligence and warrant punitive damages. Based upon the evidence, defendant Aquifer established a prima facie entitlement to summary judgment. (*See Regan v. City of New York*, 8 AD3d 462 [2nd Dept. 2004].)

However, plaintiffs raised triable issues of fact in dispute. (*See Tambaro v. New York*, 140 AD2d 331 [2nd Dept. 1988].) They relied upon the deposition testimony of Anatoliy Kholodilin, who stated he performed drilling work at the location in July 2014 and was overseen and supervised by defendant CDM. They also presented the sworn deposition of Ms. Allajbe, an employee of defendant CDM Smith Inc., who established that her job as field operator was to oversee the drilling work, ensure it was backfilled, and drilling holes were covered completely at the end of the work day. The affidavit of Richard Meserole, the Deputy Director of the New York City Department of Design and Construction, stated that on July 17 and July 18, 2014, defendant CDM supervised the drilling and excavation by Aquifer in the area where plaintiff fell. Plaintiffs demonstrated that there are issues of fact as to whether defendant Aquifer created or caused the defective condition that caused plaintiffs' accident and warrant a denial of the motion. Defendant Aquifer's claims that its work was too attenuated to the date of plaintiffs' accident is an issue of fact to be resolved at trial.

Defendant Aquifer's motion for summary judgment on plaintiffs' claim of *res ipsa loquitor* is granted, as there is no evidence that the area in which plaintiff fell was in the exclusive control of defendant Aquifer. (*See Montagnino v. Inamed Corp.*, 120 AD3d 1317 [2nd Dept. 2014]; *see also McCarthy, supra.*) Further, defendant Aquifer's motion for summary judgment on plaintiffs' claim of gross negligence is granted, as there is no evidence that defendant Aquifer performed the drilling with a reckless disregard for the rights of others. (*See Jones v. LeFrance Leasing Ltd. Partnership*, 127 AD3d 819 [2nd Dept. 2015].)

Accordingly, defendant Aquifer's motion for summary judgment and dismissal of plaintiffs' Complaint pursuant to CPLR §3212 is denied. However, defendant Aquifer's motion

for summary judgment on the issues of *res ipsa loquitor* and gross negligence is granted, and plaintiffs' claims under the doctrine of *res ipsa loquitor* and gross negligence are dismissed.

This constitutes the decision and Order of the Court.

Dated: March 23, 2021

Hon. Tracy Catapano-Fox, J.C.C.