

<b>Wilson v Phido Co Inc.</b>
2022 NY Slip Op 31117(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 150701/2019
Judge: Lori Sattler
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 02TR

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WAYNE WILSON,	<b>INDEX NO.</b>	<u>150701/2019</u>
Plaintiff,	<b>MOTION DATE</b>	<u>01/21/2022</u>
- v -	<b>MOTION SEQ. NO.</b>	<u>002</u>
PHIDO CO INC.,1638-1640 YORK LLC,1638-40 YORK AVENUE, LLC,		
Defendant.	<b>DECISION + ORDER ON MOTION</b>	

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HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Wayne Wilson (“Plaintiff”) commenced this action seeking damages for alleged negligence arising out of an incident that occurred at 1634-36 York Avenue, New York, New York (“the premises”), a property owned by Phido Co., Inc. (“Defendant”). Claims were also brought against owners of a neighboring property, who in turn commenced a third-party action. The parties subsequently stipulated to discontinue all claims in both actions except for Plaintiff’s claims against Defendant. Defendant now moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion.

Plaintiff’s claim arises from an injury he sustained on August 29, 2016, while attempting to climb over a wall located on the premises. At the time of the incident, Plaintiff worked as a local manager for nonparty Verizon, a position that required him to oversee and assist technicians in the field. Verizon technicians had been dispatched to the vicinity of York Avenue and 86th Street in Manhattan to perform repairs on equipment behind a condemned building located next to Defendant’s property. The Verizon personnel were unable to access the

equipment through the condemned building because the building was locked and calls to its owner went unanswered. The technicians then obtained permission from Defendant's employee to use the rear of the premises to access the neighboring property. The back of Defendant's property was separated from the neighboring yard by a 12- to 14-foot-tall cinderblock wall.

Defendant's employee told the technicians that the neighboring property could be accessed using a fire escape ladder to climb over the wall. The dividing wall was covered with bird spikes that had been installed by Defendant's employees. The dividing wall, fire escape ladder, and bird spikes were all located on Defendant's property. The yard could have been accessed through the back of either one of two commercial spaces in the building next door, however Plaintiff and the technicians had no independent knowledge of these routes and Defendant's employee did not mention them.

Plaintiff arrived at the job site after the technicians. One of the technicians instructed Plaintiff to access the site by going through Defendant's property and climbing the ladder over the dividing wall. Plaintiff successfully accessed the neighboring yard using this route. However, while climbing over the wall to leave the site, Plaintiff's bootlace caught on the bird spikes on top of the wall. Plaintiff fell and suffered injuries to his left shoulder and left knee.

Plaintiff testified that a technician explained the route to him when he arrived on-site (NYSCEF Doc #80, at 29). He further testified that the technicians, who had already established access to the work site prior to his arrival, "did inquire on how to get to where they needed to do the work. And upon doing that research, that was the easiest, closest access point to get to where we went" (*id.* at 38). He stated Verizon has no policy for establishing access to a work site (*id.*).

Defendant's owner, Philip John Phillips, was also deposed. He testified that he has placed bird spikes on the dividing wall "for decades" (NYSCEF Doc #79, at 22). He stated he purchases them online, his employees affix them to the wall with glue, and they must be replaced

“every season” (*id.* at 22-23). When asked whether, to his knowledge, anyone from Verizon had asked for access to the backyard area of the building prior to the date of the accident, Mr. Phillips answered “Probably. I would say over the course of the years, someone has” (*id.* at 30). When asked whether anyone else, such as Con Edison, requested access to the backyard, Mr. Phillips answered “All the time” (*id.*). He testified he was unaware of anyone being injured in the dividing wall area prior to the accident and unaware of any complaints made with respect to the wall or the bird spikes (*id.* at 54).

As to the incident in question, Defendant testified:

A: The only thing I know about the incident was one of my employees came to me and said, a Verizon technician has to go to the box in my basement. This happens pretty frequently and we allow access because we must.

Q: Aside from telling you that a Verizon technician needed to go to the basement, did this employee say anything else to you?

A. No.

Q: Did you have any conversations with any Verizon technicians that day?

A: None at all. I don’t even know what the man looked like.

Q: When this employee of yours told you about the Verizon technician, did the employee already allow access?

A: No. He asked me first. I said it was fine, and that was it.

(*id.* at 16-17).

Plaintiff’s opposition papers include an affidavit of Julio Lopez, one of the Verizon technicians dispatched to the premises on the date in question. Mr. Lopez stated “An employee of Phido was inside and escorted me through the dining room and kitchen into a utility room and outside to the back of [the restaurant]. The Phido employee then pointed out a red ladder and suggested that the ladder could be used to climb the wall over to the area where [the technicians] needed to work” (NYSCEF Doc #85, at 2).

In support of its motion for summary judgment, Defendant asserts there is no dispute of material facts and argues entitlement to summary judgment as matter of law based on several

legal theories. Defendant first argues it had no duty to a person traversing an area not intended as a public walkway. It further argues that Plaintiff's recovery is barred because he assumed the risk inherent in climbing the dividing wall, because his use of the fire escape ladder to climb the dividing wall was unforeseeable, and because his fall was unforeseeable because bird spikes are not a dangerous condition. Defendant further argues that Plaintiff's inaction in discharging his employment-related duties proximately caused his injuries, and that his allegedly reckless act in climbing the dividing wall was the proximate cause of his injuries.

Plaintiff's opposition does not raise any disputes of fact, but rather argues that Defendant's motion must fail as matter of law because, he contends, as a property owner, Defendant had a duty to maintain its premises in a reasonably safe condition, even though the area was not open to the public, and because the accident was foreseeable given that Defendant's employee instructed the technicians to cross the wall. Plaintiff contends the assumption of risk doctrine is inapplicable and that he cannot be found to be reckless when he was unaware of any alternative route and followed the route provided by Defendant's employee.

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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Denial of the motion is required when the proponent fails to make this prima facie showing, regardless of the sufficiency of the opposing papers (*Powers v 31 E 31 LLC*, 24 NY3d 84, 95 [2014]; *Alvarez* at 324).

A property owner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition under the circumstances (*Powers* at 94; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]). This duty applies "whether the property is open to the public or not" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Nevertheless, no duty exists

where a property owner shows that it maintained the property in a safe condition, did not create a dangerous condition, or did not have actual or constructive knowledge of a dangerous condition (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012]). “The existence and scope of this duty is, in the first instance, a legal question for the courts to determine by analyzing the relationship of the parties, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks” (*Powers* at 94; *see also Tagle v Jakob*, 97 NY2d 165, 168 [2001][“The scope of any such duty of care varies with the foreseeability of the possible harm”).


Defendant presents evidence indicating that its employees regularly affixed bird spikes to the top of a 12- to 14- foot wall dividing the back alleyways of two properties in an area that can only be accessed from within Defendant’s building. As set forth in Defendant’s Statement of Material Facts, “to access the Verizon equipment, you had to go through the restaurant, climb up the ladder, climb over the parapet with the bird spikes on it, and then go down to the ground in the area where the Verizon equipment was” (NYSCEF Doc #80, at 2). When the Verizon personnel arrived, they were given permission to access their equipment, and Defendant’s owner testified to previously giving Verizon, Con Edison, or other utility company technicians access to equipment in the area. Accordingly, that an individual might be injured while navigating the bird spikes and traversing the wall was a reasonably foreseeable risk. While the Court need not consider the Plaintiff’s papers, it notes that Mr. Lopez’s written testimony that Defendant’s employee specifically instructed him to access the equipment by climbing the fire escape ladder and traversing the wall further demonstrates that harm was foreseeable.

Defendant’s other bases for summary judgment are unavailing. Defendant fails to make a prima facie case that Plaintiff is barred from recovery due to assumption of risk, as a plaintiff’s assumption of risk does not exonerate a property owner from liability for negligent maintenance

of their premises (CPLR § 1411; *Sykes v County of Erie*, 94 NY2d 912, 913 [2000]). Defendant further fails to establish prima facie that Plaintiff was the proximate cause of his injuries (*see Marin v San Martin Rest., Inc.*, 287 AD2d 441, 442 [2d Dept 2001]; *Derdiarian v Felix Contractor Corp.*, 51 NY2d 308, 314-15 [1980]). While Defendant contends Plaintiff caused his injuries by choosing to take the route he did, Defendant does not present any evidence that Plaintiff or the technicians he supervised were aware of the alternate route, had a duty to search for this route, or that Plaintiff's climbing over the wall was an incautious discharge of his employment duties or an extraordinarily reckless act so unforeseeable as to sever the causal chain between the allegedly unsafe condition and Plaintiff's injury.

Accordingly for the reasons set forth herein, it is hereby ORDERED that Defendant's motion for summary judgment is denied; and it is further ORDERED that Plaintiff shall file the Note of Issue by May 13, 2022; and it is further ORDERED that counsel shall contact the Court to address any unresolved discovery issues or to request a settlement conference.

This constitutes the Decision and Order of the Court.

<p style="text-align: center;"><u>4/8/2022</u> DATE</p>	 <hr style="border: 0; border-top: 1px solid black;"/> LORI SATTLER, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE