

**Scarpelli v Biberaj**

2022 NY Slip Op 31881(U)

March 1, 2022

Supreme Court, Westchester County

Docket Number: Index No. 68664/18

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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JUSTIN SCARPELLI,

Plaintiff,

-against-

MUSA BIBERAJ; SADIK KUKAJ; JEA CONSTRUCTION CO.; JOSE E. ANGUISACA; HKH ASSOCIATES LLC, and; RIVERA’S LANDSCAPING & CONSTRUCTION CO.,

Defendants.  
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HUBERT, J.

The following documents were read on,

(A) this motion (Sequence No. 3) by Defendant, HKH Associates LLC (hereafter, “HKH”), for an order pursuant to rule 3212 of the Civil Practice Law and Rules granting summary judgment dismissing the complaint and any cross-claims in the above-captioned action as against it, and

(B) this motion (Sequence No. 4) by Defendant, Musa Biberaj (hereafter, “Biberaj”), for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims in the above-captioned action as against him:

- Notice of Motion (Seq. No. 3) - Affirmation - Exhibits
- Affirmation in Opposition - Exhibit
- Reply Affirmation - Exhibit

- Notice of Motion (Seq. No. 4) - Statement of Undisputed Facts - Affirmation - Exhibits
- Affirmation in Opposition - Exhibit - Response to Statement of Undisputed Facts - Memorandum of Law
- Reply Affirmation

Upon consideration of all of the foregoing, and for the following reasons, HKH’s motion for summary judgment dismissing as against HKH the complaint in the above-captioned action and any cross-claims as against it is granted, Biberaj’s motion for summary judgment dismissing as against

Biberaj the complaint in the above-captioned action and any cross-claims as against him is denied.

### Factual and Procedural Background

This is an action for damages for injuries allegedly sustained by Plaintiff, Justin Scarpelli (hereafter, "Scarpelli"), on May 8, 2018, when he was struck by a falling tree while being escorted in his wheelchair from his residence to a vehicle parked in a common area of the condominium complex in Yorktown Heights in which his residence was located.

Scarpelli commenced the above-captioned action by filing a Summons and Verified Complaint via the New York State Courts E-Filing system (hereafter, "NYSCEF") on November 8, 2018, in which Verified Complaint he pleads a single cause of action for negligence against all Defendants then named in the caption.

On February 7, 2019, Biberaj filed via NYSCEF a Verified Answer, which pleads a general denial, three separately stated and numbered affirmative defenses, and two cross-claims against all other Defendants then named in the caption.

Scarpelli filed via NYSCEF a Verified Amended Complaint on May 1, 2019, in which Verified Amended Complaint he pleads a single cause of action for negligence against all Defendants named in the caption but also pleads the same cause of action against an entity he identifies as "Rivera's Landscaping & Construction Inc." (hereafter, "Rivera's").<sup>1</sup>

On May 17, 2019, Biberaj filed via NYSCEF an Amended Verified Answer (hereafter, "the Biberaj Answer"), which pleads a general denial, three separately stated and numbered affirmative defenses, and two cross-claims against only Defendants, JEA Construction Co. (hereafter, "JEA"), Jose E. Anguisaca (hereafter, "Anguisaca"), and HKH.

On September 11, 2019, HKH filed via NYSCEF a Verified Answer To Verified Amended Complaint With Cross-Claims (hereafter, "the HKH Answer"), which pleads a general denial, 15 separately stated and numbered affirmative defenses, and cross-claims against Biberaj, JEA,

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<sup>1</sup> Rivera's was not named in the caption of the original complaint (*see* Verified Complaint [NYSCEF DOC. NO. 1]), and is not named in the caption of the amended complaint (*see* Verified Amended Complaint [NYSCEF DOC. NO. 9]).

Anguisaca, Rivera's and Defendant, Sadik Kukaj (hereafter, "Kukaj").<sup>2</sup>

By Decision & Order entered via NYSCEF on July 20, 2020, this Court denied Scarpelli's motion (Sequence No. 1) for default judgment against Rivera's, and denied Biberaj's motion (Sequence No. 2) for an order granting him default judgment on the issue of liability against Rivera's.

Neither Kukaj, JEA, Anguisaca nor Rivera's has filed an answer or otherwise appeared in the above-captioned action.

HKH made the instant motion (Sequence No. 3) by filing via NYSCEF on December 3, 2020. Biberaj filed papers in opposition via NYSCEF on December 31, 2020. HKH filed reply papers in further support of its motion via NYSCEF on January 5, 2021. Scarpelli was granted an adjournment of the return date of HKH's motion from January 7, 2021, to February 3, 2021, but failed to submit any papers in opposition.

On March 23, 2021, Scarpelli filed via NYSCEF a Note Of Issue and Certificate Of Readiness For Trial, with proof of service.

Biberaj made the instant motion (Sequence No. 4) by filing via NYSCEF on May 20, 2021. Scarpelli filed papers in opposition via NYSCEF on July 14, 2021. HKH did not file papers in opposition to Biberaj's motion and Biberaj did not file reply papers in further support of his motion.

Both motions were deemed fully submitted on July 28, 2021, the date to which the parties had adjourned the original return date of the Biberaj motion.

Neither Kukaj, JEA, Anguisaca nor Rivera's appeared in response to either motion.

#### Discussion

Pursuant to CPLR 3212 (b) a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party[, and] the motion shall be

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<sup>2</sup>

This is the first pleading in which Rivera's is named in the caption (*see* HKH Answer [NYSCEF DOC. NO. 34]).

denied if any party shall show facts sufficient to require a trial of any issue of fact.” Thus, the movant must submit evidentiary proof in admissible form which establishes that he is entitled to judgment as a matter of law, and one opposing the motion “must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (internal quotation marks and citations omitted)” (*Dorival v DePass*, 74 AD3d 729, 730 [2d Dept 2010]).

HKH’s motion for summary judgment (Sequence #3) dismissing as against HKH the complaint in the above-captioned action and any cross-claims as against it is granted.

The evidence which HKH proffers in support of its motion includes, among other things, copies of pleadings, materials obtained during discovery and the transcripts of the minutes of the depositions of Scarpelli, Biberaj, and one Hormoz Kheirabi, who is the owner and sole employee of HKH. Viewed in the light most favorable to Scarpelli and Biberaj, said evidence establishes: that on the date of the accident Biberaj owned property (hereafter, “the Biberaj Property”) which abutted the condominium complex where the accident allegedly occurred (hereafter, “the Accident Site”); that sometime prior to that date Biberaj hired three men to clear, level and plant grass on the Biberaj Property; that said work was being performed on the date of the accident; that at some point on that date, a tree fell, striking Scarpelli; that Biberaj did not hire or pay Hormoz Kheirabi or HKH to perform any of said work, and; that Biberaj did not receive an invoice for said work from Hormoz Kheirabi or HKH. In sum, even viewed in the light most favorable to the nonmovants, the evidence establishes that HKH had no involvement with whomever or whatever caused the tree to fall. Thus, HKH has established that it is entitled to judgment against Scarpelli and Biberaj as a matter of law.

Neither Scarpelli nor Biberaj produce evidentiary proof in admissible form sufficient to raise a material question of fact. Biberaj proffers only the affirmation of his attorney and the same transcript of his own deposition that HKH proffers in support. Biberaj testified that the three men he hired were working at another property in his neighborhood – which other property was unrelated to either the Biberaj Property or the Accident Site – when he approached them to inquire if they could do some work at the Biberaj Property. He testified that after the date of the accident one of the three men told Biberaj that he was the owner of HKH. Biberaj also testified that at some point

thereafter he contacted the Building Department and was told that HKH had obtained the permits for the work being done at such other property.

However, Biberaj testified that he could identify the man who allegedly said he was the owner of HKH only as "Marcelo," and Biberaj proffers no evidence in opposition to HKH's motion that anyone named Marcelo is or ever had been associated with HKH, much less its owner. Biberaj also testified that he could not identify the person at the Building Department with whom he allegedly spoke, or when, nor does he produce in opposition to HKH's motion copies of the permits or any correspondence from the Building Department. In other words, Biberaj's testimony as to what he was told by Marcelo and some unidentified person at the Building Department is the only submission he proffers in opposition to HKH's motion.

Biberaj's testimony about what he was allegedly told is inadmissible hearsay. "Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement" (Guide to NY Evid rule 8.00[1], Definition of Hearsay). Biberaj offers the out of court statements of Marcelo and an unidentified person from the Building Department to prove the truth of what each allegedly told Biberaj concerning HKH's involvement in the events that resulted in the accident, so Biberaj's testimony as to said statements constitutes inadmissible hearsay.

Scarpelli does not proffer any evidence in opposition to the HKH motion.

Thus, neither Scarpelli nor Biberaj has produced evidentiary proof in admissible form sufficient to raise a material question of fact.

Therefore, HKH's motion for summary judgment dismissing as against HKH the complaint in the above-captioned action and any cross-claims as against it is granted.

Biberaj's motion for summary judgment (Sequence #4) dismissing as against Biberaj the complaint in the above-captioned action and any cross-claims as against him is denied.

The evidence which Biberaj proffers in support of his motion includes, among other things, copies of pleadings, materials obtained during discovery, and the transcripts of the minutes of the depositions of Scarpelli and Biberaj. Viewed in the light most favorable to Scarpelli and HKH, said evidence establishes: that on the date of the accident the Biberaj Property abutted the Accident Site; that sometime prior to that date Biberaj hired three men to clear, level and plant grass on the Biberaj Property; that on the date of the accident one of the three men was operating a machine called a

“Bobcat”; that at some point on that date, a tree fell, striking Scarpelli, and; that during the two days after the accident Biberaj paid Marcelo for the work with four checks payable to cash. Biberaj also proffers a survey dated September 3, 2020, purportedly showing the positions of trees located on the Biberaj Property and the Accident Site – as well as the position of a single tree stump located on the Accident Site side of the common property line.

Neither Biberaj nor Scarpelli testified that they saw where or by whom the Bobcat was being operated, or that the machine did not come in contact with or undermine the tree that allegedly fell and struck Scarpelli. And not only is Biberaj’s contention that the survey somehow establishes that the tree stump shown thereon is the remains of the tree which struck Scarpelli more than two years before based upon rank speculation, the survey does not eliminate a material question of fact as to whether activity on the date of the accident caused that tree to fall, thereby leaving the stump. Moreover, Biberaj fails to proffer any evidence that would eliminate the material questions of fact raised by his own testimony about hiring, directing and paying the three men for the work performed on the Biberaj Property. In sum, his evidence is not sufficient to establish as a matter of law that he did not have control over the actions of the three men, that they were not negligent in performing said actions, or that said actions did not cause a tree to fall and strike Scarpelli.

Thus, Biberaj fails to establish that he is entitled to judgment as against Scarpelli as a matter of law.

Therefore, Biberaj’s motion for summary judgment dismissing as against Biberaj the complaint in the above-captioned action and any cross-claims as against him is denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion of Defendant, HKH Associates LLC, for summary judgment dismissing the complaint and any cross-claims in the above-captioned action as against it is granted, and it is further

ORDERED that the motion of Defendant, Musa Biberaj, for summary judgment dismissing the complaint and any cross-claims in the above-captioned action as against him is denied, and it is further

ORDERED that Plaintiff, Justin Scarpelli, shall within ten days of entry of this decision and order serve all Defendants with notice of entry, and it is further

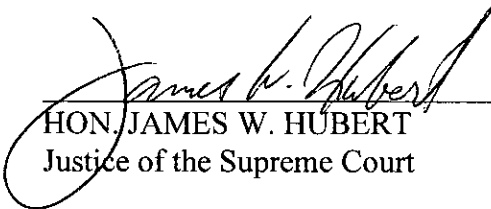
ORDERED that Defendant, HKH Associates LLC, shall within ten days of entry of this decision and order serve Plaintiff, Justin Scarpelli, and all Defendants with notice of entry, and it is further

ORDERED that Plaintiff, Justin Scarpelli, and Defendant, HKH Associates LLC, shall each within ten days after service as aforesaid file proof of service by uploading to the New York State Courts E-Filing system.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
March / , 2022

ENTER,

  
HON. JAMES W. HUBERT  
Justice of the Supreme Court