

**Nesbitt v ZB Sausalito, LLC**

2022 NY Slip Op 34853(U)

February 17, 2022

Supreme Court, Suffolk County

Docket Number: Index No. 622503/2017

Judge: Carmen Victoria St. George

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 56 SUFFOLK COUNTY**

**PRESENT:**

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

x

**SIMONE NESBITT,**

**Index No.**  
**622503/2017**

**Plaintiff,**

**Motion Seq:**  
**003 MD**

**-against-**

**Decision/Order**

**ZB SAUSALITO, LLC and JOSE CRUZ,**

**Defendants.**

x

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

Notice of Motion/Order to Show Cause.....	32-41
Answering Papers.....	44, 46-47
Reply.....	50-53
Briefs: Plaintiff's/Petitioner's.....	45
Defendant's/Respondent's.....	

Defendants move this Court for an Order granting summary judgment dismissal of the complaint against them. Plaintiff in this personal injury action opposes the requested relief. The incident giving rise to this action occurred on October 9, 2016, when plaintiff alleges that she fell on the carpeted staircase leading from the second floor to the first floor of a private rental residence located at 36 Lake Drive, Wyandanch, New York. Plaintiff specifically alleges that the railing on the staircase was loose and that the loose railing caused her to lose her balance and twist her right ankle when she reached the fourth step from the top of the staircase. Plaintiff's left hand was on the railing when it became so loose that she fell, with her whole body coming to rest, face up, on the staircase. Plaintiff apparently sustained physical injuries, including a broken ankle.

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]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). 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]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*) “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” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

“It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega v. Restani*, 18 NY3d 499, 505 [2012]). Issue-finding rather than issue determination is the court’s function upon a summary judgment motion (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Defendants have failed to include a statement of material facts as required by 22 NYCRR 202.8-g, and a word count certification as required by 22 NYCRR 202.8-b, which can serve as an independent basis for outright denial of the instant motion; nonetheless, the Court will consider the instant motion on the merits (*CPLR § 2001*).

In support of their motion, the defendants submit, *inter alia*, the pleadings, the deposition testimony of plaintiff and defendant Cruz, and the affidavit of Jose Cruz. The defendants, who are represented by the same counsel, assert that neither of them had any notice, actual or constructive, of the alleged dangerous condition of the hand railing on the staircase. Defendant Cruz further avers in his affidavit that he has no ownership in the LLC co-defendant or in the subject rental property where the incident occurred, and he further denies that he was negligent with respect to the ownership, operation, and control of the subject premises.

In his deposition testimony, defendant Cruz testified that his co-defendant, “Z.B. Sausalito/Andrew Lam,” was his “client” for which Cruz procured the subject premises. Glaringly absent from the papers submitted in support of the instant motion is any affidavit and/or testimony from a representative of the LLC/Lam. Accordingly, defendant ZB Sausalito has utterly failed to establish its *prima facie* entitlement to summary judgment as a matter of law.

Turning to Jose Cruz, his relationship with the LLC is demonstrated by his own deposition testimony to be a rather murky, fluid, and inconsistent one. He testified variably that he procured the subject premises for the LLC (for the purposes of rental) through a person named “Bobby,” but Cruz received no payment from the LLC for this service. He also testified that he provided these services under the auspices of his own corporation, JRCN Services, Inc., and that he hoped to get construction/repair work referred to him by the LLC in the future. He also testified that he acted as the self-described property manager for the LLC and collected rents on behalf of the LLC. He also acknowledged that he served the plaintiff’s mother with a petition for eviction on October 4, 2016, on behalf of ZB Sausalito. He explained how it came about that he

served process for the eviction on plaintiff's mother five days before the incident as follows: "The Z.B. Sausalito asked me for -- get a lawyer to evict them, and I know this lawyer, and I went to the lawyer, and in order to not pay nobody, I did the serve." Apparently, all arrangements for Cruz's services rendered for, or performed on behalf of, ZB Sausalito were never reduced to writing, but were an oral contract/ "verbal." Based upon the "shifting sands" nature of the relationship between Cruz and his LLC co-defendant, it cannot be determined by this Court that Cruz can provide any evidence on behalf of the LLC; therefore, the LLC's failure of proof is not cured by Cruz's affidavit or testimony. Moreover, the overall nature of Cruz's testimony raises an issue of credibility.

Furthermore, although defendant Cruz denies ever having been given any notice of the loose staircase railing, and having been denied access to the property prior to plaintiff's fall, plaintiff's testimony submitted by the defendants contradicts Cruz's testimony. According to the plaintiff, although she met Cruz for the first time after her accident, she knew Cruz as "the landlord," and it was her understanding that ZB Sausalito was "supposedly . . . his business." Furthermore, the plaintiff testified that her mother signed a lease with Jose Cruz, and that her mother and stepfather with whom she resided at the subject premises each complained to Cruz about the railing before plaintiff fell. Notably, the defendants have not submitted with their moving papers any written lease for the Court's consideration.

Based upon the foregoing, defendant Cruz has also failed to establish his *prima facie* entitlement to summary judgment as a matter of law; however, even if Cruz had sustained his *prima facie* burden, plaintiff's mother's affidavit submitted in opposition raises a triable issue of fact.

The affidavit of Phyllis Whaley asserts that she complained of the loose handrail on "multiple" occasions by "face-to-face" contact with Cruz. She claims that the approximately ten to fifteen complaints were made over the period of time from December 2015 until her daughter's accident, and that no action was taken to remedy the handrail.

Although it is established in reply that ZB Sausalito did not purchase the subject premises until July 2016, the Court cannot conclude as a matter of law that it was impossible for Whaley to have made any of her complaints to Cruz since there was a period of approximately two and one-half months from the date of the conveyance to ZB Sausalito and plaintiff's fall.

Underscoring the existence of material questions of fact, plus overwhelming issues of credibility as to all of the litigants, is the fact that Cruz submits an additional affidavit in reply asserting that Whaley's statements are "blatantly false."

"Where credibility assessments are interwoven with factual disputes, as is often the case, summary judgment must ordinarily be denied. Credibility assessments cannot be made by the assigned judge in granting or denying motions for summary judgment. Doing so would be like applying a square peg to a round hole. Instead, it is the role of a trier of fact in a courtroom to assess witness credibilities and decide the extent to which those assessments drive the ultimate verdict to be rendered. It is during the trial, and not by the summary judgment procedure, that witnesses can be heard on direct and cross-examination and their credibilities assessed by

considering how convincing or forthright their testimony is viewed, the consistence of testimony when measured against other evidence of the case, eye contact and body language, and common sense” (*Hon. Mark C. Dillon, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3212:6*, at 17-18).

The defendants’ summary judgment motion is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 17, 2022  
Riverhead, NY



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

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [ X ]