

Diaz v Felix Schoeller N. Am. Inc.

2022 NY Slip Op 34963(U)

June 17, 2022

Supreme Court, Bronx County

Docket Number: Index No. 25739/2019E

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA-5

JOSE G. ECHAVARRIA DIAZ,

Plaintiff(s),

Against

FELIX SCHOELLER NORTH AMERICA INC. AND
LEE SCHOELLER PAPER COMPANY, INC.,

Defendant(s).

Index No.: 25739/2019E

Mot. Seq. No.: 3

Present:

HON. **ALISON TUITT**

Justice

The following e-filed papers NYSCEF Doc. 55 - 67 were read on this motion (NYSCEF and Case Management Seq No. 3) to **Summary Judgment** noticed on **March 30, 2022**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	Nyscef No(s). 55 - 67
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Upon the foregoing papers, Defendants Felix Schoeller North America Inc. and Lee Schoeller Paper Company, move for summary judgement pursuant to CPLR § 3212 dismissing the complaint on the basis of the “storm in progress” doctrine. There is no opposition to the motion.

Plaintiff commenced this personal injury action to recover damages for injuries, allegedly sustained on February 11, 2019. Plaintiff alleges that while making a delivery on the premises on Defendants, he tripped and fell in the snow and/or ice at their premises located at 179 County Route 2A in Oswego, New York.

Defendants contend that it is absolved from liability because there was a storm in progress on the morning of Plaintiff’s accident. In support of their motion, Defendants submit a statement of material fact, Plaintiff’s and Defendants’ deposition testimony, an Affidavit of meteorology expert witness, Dr. Alicia C. Wasulas, PhD, CCM., and National Centers for Environmental Information Certified Weather records. Defendants argue all supporting documentation provided for the herein motion confirms that before, during and after the alleged accident on February 11, 2019, it was snowing in the area and on the grounds where the accident

occurred. Defendants state that Plaintiff testified that on the morning of the incident when he arrived at the premises, it was snowing and continued to snow when he slipped and fell. Defendants further provide that in her affidavit, Dr. Wasulas informs with a reasonable degree of meteorology certainty that “the snow and ice that Plaintiff alleges to have slipped on was part of an ongoing storm that was in progress and producing accumulating snow at the Premises at the time of Plaintiff’s alleged accident at approximately 3:00 a.m. on February 11, 2019.”

The court’s function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997). Defendants have shown that there are no issues of facts present as there was a storm in effect.

Here, with the submission of their witness's and a nonparty witness's deposition transcripts, as well as the certified meteorological data and an affidavit from Dr. Wasulas, meteorologist, Defendants establish a *prima facie* entitlement to summary judgment based on the storm-in-progress doctrine. CPLR § 4528; Weinberger v. 52 Duane Assoc., LLC, 102 AD3d 618 [1st Dept 2013]; Pippo v. City of New York, 43 AD3d 303, 304, 842 NYS2d 367 [1st Dept 2007]. This Court finds that there are no triable issues of fact present as to the liability of Defendants as

