

**Irish v Triton Constr. Co. LLC**

2023 NY Slip Op 31550(U)

May 8, 2023

Supreme Court, New York County

Docket Number: Index No. 365059/2018

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART 11M**

*Justice*

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KEITH IRISH,

Plaintiff,

- v -

TRITON CONSTRUCTION COMPANY LLC, 215 CHRYSTIE  
LLC, IS COMPANY LLC, A/K/A IAN SCHRAGER COMPANY  
LLC, THE WITKOFF GROUP LLC, AND 259 BOWERY LLC,

Defendant.

-----X

TRITON CONSTRUCTION COMPANY LLC,, 215 CHRYSTIE  
LLC,, IS COMPANY LLC, A/K/A IAN SCHRAGER COMPANY  
LLC,, THE WITKOFF GROUP LLC,, AND 259 BOWERY LLC,

Plaintiff,

-against-

KINGS READY MIX, INC., U.S. CONCRETE, INC.

Defendant.

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**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595131/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 57, 58, 59, 60, 61, 62

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

This action arises out of injuries sustained by plaintiff when he was struck by a vehicle while working at a construction site. Third-party defendant<sup>1</sup>, Kings Ready Mix, Inc., now moves for summary judgment to dismiss the third-party complaint and any and all cross claims. Plaintiff and defendant/third-party plaintiffs oppose the motion. For the reasons set forth below, third-party defendant's motion for summary judgment is granted.

<sup>1</sup> By stipulation dated, July 21, 2020, defendants/third-party plaintiffs discontinued the action with prejudice against third-party defendant, U.S. Concrete, Inc.

The facts of this matter do not appear to be much in dispute. On December 21, 2015, plaintiff, while in the course of his duties for Parkside Construction, was struck by a vehicle operated by non-party, Simon Landou. He had exited his vehicle just before his accident where he had gone because his phone “died.” The accident occurred on the roadway at or near 215 Chrystie Street, New York, New York. Third-party defendants were making a concrete delivery at the time of the accident. The plaintiff was crossing the street to approach the third-party defendants’ vehicle, which was illegally parked when he was struck.

#### Summary Judgment Standard

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

#### Discussion

The basis of third-party defendant’s motion is that they were not the proximate cause of accident as a matter of law. The testimony from the non-party is undisputed, that nothing, not even the concrete truck, obstructed his view of the roadway. Thus, the opposing parties contentions to the contrary are unfounded, not based on the record before this court and speculative.

Third-party plaintiffs also contend that “the only reason” that the plaintiff was in the middle of the street at the time of the incident was that third-party defendant’s truck was illegally parked in the crosshatch area. Third-party plaintiffs contend that that sole purpose for plaintiff being in the roadway was to tell the driver of the Kings Ready Mix cement truck to go around the block. However, the Court does not find this argument persuasive. It is undisputed that plaintiff was going back to the construction site, where he was supposed to have been before the accident occurred, and it is no fault of the third-party defendant that plaintiff was returning from his vehicle, whether or not the concrete truck was illegally parked.

A prima facie case of negligence requires plaintiff to establish "first, the existence of a duty owing by the defendant to the plaintiff; second, defendant's failure to discharge that duty; third, injury to plaintiff proximately resulting from such failure" *Peresluha v City of New York*, 60 AD2d 226, 230 [1st Dept 1977].

Here, the Court finds that even assuming that third-party defendant’s vehicle was illegally parked, that was not a substantial factor in causing the accident and subsequent injury as a matter of law. The testimony is undisputed that the non-party’s vision of the roadway was unobstructed. While the Court will not opine as to the apportionment of fault between plaintiff, the non-party driver, or any direct defendant, it is clear to this Court that no fault lies with the third-party defendant. Accordingly, it is hereby

ADJUDGED that the motion for summary judgment by third-party defendant Kings Ready Mix, Inc., is granted in its entirety; and it is further

ORDERED that the third-party complaint is dismissed in its entirety and any and all cross claims are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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5/8/2023  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE