

Zuniga v Smith
2024 NY Slip Op 35634(U)
April 1, 2024
Supreme Court, Nassau County
Docket Number: Index No. 616418/2019
Judge: Felice J. Muraca
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T:

HON. FELICE J. MURACA, A.J.S.C.

TRIAL/IAS PART 42

JOSEPH A. ZUNIGA,

Plaintiff,

DECISION & ORDER

Index No. 616418/2019

Mot. Seq. #: 001

-against-

HALLY ROBERTA SMITH,
PATRICK D. SMITH,
JILL VERBECK and
ARLENE EATON,

Defendants.

HALLY ROBERTA SMITH and
PATRICK SMITH,

Third-Party Plaintiff,

-against-

NT CONSTRUCTION CORP.,

Third-Party Defendant.

E-filed documents numbered 39-61 were reviewed in preparing this Decision and Order.

Defendants, Jill Verbeck and Arlene Eaton ("**Moving Defendants**"), move for an order pursuant to CPLR § 3212, granting summary judgment, dismissing the Plaintiff's complaint against them. Plaintiff Joseph A. Zuniga ("**Zuniga**") opposes. Defendants/Third-Party Plaintiffs Hally Roberta Smith and Patrick D. Smith also oppose and adopt Zuniga's Opposition for the sake of judicial economy. Third-Party Defendant, NT Construction Corp. ("**NT Construction**"), has not submitted opposition.

This action arises from a motor vehicle accident that occurred on November 4, 2019, in front of a private residence located at 1135 Coates Avenue, Holbrook, County of Suffolk, State of New York. Moving Defendants are the owners of said residence ("**Premises**"). Zuniga was hit as

a pedestrian by a vehicle operated by Hally Roberta Smith (“Smith”) and owned by Patrick D. Smith.

At the time of accident, Zuniga was employed by NT Construction. NT Construction was hired by Moving Defendant, Arlene Eaton (“Eaton”) to perform demolition work and remove an in-ground pool from the Premises. On the date of the accident, NT Construction’s dump truck was parked in the street in front of the Premises. Zuniga claims a dangerous condition was created because Eaton required that the dump truck be parked in the street instead of in the driveway at the Premises. Zuniga alleges as a result he was forced to load and unload construction materials in the roadway. Zuniga was struck by Smith’s vehicle while performing this task.

It is well settled that in a motion for summary judgment, the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. (*See Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alyarez v. Prospect Hospital*, 68 NY2d 320 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*See Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). 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 (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 N2d 361 [1974]).

Moving Defendants argue they are entitled to judgment as a matter of law because they had no duty to Zuniga because the accident occurred on a public roadway, Coates Avenue, and not on their property. Moving Defendants have not submitted any admissible evidence that they do not own the public roadway where the accident occurred.

Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks and roadways is placed on the municipality, and not the abutting landowner (*Kilfoyle v Town of N. Hempstead*, 138 AD3d 1069 [2d Dept 2016]; *Gerena v Town of Brookhaven*, 280 AD2d 450, 451 [2d Dept 2001]). However, an abutting landowner will be liable to a pedestrian where the landowner actually created the dangerous condition, caused the defect to occur by some

special use of the public roadway, or breached a specific ordinance or statute which obligates [him or her] to maintain the sidewalk” (*Gerena*, 280 AD2d at 451; *Kilfoyle*, 138 AD3d at 1069; *Yass v Deepdale Gardens*, 187 AD2d 506 [2d Dept 1992]), *Kaufman v Silver*, 90 NY2d 204; *Gerena v Town of Brookhaven*, 280 AD2d 450, 451 [2d Dept 2001]). Notwithstanding the inadmissible evidence, as abutting landowners, Moving Defendants have not proffered any evidence that they did not create the dangerous condition or cause the condition by some special use of the public roadway.

Moving Defendants next argue that they had no control over the manner or means of the work done by NT Construction. Moving Defendants had a common law duty to provide NT Construction with a safe working environment. (Labor Law § 200; *Everitt v. Nozkowski*, 285 A.D.2d 442 [2nd Dept. 2011]). Where the conditions of the premises is at issue, property owners may be found liable for violating Labor Law § 200. (*Ortega v. Puccia*, 57 A.D.3d 54 [2nd Dept. 2008]). However, where the injury was caused by the manner in which the work was performed, as opposed to the condition of the premises, there is no liability for an owner under §200. *Id.* The only exception to this rule is where the owner had the authority to supervise or control the work being performed. (*Id.*) This authority must be more than a general authority to review progress and inspect the premises. (*Id.*)

To establish liability for injuries resulting from a dangerous condition in the workplace, a plaintiff must demonstrate that the owner or manager had control over the work site and had actual or constructive notice of the dangerous condition causing the incident. (*Fuchs v. Austin Mall Assocs.*, 62 A.D.3d 746 [2nd Dept. 2009]). Additionally, an implicit pre-condition to this statutory duty to provide a safe workplace, is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition. (*Russin v. Louis N. Picciano & Son.*, 54 N.Y.2d 311 [1981]).

There is a question of fact as to whether Eaton had control over Zuniga’s activities in the roadway which created the dangerous condition. At his deposition, Zuniga testified that his job on the day of the accident was to follow a machine called a Bobcat and collect any debris that fell from it. The Bobcat was used to transport materials from the front to the back of the Premises. Zuniga was supposed to collect any debris and place it either into the Bobcat or in the dump truck that was parked in front of the Premises. Zuniga testified that his last recollection prior to the accident, was that the Bobcat was in the front yard.

Gabriel Garcia-Montejo, owner of NT Construction, testified at his deposition that Eaton had initially given him permission to park the dump truck in the driveway, but after causing damage to the driveway, Eaton no longer allowed the truck to be parked there. Garcia-Montejo was not on the Premises at the time of the accident.

Eaton testified that NT Construction did not bring the dump truck into the backyard because it had a fence with a small opening. Eaton further testified that she allowed the truck to be parked in her driveway overnight at one point and "to get it out first thing in the morning." (Defendant's Exhibit "E", Pg. 38-39). Eaton testified that she did not have any other conversations with NT Construction workers about the use of the driveway for work vehicles. Eaton also testified that she was inside the house at the time of the accident and therefore, did not see it occur.

From the evidence proffered, it is unclear to what extent Eaton had control over the manner of the work performed at the Premises. This is an issue of fact and credibility that cannot be resolved on a motion for summary judgment. (*Walker v Ryder Truck Rental and Leasing*, 206 AD3d 1036, 1038 [2d Dept 2022]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Id.* at 1038; *Spilman v Matyas*, 212 AD3d 859, 860 [2d Dept 2023]).

The Court finds that Moving Defendants have not established prima facie entitlement to summary judgment as a matter of law. Since Moving Defendants have failed to meet their initial burden, the Court need not consider the opposition. (*Ciuffo v. Testa*, 118 AD3d 737 [2d Dept. 2014]).

Accordingly, it is hereby

ORDERED, that Moving Defendants' motion for summary judgment is DENIED; and it is further

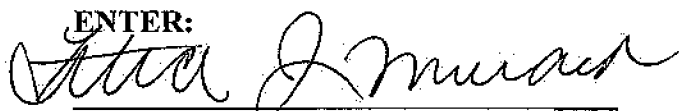
ORDERED, that the parties are directed to appear as previously scheduled in the DCM Trial Part for trial scheduling on April 3, 2024.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this Court.

Dated: April 1, 2024
Mineola, New York

ENTER:



HON. FELICE J. MURACA, A. J. S. C.

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Apr 08 2024

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