

Blackburne v Town of Hempstead
2024 NY Slip Op 35714(U)
March 13, 2024
Supreme Court, Nassau County
Docket Number: Index No. 619954/2023
Judge: Thomas Rademaker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
COUNTY OF NASSAU: TRIAL/IAS PART12**

PRESENT:

Hon. Thomas Rademaker, J.S.C.

NYGEL BLACKBURNE,

Plaintiff,

-against-

**TOWN OF HEMPSTEAD, COUNTY OF
NASSAU, HENRY HINTON and WINIFRED
O'LEARY,**

Defendant(s).

Index No:619954/2023

Motion Seq. No.: 001; 002

Motion Submitted: 3/12/2024

DECISION AND ORDER

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including e-filed documents/exhibits numbered 8 through and including 32, this motion is decided as follows:

The Defendant, Winifred O'Leary("Moving Defendant") move the Court by Notice of Motion for an Order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing the complaint and cross-claims against them on the ground that they are not liable for the accident which gave rise to the action at bar (mot seq 001).

The Plaintiff opposes the Defendant's summary judgment motion and moves for an Order pursuant to Section 602 of the CPLR 1) consolidating Action No. 1 bearing index number 619954/2023 and Action No. 2 bearing index number 600286/2024 and/or issuing an Order for Joint

Trial of these actions; and 2) An order amending the caption of the within matter as presented herein.

The Moving Defendant owns a property known as 584 Irene Street, South Hempstead, New York, a single family home, which is owner occupied ("subject premises"). The complaint provides that on September 23, 2022, the Plaintiff sustained "severe and permanent injuries" when a tree, located at the subject premises, fell and struck the Plaintiff's motor vehicle, with the Plaintiff inside. The Moving Defendant denies that the tree was located on the subject premises, and seeks summary judgment on the theory that she is not tortiously responsible for the maintenance of the tree in question, since she contends the tree was not located on the subject premises, and therefore was not her responsibility.

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 *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez 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 *Winegrad 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]). 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]).

Whether a dangerous condition exists on real property so as to create liability upon the part of the landowner depends upon the particular facts and circumstances of each case and is generally a question of fact for the jury. (*Fasano v. Green-Wood Cemetery*, 21 AD 3d 446 [2nd Dept 2005]). To impose liability upon a defendant, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it. (*Rubin v. Cryder House*, 39 AD3d 840 [2nd Dept, 20070; *Penn v. Fleet Bank* 12 AD3d 584 [2nd Dept 2004]). A defendant has constructive notice of a defect when the defect is visible and apparent and has existed for a sufficient length of time before the accident that it could have been discovered and corrected. (*Gordon v. American Museum of Natural History*, 68 NY2d 836[1986]; *Larsen v. Congregation B’Nai Jehurun of Staten Island*, 29 AD3d 643 [2nd Dept 2006]).

The burden for a defendant who moves for summary judgment is to make a "prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." (*Birnbaum v. New York Racing Ass, Inc.*, 57 A.D.3d 598, 598 ([d Dep't 2008]). Only if the initial threshold is satisfied, may the Court examine the plaintiff's opposition. Failure in the movant argument to meet the threshold requires the denial of the motion. (See *Winearad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]).

A motion for summary judgment is premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence, more speculation will not suffice. (See *Bevens v. Tarrant Mfg., Co, Inc.* 48 AD3d 939 [3rd Dept 2008]) “A

party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.” (Elliot v. County of Nassau, 53 AD3d 561, 563 [2nd Dept 2008] quoting Amico v Melville Volunteer Fire Co., Inc. 39 AD3d 784, 785 [2nd Dept 2007], citing Urcan v. Cocarelli, 234 AD2d 537 [2nd Dept 1996])

CPLR 3212[F] provides that “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

Upon a careful review of the affidavit in support of the Moving Defendants’ motion, and the annexed exhibits thereto, and in the exercise of its discretion, the Court finds that granting summary judgment in favor of the Moving parties prior to the completion of the discovery process, including but not necessarily limited to depositions, is premature and accordingly it is hereby

ORDERED, that motion sequence 001 is **DENIED** without prejudice to the parties’ right to file for summary judgment after the completion of discovery.

With respect to the Plaintiff’s cross-motion, it is noted that the matter involves the same accident, but notes that the accident occurred on property located between 583 Irene Street and 1071 Weber Avenue, South Hempstead, N.Y. The consolidation would streamline the processing of this matter, as Action 2 involves another private property owner who the Plaintiff contends was allegedly responsible for the fallen tree, while action 1 includes the remaining municipal defendants.

The Plaintiff only recently requested a preliminary conference in Action 2 and the matters cannot be considered at the same stage of litigation. However, at some future date, when both

matters may be considered at a similar stage in the litigation process, consolidation may indeed be of benefit to the parties in both actions.

At this juncture, motion sequence 002 is **DENIED**, but without prejudice to re-file after the parties in Action 2 complete a preliminary conference order.

This constitutes the Decision and Order of the Court.

Dated: March 13, 2024
Mineola, N.Y.



Hon. Thomas Rademaker, J. S. C.

ENTERED

Mar 20 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE