

**Cardillo v D'Amico**

2006 NY Slip Op 30679(U)

September 18, 2006

Supreme Court, Queens County

Docket Number: 28455/04

Judge: David Elliot

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE DAVID ELLIOT IAS PART 10  
JUSTICE

----- Index  
LUCIA CARDILLO, No. 28455/04

Plaintiff, Motion  
-against- Date August 1, 2006

SALVATORE D'AMICO, ANTONINA Motion  
D'AMICO, SAL D'AMICO Cal. Nos. 1 & 2  
CONSTRUCTION, INC. AND  
THE CITY OF NEW YORK,

Defendants.  
-----

PAPERS  
NUMBERED

Notice of Motion-Aff.-Exhib.....	1-8
Answering Affid-Exhib.....	9-14
Reply.....	15-18
Sur-Reply.....	19-24
Stipulation.....	25

This order disposes of two motions, numbered 1 and 2, which appeared on the Part 10 motion calendar of August 1, 2006.

Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained on September 23, 2003 due to a trip and fall which occurred

on the sidewalk adjacent to premises located at 90-37 52<sup>nd</sup> Avenue, in the County of Queens, City and State of New York.

Plaintiff moves for an order pursuant to CPLR § 3403 granting a special preference and directing the calendar clerk to place this action on a list of preferred cases on the ground that plaintiff has reached the age of seventy years.

Defendant Sal D'Amico Construction, Inc. (Construction) moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the action in its favor.

On August 1, 2006, the parties, except defendant Construction which did not appear, executed a stipulation consenting to the granting of a trial preference to plaintiff and resolving certain discovery issues.

#### Contentions of the Parties

Defendant Construction asserts that the individual defendants Salvatore D'Amico (S. D'Amico) and his wife Antonia D'Amico (A. D'Amico) purchased the subject premises in April 2003. They owned it in their individual capacities but never lived there. There was a one-family house on the property at that time. In February 2004, the corporate defendant Construction began demolition of the house and the construction of two houses on the property - a four family house and a three family house. Defendant Construction did not perform any work on the premises until after plaintiff's accident. It obtained a permit for the work from defendant The City of New York (City) in February 2004. Defendant Construction submits the affidavit of defendant S. D'Amico, who is also its principal officer, in support of such assertions.

In opposition to the motion, defendants S. D'Amico and A. D'Amico assert that plaintiff testified at her deposition that there was wood around the property located to the right of where she fell. On the accident date, she did not notice anything written on the wood nor did she see an address for the property at that time. Defendant S. D'Amico testified that he put plywood at his premises in February, 2004 before

he started the demolition of the premises. Plaintiff's testimony conflicts with defendant S. D'Amico's affidavit concerning the time when the plywood was erected at the premises. It is argued that a question arises as to whether plaintiff actually fell in front of the D'Amico premises especially as she didn't see any address, signs or other postings thereat.

Plaintiff opposes the motion for summary judgment and annexes the sworn affidavit of Joseph McPherran, a previously identified witness to the subject accident. He states that prior to plaintiff's trip and fall, he had observed construction work going on at the subject premises. Specifically, he observed construction equipment, such as Bobcats, being driven on the subject sidewalk prior to plaintiff's accident. Such affidavit squarely contradicts defendant S. D'Amico's account as to the commencement of construction work at the subject premises.

In reply, defendant Construction contends that the affidavit of Mr. McPherran does not contradict the affidavit of defendant S. D'Amico which states that he acted solely in his individual capacity as the owner of the premises at all times prior to the issuance of the demolition permit in February, 2004. Any work done prior thereto would have been by the homeowners in their individual capacity. Mr. McPherran also stated that there was a gap in time of several weeks when he observed work being done, the breaking of a portion of a front fence to clean and maintain the lawn, and the alleged accident. There would have been actual or constructive notice of the alleged defect on the part of the homeowners. Defendant Construction sharply contests Mr. McPherran's affidavit which is contradicted by defendant S. D'Amico's and plaintiff's testimony.

Plaintiffs and defendants S. D'Amico and A. D'Amico submit sur-replies contending that defendant Construction has raised a new argument which is not supported by any evidence. Defendant S. D'Amico never made any statements in his affidavit that he was acting in his individual capacity prior to February, 2004, including when he cleaned up his front lawn. Defendant Construction refers to his deposition testimony but has not submitted a full transcript or relevant pages thereof. The sur-replies contain the deposition testimony of Mr. McPherran which was taken after

the instant motion was submitted. He testified that he saw workers with a truck and a sign with defendant Construction's name on them at the premises when work was being performed there prior to plaintiff's accident. He observed heavy equipment going over the sidewalk and tearing it up. Although served with the motions, defendant City has not submitted any papers in opposition thereto.

#### Decision of the Court

The motion by plaintiff is granted there being no opposition and in accord with the stipulation dated August 1, 2006. A special preference pursuant to CPLR 3403 based upon plaintiff's having reached the age of seventy years is granted provided that a copy of this order with notice of entry is served upon all defendants and filed upon the Clerk of the Trial Term Support Office forthwith. The court notes that this matter is presently scheduled in the Trial Scheduling Part on October 18, 2006.

The motion by defendant Construction is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, defendant Construction initially established its entitlement to judgment as a matter of law by submitting evidence to show that it did not perform any work at the subject premises prior to receiving its demolition permit in February, 2004. However, in opposition to the motion, the other parties have raised material issues of fact which warrant denial of the motion. The affidavit and deposition testimony of Mr. McPherran clearly show that trucks, equipment and workers of defendant Construction were present at the subject premises and were performing work thereat prior to plaintiff's accident. He specifically testified that such equipment traversed the sidewalk and

damaged it in the area where plaintiff fell. While defendant Construction refers to certain deposition testimony by defendant S. D'Amico, no full transcript of his testimony has been provided to the court on this motion.

Accordingly, the plaintiff's motion for a trial preference is granted there being no opposition and upon consent as set forth above.

The motion by defendant D'Amico Construction, Inc. for summary judgment is denied.

Dated: September 18, 2006

.....

**HON. DAVID ELLIOT**