Garcia v Ullmann
2015 NY Slip Op 31771(U)
September 15, 2015
Supreme Court, Suffolk County
Docket Number: 12-33091
Judge: Daniel Martin

SHORT FORM ORDER

INDEX No. 12-33091
CAL No. 14-01449OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 3-3-14 (#001)
MOTION DATE 1-6-15 (#002)
ADJ. DATE 3-31-15
Mot. Seq. # 001 - MG
002 - MD

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GUILLERMO GARCIA and AMALIA LIZETH PEREZ de GARCIA,

Plaintiffs,

- against -

EUGENE ULLMANN, LILLIAN ISOLA, and VINCENT ISOLA,

Defendants.

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Upon the following papers numbered 1 to 32 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10, 11-22 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 23-30 ; Replying Affidavits and supporting papers 31-32 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by the defendant Lillian Isola ("Lillian Isola") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against her is granted; and it is further

ORDERED that the motion by the defendants Eugene Ullman ("Ullman") and Vincent Isola ("Isola") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against them is denied.

This is an action for personal injuries which resulted from an accident involving a snow blower, which occurred on January 27, 2011 at the premises located at 11 Tuthill Lane, Remsenberg, Town of Southampton, County of Suffolk. Plaintiff Amalia Lizeth Perez de Garcia seeks damages for loss of services.

Defendant Lillian Isola now moves for summary judgement dismissing the complaint and all cross-claims. In support of the motion, she submits, *inter alia*, her attorney's affirmation, a copy of the pleadings, the transcripts of the depositions of defendants Lillian Isola, Eugene Ullman, and Vincent Isola. Defendants Ullman and Isola also now move for summary judgement dismissing the complaint and all cross-claims. In support of the motion, they submit, *inter alia*, their attorney's affirmation, a copy of the pleadings, the transcripts of the depositions of plaintiff, and of the defendants Lillian Isola, Ullman, and Isola. In opposition, plaintiffs have submitted their attorney's affirmation, six photographs and the affidavit of Guillermo Garcia, sworn to March 13, 2015.

Plaintiff testified that at the time of the accident he was working off and on doing landscaping. For four or five years, he worked for defendant Ullmann, including shoveling snow. He had never used a snowblower. On the day of the accident, he worked at the Ullmann house, then Ullmann told him to go to his brother-in-law's house and then his mother-in-law's house, where he was injured. About a foot of heavy snow fell that day. At Ullmann's house, he shoveled snow, while defendant Isola (whom he mistakenly thought was named "Ben") used the snowblower to clear the driveway. He never observed him clean the snowblower. He had helped clear snow at the mother-in-law's house previously but had always used a shovel. After they arrived at the mother-in-law's house, he started clearing with a shovel. Defendant Isola asked him if he wanted to use the snowblower. He said yes. They had no discussion about how to operate the machine. He was told to pull the handle so that it would walk. He could not remember if it was the right handle or the left handle. He never saw a brush used to clean out the snowblower, and he never saw the brush on the snowblower. He started to use the machine at the entrance to the garage and headed towards the outside of the driveway. He had his hand on the handle that moved the machine forward. He did not have his hand on the other handle because it was tied down with something like tape. He did not know what that handle did. The machine stopped throwing snow. He released the handle and it stopped moving. He did not know where the blades were located on the machine. He thought the blades had stopped moving. He put his hand in where the snow came out. He felt pain and a "grabbing" that hit him. He pulled his hand out and started to yell to "Ben", and showed him his injury. He gave him a rag to tie up his hand and took him to the hospital.

Defendant Lillian Isola testified that she was at home at 11 Tuthill Lane on the date of the accident. On that date she had not spoken to any of her children about coming over to remove snow. She did not see her son Vincent Isola drive up to her house that day because the garage hides her driveway. She never had any conversation with him with regard to the snow blower. The first she knew of the accident was when Vincent ran into the house saying that he needed white towels. She went

outside with the towels and saw the plaintiff was hurt and bleeding. She alleged that the plaintiff repeatedly yelled "estupido" and "me culpa." She did not speak to plaintiff.

Defendant Isola testified that the snowblower involved in the accident was his. On the day of the accident, plaintiff helped him to remove snow from the Ullmann property. Plaintiff shoveled, and he used the snowblower. It was a heavy wet snow, and he had to use the small brush that came with the machine to brush off the machine and clear out the chutes. There are two handles on the machine. If you squeeze down the right one, the machine moves forward. If you disengage the right handle, the machine will stop and all of the blades will stop. He testified that there was nothing holding down the right handle as the snowblower was being used. It took them an hour or two to clean the snow, after which they went to his brother's house in Quogue to clear the snow there. He used the snowblower there, plaintiff did not. When they finished there, they went to his mother's house to clear snow. They unloaded the snow blower, and he showed plaintiff all of the controls, because he had asked him if he wanted to use the machine. He showed plaintiff how to use the controls, right was the snow blades, left was to drive it forward and reverse. Plaintiff shook his head indicating that he understood him. There were safety decals on the snowblower. He spoke very little Spanish, so he and plaintiff communicated in English. Plaintiff then began to use the machine. He finished his first pass up the driveway. He started to make the turn and then stopped. That is when the accident occurred. It was heavy, wet snow and close to a foot high. He heard plaintiff yelling "estupido". He was holding his right hand with his left hand. He saw that plaintiff's right glove had been cut. When he went to turn off the machine, the blades were not moving. Plaintiff gestured to him that he had tried to clean the snow out. Isola then ran into the house to get towels.

Defendant Ullman testified that on the date of the accident he and the plaintiff cleared snow at his house. His brother-in-law Vincent Isola was living in a cottage on his property at that time, and he owned a snow blower. He himself had never used the snow blower and he could not recall if he ever saw defendant Isola using it. Plaintiff had done yard work for him for a few years. He recalled that it started snowing, and plaintiff came over and started shoveling his walkways. Isola and plaintiff brought the snowblower to his mother-in-law's house later that day.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Defendant Lillian Isola has established her prima facie right to summary judgment herein. It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). When a property owner moves for summary judgment in a premises liability action, it bears the burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective condition that caused the accident (*see* ***Sheehan v J.J. Stevens & Co., Inc.***, 39 AD3d 622, 833 NYS2d 237 [2d Dept 2007]; ***Solomon v Loszynski***, 21 AD3d 366, 800 NYS2d 46 [2d Dept 2005]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***McMahon v Gold***, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]). Defendant Lillian Isola has set forth facts showing that, at the time of the accident, she had not spoken to any of her children about coming over to remove snow; that she had not seen her son Vincent Isola drive up to her house because the garage hides her driveway; she never had any conversation with him with regard to the snow blower; and the first she knew of the accident was when Vincent ran into the house saying that he needed white towels. Thus, she had no knowledge of any potentially dangerous condition even existed prior to the accident. Therefore, this defendant is entitled to summary judgment dismissing the complaint and all cross-claims asserted against her. In opposition, plaintiffs failed to raise an issue of fact as to the liability of Lillian Isola.

Defendants Ullmann and Isola have failed to establish their entitlement to summary judgment dismissing the complaint. There can be more than one proximate cause of an accident, and it is generally left to the trier of fact to determine the issue of proximate cause in a negligence suit (***Theodorou v Perry***, 129 AD3d 1056, 12 NYS3d 247 [2d Dept 2015]; ***Velez v Mandato***, 129 AD3d 945, 12 NYS3d 172 [2d Dept 2015]). A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident (*see* ***Boulos v Lerner-Harrington***, 124 AD3d 709, 2 NYS3d 526; [2d Dept 2015]; ***Calderon–Scotti v Rosenstein***, 119 AD3d 722, 723, 989 NYS2d 514 [2d Dept 2014]; ***Pollack v Margolin***, 84 AD3d 1341, 1342, 924 NYS2d 282 [2d Dept 2011]). The testimony of defendant Vincent Isola raises an issue of fact as to whether the snowblower was negligently entrusted to plaintiff, as does plaintiff's contradictory testimony that he received almost no instruction as to how to properly operate the machine (*see* ***Cook v Schapiro***, 58 AD3d 664, 871 NYS2d 714 [2d Dept 2009]; ***Monette v Trummer***, 105 AD3d 1328, 964 NYS2d 34 [4th Dept 2013]; ***Byrne v Collins***, 77 AD3d 782, 910 NYS2d 449 [2d Dept 2010]).

To prove proximate causation, claimant must show that defendant's conduct "directly produces an event and without which the event would not have occurred" (***Giuffrida v Citibank Corp.***, 100 NY2d 72, 80, 760 NYS2d 397 [2003]; ***Gani v State***, 44 Misc3d 740, 988 NYS2d 411 [Ct.Cl.2014]). Here plaintiff alleges that one handle of the snowblower was tied down, which, if true, could have created the dangerous condition which lead to plaintiff's injuries, raising yet another issue of fact. The role of the

court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist (*see* ***Santiago v Joyce***, 127 AD3d 954, 7 NYS3d 403 [2d Dept 2015]; ***James v Albank***, 307 AD2d 1024, 763 NYS2d 838 [2d Dept 2003]; ***Dyckman v Barrett***, 187 AD2d 553, 590 NYS2d 224 [2d Dept.1992]). Since issues with regard to both fact and credibility have been raised by the parties, summary judgment must be denied.

Accordingly, the motion by defendants Vincent Isola and Eugene Ullman for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against them is denied.

Dated: SEPTEMBER 15, 2015

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**