Bunkoff v Faddegon's Nursery Inc.
2018 NY Slip Op 33667(U)
December 19, 2018
Supreme Court, Albany County
Docket Number: 900834-17
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JAMES BUNKOFF, DIANE BUNKOFF,
Plaintiffs,

-against-

FADDEGON'S NURSERY INC.,
Defendant.

DECISION/ORDER

Index No. 900834-17
RJI No. 01-17-125646

APPEARANCES:

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RYBA J.,

On September 21, 2015, plaintiffs purchased several large shrubs from a nursery owned and operated by defendant in the Town of Colonie. Following the purchase, defendant's employee, Gregory Greene, loaded the shrubs onto a wagon and transported them to the rear of plaintiffs' pick-up truck. A surveillance video of defendant's parking lot shows that as Greene began loading the shrubs into the bed of the pick-up truck, plaintiff James Bunkoff stood on the rear passenger tire of the truck and hoisted himself into the truck bed. The video does not clearly depict the events that ensued because the camera angle and time stamp displayed across the top of the video obstructs the view of the inside of the truck bed. However, the video does show that within seconds of stepping into the truck bed, Mr. Bunkoff fell from the passenger side of the truck onto the pavement. The video reveals that at the time of the fall, Greene was standing next

to the wagon of shrubs and plaintiff Diane Bunkoff was standing next to the open passenger door of the truck. Notably, neither Greene nor Mrs. Bunkoff can identify what caused Mr. Bunkoff to fall, and Mr. Bunkoff has no recollection of the incident at all.

Plaintiffs thereafter commenced this action seeking to recover damages based upon allegations that Greene was negligent in loading the shrubs into the truck bed, that defendant was negligent in failing to properly train its employees to safely load materials, and that defendant created a dangerous condition by "launching an instrumentality of harm". Following joinder of issue and discovery, defendant filed the present motion for summary judgment dismissing the complaint on the ground that plaintiffs are unable to identify the cause of Mr. Bunkoff's fall or establish that a dangerous condition existed. Plaintiffs oppose the motion.

Liability for personal injuries sustained as the result of a fall on property may not be imposed on a landowner absent evidence that a dangerous condition caused the injury and that the defendant either created the condition or had actual or constructive notice thereof (see, Oliviera v County of Broome, 5 AD3d 898, 899 [2004]). With regard to a claim for the alleged negligent training of an employee, it must be established that the employee was negligent and that the employer knew of the employee's propensity to engage in the negligent conduct (see, McCarthy v Mario Enterprises Inc., 163 AD3d 1135, 1137 [2018]). As the proponent of the motion for summary judgment, defendant has the initial burden to establish that liability cannot attach as a matter of law (see, McNally v Kiki Inc., 92 AD3d 1105, 1007 [2012]; Jones-Barnes v Congregation Agudat Achim, 12 AD3d 875 [2004], lv dismissed 4 NY3d 869 [2005]). Once that burden has been satisfied, the burden will then shift to the plaintiff to oppose the motion with sufficient admissible evidence to create a material issue of fact (see generally, Davis v Golub

Corp., 286 AD2d 821, 822 [2001]; Hedrick v Genesee Mgt., 246 AD2d 858, 860 [1998]).

In support of the summary judgment motion, defendant contends that dismissal is warranted because the evidence fails to establish the cause of Mr. Bunkoff's fall or that defendant's conduct in any way contributed thereto. Indeed, in a case such as this, "[a] plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action, since, in that instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (Boudreau–Grillo v Ramirez, 74 AD3d 1265, 1267 [2010] [internal quotation marks and citations omitted]; see, Smith v Maloney, 91 AD3d 1259, 1259 [2012]; Louman v Town of Greenburgh, 60 AD3d 915, 916 [2009]). Significantly, the evidence offered by defendant demonstrates that Mr. Bunkoff has no memory of the incident whatsoever and does not know what caused his fall. In addition, Mrs. Bunkoff's deposition testimony establishes that she did not witness the incident and does not know what caused her husband to fall.

Defendant also offers Greene's deposition testimony, which is the only evidence in the record describing the manner in which Mr. Bunkoff's fall occurred. Greene states when he loaded the first shrub into the bed of the pick-up truck, Mr. Bunkoff had not yet climbed into the truck. Greene further testified that as he placed a second shrub on the lowered tailgate of the truck, he observed Mr. Bunkoff standing in the bed of the pick-up truck. According to Greene, Mr. Bunkoff was leaning over to adjust the shrub and when he stood up, he "stumbled" or "side shuffled" to the left and "just pitched over the side" of the truck. Greene testified that neither he nor any of the shrubs came into contact with Mr. Bunkoff, that the truck did not move or shift as he was loading the shrubs, and that none of the shrubs had been dropped or tipped over at the time of the incident. Finally, the video of the incident does not clearly show Mr. Bunkoff as he stood

in the truck bed and does not provide insight as to the cause of the fall. In the Court's view, defendant has made a sufficient prima facie showing of entitlement to judgment as a matter of law by establishing that the cause of Mr. Bunkoff's fall cannot be determined without resorting to speculation (see, Pascucci v MPM Real Estate, LLC, 128 AD3d 1206, 1206 [2015]).

Inasmuch as defendant satisfied its initial burden on the motion, it is incumbent upon plaintiffs to oppose the motion with sufficient evidence to create an triable issue of fact. In opposition, plaintiffs contend that because Greene was in the process of loading shrubs into the back of the truck at the time of the incident, there remains the possibility that the shrubs were a tripping hazard that contributed to Mr. Bunkoff's fall. However, there is no evidence in the record to support the theory that either the presence of the shrubs or any conduct on Greene's part played any role in Mr. Bunkoff's fall. Under these circumstances, a jury would be required to speculate as to the cause of Mr. Bunkoff's fall. Given that plaintiffs' opposition to the motion is based on sheer speculation, the have failed to raise a material issue of fact sufficient to defeat the motion. Summary judgment in defendant's favor is therefore warranted (see, Pascucci v MPM Real Estate, LLC, 128 AD3d at 206 [2015]; Smith v Mahoney, 91 AD3d at 1259 [2012]; Dalinedesroches v Lazard, 70 AD3d 626 [2010]; Martin v Wilson Mem. Hosp., 2 AD3d 938, 939 [2003]).

For the foregoing reasons, it is

ORDERED the motion is granted, without costs, and the complaint is dismissed.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for defendant. The original papers are being transferred to the Albany County Clerk. The signing of this Decision and Order shall not

constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

ENTER:

Dated: December 19, 2018

HON. CHRISTINA L. RYBA
Supreme Court Justice

12/28/18