

<b>Cucuzza v 734 Foch Blvd. Realty Corp.</b>
2019 NY Slip Op 33161(U)
October 8, 2019
Supreme Court, Kings County
Docket Number: 517253/2016
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
*Justice*

**PART 97**

**ANTHONY CUCUZZA,**

Plaintiff,

**INDEX NO. 517253/2016**

**SEQ. NO. 5**

- against -

**734 FOCH BLVD. REALTY CORP.,**

Defendant.

In accordance with CPLR 2219(a), the following papers were read on this motion by defendant.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3</u>
Replying Affidavits (Reply Memo) _____	<u>4</u>

This is a personal injury action commenced by plaintiff Anthony Cucuzza (plaintiff) via Summons and Complaint on September 29, 2016 to recover monetary damages for injuries allegedly sustained on April 27, 2015 during the course of his employment with non-party Gotham Steel Company (Gotham), who leased a warehouse owned by defendant 734 Foch Blvd. Realty Corp. (Foch or defendant) located at 1231 Rockaway Avenue, Brooklyn, New York.

Before the Court is a motion by Foch for an Order, pursuant to CPLR 3212, granting Foch summary judgment dismissing the Complaint. Plaintiff is in opposition to the motion. Foch submits a reply. Foch's previous motion for summary judgment dismissing the Complaint was denied, without prejudice, in a Decision and Order of this Court dated July 20, 2017

(motion sequence 1). Accordingly, Foch resubmits a summary judgment after further discovery, including an inspection of defendant's warehouse by plaintiff's counsel.

#### SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "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 Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). The court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated (see *Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (see *Zuckerman*, 49 NY2d at 562; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all

reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

#### DISCUSSION

As a threshold matter, the Court finds that defendant's resubmitted motion for summary judgement is timely. While, as plaintiff points out, it is true that the Note of Issue was filed on April 26, 2018, discovery remained outstanding at that time. Discovery continued to take place, including a site inspection of the warehouse, through November 2018. Accordingly, defendant's motion, filed on January 29, 2019, was made within a reasonable time after the completion of discovery and shall be considered on the merits.

Upon review of the papers and after oral argument before the Court, the Court finds that defendant has met its prima facie burden to demonstrate its entitlement to summary judgment dismissing the Complaint. On the date of the accident, plaintiff had been instructed by Gotham to move a flatbed truck, which was pre-loaded with steel beams. As plaintiff was securing steel beams to said flatbed truck owned by Gotham, he was struck by the heavy I-beams that became dislodged resulting in injuries. It is conceded by plaintiff that this flatbed truck was located approximately 50 feet away from the defendant's warehouse and that negligent fastening and/or loading of the steel beams onto the rear of the truck caused them to loosen and strike plaintiff. Specifically, defendant had no involvement in loading or moving the truck, nor did defendant control the area where the accident took place since it undisputedly occurred off of any Foch-owned property. Plaintiff fails to raise a triable issue of fact in opposition. Moreover, this Court finds plaintiff's argument that the incident was caused as a result of the

negligent manner the defendant permitted its premises to be used by Gotham, its tenant, to be unavailing and contrary to the proffered facts as to how the accident occurred herein.

CONCLUSION

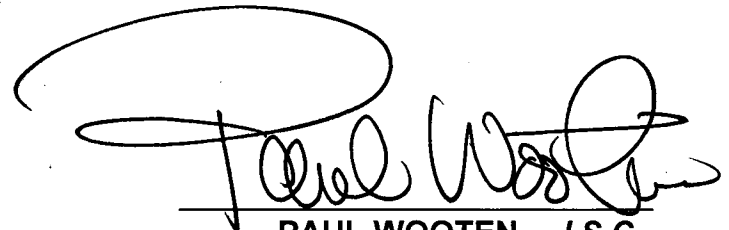
Accordingly it is hereby,

ORDERED that the motion by Foch for an Order, pursuant to CPLR 3212, granting Foch summary judgment dismissing the Complaint is granted, and the Complaint is dismissed as against Foch and this matter disposed; and it is further,

ORDERED that counsel for Foch shall serve a copy of this Order with Notice of Entry upon the plaintiff and the County Clerk who shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 10/8/19

  
PAUL WOOTEN J.S.C.

KINGS COUNTY CLERK  
FILED  
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