To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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GIANNI SCIPIONI,

Plaintiff,

-against-

LULZIM PRELVUKAJ and FLORENTINA PREVLVUKAJ,

Defendants.

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DECISION & ORDER
Index No. 57965/2018
Sequence No. 1

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 18-34, were read in connection with defendants' summary judgment motion.

Sanitation worker brought action against property owners to recover damages sustained when worker was picking up garbage cans in front of owners' home. Plaintiff was a Yonkers sanitation worker who claims that he was working picking up two garbage bags at defendants' home, one in each hand when he immediately felt a sharp pain in his lower right leg and then dropped the bags. He could feel blood pooling in his boot, and he saw a piece of aluminum with a jagged edge like a window frame cut up extending six to seven inches outside of the bag. Said injuries lead to plaintiff commencing this action against defendants for negligence.

NOW based upon the foregoing, the summary judgment motion is decided as follows:

It is well settled that "a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d

320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). The court's function on this motion for summary judgment is issue finding rather than issue determination (Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320,324). Further, CPLR 3212(b), specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

The elements of common law negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]).

Defendants, as the movants, bear the burden to demonstrate in the first instance entitlement to summary judgment. The deposition testimonies of plaintiff and defendant Lulzim Prelvukaj were offered in support of their motion for summary judgment. Defendants claim that the record is devoid of evidence proving that defendants maintained, operated and/or controlled the subject garbage bag/and or the item contained in the subject garbage bag that allegedly injured plaintiff. Further, defendants argue that the record reveals that they did not have actual or constructive notice of the alleged dangerous object in the subject garbage bag. Defendants cannot be liable for plaintiff's alleged injuries as the object would have been open and obvious and in any event, the hazard of sustaining this type of injury from the contents of a garbage bag, is inherent to plaintiff's duties as a sanitation worker. As such, defendants argue that plaintiff has failed to demonstrate that defendants were negligent in any way.

The Court of Appeals examined a similar case and found in relevant part, that whether presence of concrete construction debris in a garbage can was an ordinary and obvious hazard was a genuine issue of material fact (Vega v Restani Const. Corp., 18 NY3d 499 [2012]).

The Second Department has found that:

"Certainly, a small piece of glass constitutes ordinary garbage or a common item of trash, the disposal of which is a hazard inherent in the duty of a sanitation worker" (Wagner v Wody, 98 AD3d 965, 966, [2d Dept 2012]). Distinguishable is here it does not appear that the bag contained just a small piece of glass. While it is true that a worker who "confronts the ordinary

and obvious hazards of his [or her] employment, and has at his [or her] disposal the time ... to enable him [or her] to proceed safely ... may not hold others responsible if he [or she] elects to perform his [or her] job so incautiously as to injure himself [or herself]" (Wagner v Wody, 98 A.D.3d 965, 966, 951 N.Y.S.2d 59, 60 (2012). Here, it is unclear whether plaintiff was in fact not cautious.

In addition, defendants failed to eliminate triable issues of fact, including as to whether plaintiff performed his job appropriately by picking up two bags of garbage at once (if he in fact did); (Vega v. Restani Const. Corp., 18 NY3d 499, 506 [2012]).

As in the Court of Appeals Case in Vega, and the Second Department Case in Wagner defendants, who bore the initial burden of proof on their motion for summary judgment, failed to submit any evidence establishing that the disposal of materials of the type found in the defendants' garbage bag "would not constitute negligence". In addition, questions of fact exists as to whether the jagged aluminum piece of the type found in the defendants' garbage bag was an "ordinary and obvious" hazard as opposed to one about which the defendants should have provided a warning.

As defendants failed to make a prima facie showing of entitlement to summary judgment the court denies defendants' motion, regardless of the sufficiency of the opposing papers.

Accordingly, the question of the reasonableness of the parties' conduct is one of fact for a jury, which can consider the features of the discarded material in the garbage bag and all relevant surrounding circumstances.

The arguments by the parties not explicitly addressed herein have been reviewed and deemed to be devoid of merit. This constitutes the Decision and Order of the Court.

For the stated reasons, it is hereby:

ORDERED, that defendant's motion for summary judgment is **denied**; and it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part in Courtroom 1600 on December 10, , 2019, at 9:15AM, at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: November 1, 2019
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF