

To commence the statutory time period of 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
WESTCHESTER COUNTY**

-----X
CAROL VAN DYKEN,

Plaintiff,

-against-

**DECISION AND ORDER
Motion Seq. No. 001-003**

**ASIM S. ALI-RIZA and AWESOME LANDSCAPING
CORPORATION,**

INDEX NO. 24585/10

Defendants.

-----X
DIBELLA, J.

The following papers were read and considered on this motion by defendants for summary judgment dismissing the complaint, motion by plaintiff for partial summary judgment in her favor on the issue of liability and cross motion by defendants to preclude certain trial testimony:

- 1) Notice of Motion (seq. no. 001); Affirmation in Support of Marc D. Orloff, Esq.; Exhibits A-I; Affidavit in Support of Asim S. Ali-Riza;
- 2) Affirmation in Opposition of Gary Mitchel Gash, Esq.;
- 3) Affirmation in Reply of Marc D. Orloff, Esq.;
- 4) Notice of Motion (seq. no. 002); Affirmation in Support of Gary Mitchel Gash, Esq.; Exhibits 1-9; Affidavit of Vincent A. Ettari, P.E.;
- 5) Notice of Cross Motion (seq. no. 003); Affirmation in Opposition to Plaintiff's Motion and In Support of Cross Motion of Marc D. Orloff, Esq.; Exhibit A (Affidavit of Andrew R. Yarmus, P.E.);
- 6) Reply Affirmation and Affirmation in Opposition to Cross Motion of Gary Mitchel Gash, Esq.; and
- 7) Affirmation in Reply of Marc D. Orloff, Esq.

In this personal injury action, defendants moves for summary judgment dismissing the complaint (motion seq. 001), pursuant to CPLR 3212. In motion seq. 002, plaintiff moves for partial summary judgment in her favor on the issue of liability. Defendants cross-move to preclude certain trial evidence (motion seq. 003). The motions for summary

VAN DYKEN v. ALI-RIZA
INDEX NO. 24585/10

judgment are both denied and the cross motion for preclusion is denied without prejudice to renew before the trial judge.

This is an action to recover money damages for personal injuries which were allegedly sustained by plaintiff on October 20, 2007. Plaintiff alleges that she was struck and knocked to the ground by a swinging gate located upon a premises owned by defendant Asim S. Ali-Riza, which is located at 567 Main Street, Armonk, New York. Defendant Awesome Landscaping Corporation operates its business out of said premises. Plaintiff contends that defendants failed to maintain their premises in a reasonably safe manner, that they had allowed the gates to exist in a defective condition and that they had failed to warn plaintiff of the defective condition of the gates.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980). "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v. New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

In order for plaintiff to establish a *prima facie* case against defendants, she must

VAN DYKEN v. ALI-RIZA
INDEX NO. 24585/10

establish either that: (1) defendants caused or contributed to the creation of the allegedly dangerous condition which caused plaintiff's injuries; or (2) defendants had either actual or constructive notice of such dangerous condition, and had a reasonable opportunity to remediate the condition but failed to do so. *Williams v. KJAEL Corp.*, 40 AD3d 985 (2d Dep't 2007).

Defendants contend that they did not create the allegedly defective condition and had no notice prior to the date of the subject occurrence, of any such defect or dangerous condition with respect to the subject gates and that they had no duty or obligation to warn plaintiff of the condition which was open and obvious and not inherently dangerous.

Upon review of the parties' submissions, the motions for summary judgment must be denied, as there are issues of fact precluding the granting of summary judgment in either party's favor, including as to whether defendants were negligent and whether plaintiff was comparatively at fault. Neither party met its *prima facie* burden of establishing entitlement to judgment as a matter of law.

Moreover, both parties submit expert affidavits in support of their positions. The conflicting expert affidavits raise an issue of fact, as "the weight to be afforded the conflicting testimony of experts is a matter particularly within the province of the jury." *Gleeson-Casey v. Otis Elevator Co.*, 268 AD2d 406, 407 (2d Dep't 2000), quoting *Guzman v. Saks Fifth Ave. Corp.*, 141 AD2d 801 (2d Dep't 1988).

Defendants cross-move for an order precluding plaintiff and/or her expert witness from offering any evidence, during the trial of this matter, with respect to the Americans

VAN DYKEN v. ALI-RIZA
INDEX NO. 24585/10

with Disabilities Act (the "ADA").

The cross motion is denied without prejudice to renew before the trial court, prior to the commencement of the trial, as the issue of whether to preclude certain testimony at the trial is more properly determined by the trial court which will preside over the course of the trial.

Accordingly, it is

Ordered that defendants' motion for summary judgment (motion seq. 001) is denied; and it is further

Ordered that plaintiff's motion for partial summary judgment (motion seq. 002) is denied; and it is further

Ordered that defendants' cross motion to preclude certain testimony at the trial (motion seq. 003) is denied without prejudice to renew before the trial court; and it is further

Ordered that counsel are directed to appear for a settlement conference on August 26, 2013 at 9:30 AM before the Settlement Conference Part, Room 1600 of the Westchester County Courthouse.

This is the Decision and Order of the Court.

Dated: June 26, 2013
White Plains, New York


Hon. Robert DiBella, JSC

VAN DYKEN v. ALI-RIZA
INDEX NO. 24585/10

To: Law Office of Marc D. Orloff, P.C.
55 Main Street, PO Box 386
Goshen, NY 10924

Gary Mitchel Gash, Esq.
235 Main Street, 4th Floor
White Plains, NY 10601