

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

JOSE VENTURA and JUANA VENTURA,

TRIAL/IAS, PART 16
NASSAU COUNTY

Plaintiff(s),

MOTION DATE: 12/18/01

INDEX No.21698/98

-against-

MOTION SEQUENCE NO:4

CAL. NO.: 2000H6548

GROEN DIVISION/DOVER INDUSTRIES,
ALDO LOMBARDO and LOMBARDO & ASSOC.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4-7
Replying Affidavits.....	8,9
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, it is ordered that this motion by defendant Aldo Lombardo for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint and any and all cross-claims asserted against him is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Jose Ventura on August 11, 1997. At the time of the accident plaintiff was working as a cook for Hannelore Gourmet Foods, Ltd. ("Hannelore") located at 247 Broadway, Greenlawn, Huntington, and was boiling water in a machine to cook pasta. Specifically, plaintiff testified that as he was walking past the steam kettle, he felt a "bucket of water" come onto his legs.

Initially, plaintiffs commenced an action against Groen Division, the manufacturer of the kettle in question. Thereafter, plaintiffs brought an action against Aldo Lombardo, the architect who designed the kitchen.

In the complaint, plaintiff alleges, **inter alia**, that defendant Lombardo was negligent in designing the kitchen and

placing a Cooking Kettle Station in a high traffic area and in an unsafe area.

Mr. Lombardo does not dispute that he was retained by Hannelore to redesign the kitchen. He alleges, however, that he was hired by Hannelore for the sole purpose of providing them with architectural plans/drawings regarding a small and specific portion of the kitchen located at the subject premises. In particular, Lombardo claims that he was only involved in the movement/placement of a new oven and had no connection with any other appliances.

In support of his motion, defendant Lombardo asserts, that plaintiff was injured when a kettle of hot water spilled on him during his workday and there is no causal link between his architectural work and plaintiff's injuries.

Plaintiff opposes the motion claiming, **inter alia**, that issues of fact exist as to whether Lombardo was involved in the placement of the kettle and whether his negligence contributed to plaintiff's injuries. In a similar vein, Groen asserts that there is a material issue as to whether Mr. Lombardo's actions regarding the layout of the kitchen proximately caused plaintiff's injuries.

In **Derdarian v Felix Contr Co** (51 NY2d 308), the Court of Appeals stated at pages 314-315 as follows:

"The concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations (see, e.g., *Pagan v Goldberger*, 51 AD2d 508, 509 [Hopkins, Acting P.J.]; Prosser, *Law of Torts* [4th ed], §42, p 249; see, also, 1 Shearman & Redfield, *Negligence*, §35). This is, in part, because the concept stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct (e.g., *Ventricelli v Kinney System Rent A Car*, 45 NY2d 950, 952; *Palsgraf v Long Is. R. R. Co.*, 248 NY 339, 352 [Andrews, J., dissenting]). Depending upon the nature of the case, a variety of factors may be relevant in assessing legal cause. Given the unique nature of the inquiry in each case, it is for the finder of fact to determine legal cause, once the court has been satisfied that a prima facie case has been established (citations omitted)."

In order to establish a **prima facie** case of negligence, a "plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury". (**Boltax v Joy Day Camp**, 67 NY2d 617, 619, quoting **Derdarian v Felix Contr. Corp.**, *supra*). Plaintiff need not establish, however, that the exact manner in which the accident happened, or

the extent of injuries, was foreseeable (**Derdiarian v Felix v Contr. Corp.**, *supra*, at p. 315, citing Restatement, Torts2d, §345, subd 2).


Further, since "questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve" (**Derdiarian v Felix Contr. Corp.**, *supra*).

It is equally well settled that summary judgment may be granted only when it is clear that no triable issue of fact exists (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324). When seeking summary judgment, the movant bears the burden to establish by competent and admissible evidence a **prima facie** entitlement to judgment as a matter of law (**Winegrad v New York University Medical Center**, 64 NY2d 851, 853; **Zuckerman v City of N.Y.**, 49 NY2d 557, 562; **Republic National Bank of New York v Zito**, 280 AD2d 657). A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (**Ayotte v Gervasio**, 81 NY2d 1062, 1063; **Rentz v Modell**, 262 AD2d 545). Further, on a summary judgment motion, the court's role is one of issue finding, not issue determination (**Kriz v Schum**, 75 NY2d 25). It is also not the court's function to resolve issues of credibility (**Ferrente v American Lung Association**, 90 NY2d 623).

Applying these principles to the case at bar, this court finds that a question of fact exists as to whether any negligence on the part of Lombardo could be considered the proximate cause of plaintiff's injuries. This question should be resolved by a trier of fact.

In view of the foregoing, Lombardo's motion for summary judgment is denied.

Dated: JAN 30 2002



J.S.C.

ENTERED

FEB 05 2002

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**