

**SUPREME COURT OF THE STATE OF NEW YORK**  
*Appellate Division, Fourth Judicial Department*

**374**

**CA 19-01746**

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

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NATIONWIDE AGRIBUSINESS INSURANCE COMPANY,  
AS SUBROGEE OF FRANJO FARMS, LUCIAN SACHELI,  
ET AL., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KYLE A. HEATH, EMMA J. GARRETT,  
DEFENDANTS-RESPONDENTS,  
JACK D. HENDERSON, DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.

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LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL),  
FOR DEFENDANT-APPELLANT.

LAW OFFICES OF STEVEN L. SMITH, P.C., SWARTHMORE, PENNSYLVANIA (STEVEN  
L. SMITH, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL),  
AND RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER, FOR PLAINTIFF-  
RESPONDENT.

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Appeal from an amended order of the Supreme Court, Yates County  
(Jason L. Cook, A.J.), entered March 12, 2019. The amended order  
denied the motion of defendant Jack D. Henderson for summary judgment  
dismissing the complaint and all cross claims against him.

It is hereby ORDERED that the amended order so appealed from is  
unanimously affirmed without costs.

Memorandum: After a home that defendant Kyle A. Heath was  
renting was damaged by fire, plaintiff insurer paid the homeowner on  
an insurance policy and then commenced this action against the four  
individuals who were at the residence on the night of the fire,  
alleging that the fire was started "as a direct result of the careless  
and improper use and disposal of smoking materials and/or candles."  
Jack D. Henderson (defendant) moved for summary judgment dismissing  
the complaint and all cross claims against him. We conclude that  
Supreme Court properly denied that motion.

Contrary to defendant's contention, he failed to meet his initial  
burden of establishing that he did not cause the fire. " 'On a motion  
for summary judgment, . . . self-serving statements of an interested  
party which refer to matters exclusively within that party's knowledge  
create an issue of credibility which should not be decided by the  
court but should be left for the trier of facts' . . . Indeed, '[i]f  
everything or anything had to be believed in court simply because

there is no witness to contradict it, the administration of justice would be a pitiable affair' " (*Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1438 [4th Dept 2018]; see *Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015]).

Here, although defendant testified at his deposition that he properly disposed of his ashes and cigarettes by placing them in a metal bucket and thus could not be the cause of a fire that seemingly started in the hollow area of the table on which the bucket was kept, the deposition testimony of other witnesses establishes that no one else who was present that night could recall how defendant disposed of his cigarettes. Moreover, at least one of the witnesses testified that defendant was alone on the deck after everyone else went to bed, and it appears that the fire started on the deck. As in *Mills*, "plaintiff is not in a position to refute [defendant's] claims [that he did not unsafely dispose of his cigarettes on the porch], and a jury could disbelieve those claims even though they are uncontroverted" (*Mills*, 163 AD3d at 1438). Inasmuch as defendant failed to establish his prima facie entitlement to judgment as a matter of law, the court properly denied his motion regardless of the sufficiency of the opposition papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Based on our determination, we do not address defendant's remaining contentions.

Entered: October 2, 2020

Mark W. Bennett  
Clerk of the Court