

Anand v Kapoor

2007 NY Slip Op 34463(U)

May 7, 2007

Supreme Court, Nassau County

Docket Number: 15942/05

Judge: Joseph DeMaro

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

----- TRIAL/IAS, PART 3
NASSAU COUNTY

AZAD ANAND and NUTAN ANAND,

Plaintiffs,

MOTION DATE:
April 10, 2007
INDEX No. 15942/05

-against-

SEQUENCE No. 1, 2

ANOOP KAPOOR,

Defendant.

The following papers read on this motion:

- Notice of Motion and Supporting Papers
- Notice of Cross-Motion and Supporting Papers
- Reply Affirmation and Affirmation in Opposition
- Reply Affirmation in Support of Cross-Motion

This is a motion by defendant, Anoop Kapoor, to dismiss this negligence action, on the grounds that defendant was not negligent and that plaintiff assumed the risk of his injury.

Plaintiff, Azad Anand, cross-moves for judgment in his favor on issues of liability.

The parties and an eyewitness, a friend of plaintiff and defendant, Balram Verma, were playing a game of golf, on October 19, 2002, at the Dix Hills Park Golf Club. The accident happened

on the first hole. Plaintiff eventually was struck in the left eye by a golf ball hit by the defendant.

Plaintiff testified at a deposition.

He testified that his ball after the second stroke was in the middle of a fairway (p. 20), which was 80-100 yards wide (p. 21). The defendant's ball was on the left side of the fairway (p. 24, lines 14-18). It was a little into the rough (pgs. 24-25).

After the second stroke the three golfers walked for a time together, then each went to their own ball (pgs. 26-28).

Plaintiff walked to his ball on the fairway; he then looked to his right for Verma (p. 30).

Verma's ball was 10-15 yards ahead of his (p. 31); as he turned toward defendant he was struck in the face (p. 31). He was trying to look for defendant but was unable to place him (p. 44); defendant was not in front of him (p. 35).

In discussing a photo arranged and taken on behalf of plaintiffs (p. 81), questions were asked of plaintiff again about defendant's position at time of the occurrence. Plaintiff testified that he was "15-20 feet" (p. 83, line 21-23) in front of defendant at the time of occurrence. This, he recounted from his recollection after being hit.

At page 81, the photo was described. The photo, together with plaintiff's testimony, is critical. Plaintiff places the persons staged in the photo to represent the position of the threesome of golfers on October 19, 2002 (p. 81-84).

Defendant is 15-20' behind plaintiff (p. 83); the angle suggested in the photo is just under 90 degree (Exhibit E, on motion; Exhibit A, at deposition).

Defendant testified at his deposition that he, plaintiff and Verna were playing golf together at the time of the incident.

That there came a time when he approached the ball for the stroke that struck plaintiff (p. 12). It was on the left side 5-6' inside the rough, 50-60 yards to the pin (p. 12). Plaintiff's ball was on the right side of the fairway, 10-15 yards further toward the green than defendant's ball (p. 13, lines 6-16). 30-40 yards separated defendant's ball from plaintiff's and Verma's was another 10 yards to the right (50 yards from defendant) (p. 14 lines 7-12).

Defendant asserted that (p. 15, line 20), "Well, I left Dr. Anand and Mr. Verma standing behind in the fairway behind me after I had taken my second shot, and that was the last time that I observed him (Mr. Anand). Then I walked up to my ball on the left side of the fairway."

Defendant did not know where plaintiff or Balram Verma were standing when he hit the ball that hit plaintiff. He didn't know where they were when he took the previous stroke. He then stated (p. 17, line 3-4) "they were standing behind and to the right". Plaintiff was near his ball when he was struck (p. 19).

At page 30, line 25 through page 34 line 3, the questioning involved imaginary lines and degrees from perpendiculars. Defendant was asked to draw an imaginary line from his ball,

perpendicular to the fairway and to position the plaintiff in relation to the line.

He stated (p. 31, lines 9-14):

A. "He was very close, or a little bit beyond that perpendicular line. He had moved down the fairway, beyond that perpendicular line, towards the green and he was maybe 10 to 20 degrees, or 20 degrees or so from that line, but way to the right where I was.

Q. (Line 15) When you say he moved "toward the green" is this an assumption on your part or something that you actually saw?

A. (Line 18) This is when he was hit by the ball I realized that he had moved in the front." Defendant did not yell "fore" prior to the stroke (p. 38, lines 8-10).

Defendant testified that when he hit his second ball the other two golfers were behind on the right side (p. 40 line 20-23). That he "topped" the second ball and it went 15, 20 yards to the left (p. 41, lines 2-4. At that point the other two were to the right and behind him (p. 40-41, line 11).

Line 16: Q. "When you approached your ball and you looked to the green to see how far it was from you, was there anyone ahead of you between your ball and the green? (p. 41. lines 19-22)

Line 23: A. No"

After hitting the ball it went sharply to the right at a low trajectory (p. 42). He saw plaintiff and yelled but the ball struck him. Plaintiff was ahead of his position; this was first time defendant saw plaintiff ahead of him (p. 42).

Verma testified at a deposition that plaintiff was 10 yards behind him and defendant another 10 yards back (p. 36, lines 17-20); further that he saw defendant set up and walked in front of him on the right side (p. 37).

He didn't realize defendant could "shank" that far to the side; he thought he was safe (38 line 3-4).

Balram Verma testified that the distance between defendant's ball and plaintiff's ball was 20', that there was an angle of 20 degrees between defendant's ball and plaintiff's ball horizontally (pages 8-11). "Almost straight lines all three balls" (p. 11, lines 20-21).

While the angle testimony is confusing, it demonstrates the basis of Verma's conclusion as to his safety.

The law concerning persons hit by golf balls generally favors the player hitting the ball; this is a nuance of assumption of risk doctrines.

In cases where the ball has left the course and hit a motorist Rinaldo v. McGovern, 78 NY2d 729 or a homeowner, Nussbaum v. Lacopo, 27 NY2d 311, judgment has been rendered in favor of defendant. Also, where an errant ball has left the playing area of one hole and struck a golfer or another, Jenks v. McGranaghan, 30 NY2d 475, Trauman v. City of New York, 208 Misc. 252, judgment again, has favored defendant, cf. Rose v. Morris, 97 Ga. App. 764.

The plaintiff in Johnston v. Blanchard, 301 N.Y. 599, affirming 276 AD2d 839, helped defendant find his ball in the rough and was hit while walking through the rough to the pin. There, the

Court found that plaintiff left a place of safety to help defendant find the ball and was thereafter struck when defendant, without warning, played the recovered ball.

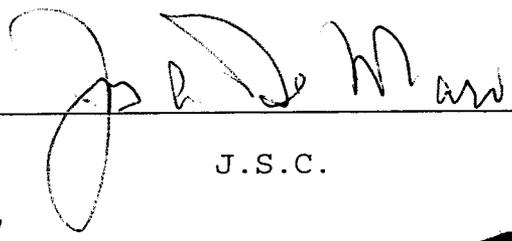
Here, while defendant's position as to plaintiff was less than 90 degrees (see, Rabinowitz v. Roland Stafford Golf School, 157 Misc.2d 458), it appears uncontradicted that when defendant approached his ball in the rough, his ball was furthest from the pin. That as such, would be expected to play first, (see affidavit, plaintiff, paragraph 7). That when defendant took his approach, plaintiff and Verma were behind and to his right, at a significant angle from the pin. That without taking account of defendant's whereabouts, plaintiff left a place of safety behind defendant to look for his ball. The golf ball that hit plaintiff was an errant ball, hit under circumstances where no other golfer was in the intended line of flight, neither at the time defendant approached the ball nor at the time of the swing, was any other golfer in the foreseeable zone of danger.

This was a terrible accident with terrible consequences, but the result of a known, accepted risk, for the game of golf.

It is a relatively rare situation, considering the effect of this accident and considering the millions of rounds of golf played. It is a part of inherence and not negligence, (Morgan v. State, 90 NY2d 471, 488).

Accordingly, summary judgment is granted to defendant dismissing plaintiff's complaint and plaintiff's cross motion for judgment in their favor on issues of liability, is denied.

This constitutes the Decision and Order of the Court.



J.S.C.

Dated: May 7, 2007

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