

Jahier v Jahier

2006 NY Slip Op 30057(U)

December 20, 2006

Supreme Court, Suffolk County

Docket Number: 0018021/2003

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 03-18021
CAL. No. 05-02770-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4/18/06
ADJ. DATE 5/30/06
Mot. Seq. # 002 - MD

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JOHN JAHIER,	:	TASSAN PUGATCH & NIKOLIS	
	:	Attorneys for Plaintiff	
Plaintiff,	:	1205 Franklin Avenue	
	:	Garden City, New York 11530	
- against -	:		
	:	DEVITT SPELLMAN BARRETT, LLP	
LOUIS JAHIER and EDITH JAHIER,	:	Attorneys for Defendants	
	:	50 Route 111	
Defendants.	:	Smithtown, New York 11787	
-----X			

Upon the following papers numbered 1 to 34 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 24 - 27; Replying Affidavits and supporting papers 28 - 34; Other _____: (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants, Louis Jahier and Edith Jahier, for an order pursuant to CPLR 3212 granting them summary judgment dismissing the plaintiff's complaint against them is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, John Jahier, on June 10, 2002 as a result of hitting his head on the bottom of the in-ground backyard swimming pool, at the home of his grandparents at 497 Woodbury Road, Cold Spring Harbor, County of Suffolk, New York.

Defendants now move for summary judgment on the basis that plaintiff, an experienced swimmer, assumed the risk of hitting his head on the bottom of the swimming pool by the manner in which he dove into the swimming pool. Defendants also assert that an independent contractor was engaged to install the swimming pool and as such they are not liable for the negligence, if there was any, of the independent contractor in the performance of his duty. They further argue that they were not on notice of any defective condition pertaining to the swimming pool or diving board and their usage. In support of the motion, defendants submit the pleadings, the affidavit of defendant Louis Jahier, the affidavit of H. Roy Jaffe, the deposition transcript of plaintiff and nonparty witnesses Scott Robey and Drew Wright, photographs depicting the situs of the accident, and a copy of the installation contract, dated September 30, 1961, between defendants and independent contractor Algeria.

Jahier v Jahier
Index No 03-18021
Page 2

Plaintiff opposes defendants' motion on the ground that defendants breached their duty to plaintiff by failing to maintain the pool in a reasonably safe condition. Plaintiff also asserts that defendants' pool was designed and constructed in violation of the industry standards determined by the National Swimming Pool Institute (hereinafter "NSPI"). He further asserts that he did not assume the risk of hitting his head on the bottom of the swimming pool because he had no knowledge of nor did he comprehend the fact that defendants' pool was negligently designed and construed in violation of the NSPI industry standards. Plaintiff submits the affidavit of Denise Bekacrt, a licensed architect.

By his personal affidavit Louis Jahier stated that he and his wife, Edith Jahier, own the subject premises, which they purchased in 1952. He stated that in 1961, he contracted with Algeria, the preeminent pool installer in the Huntington area at that time, to install a 20- by 40-foot in-ground pool with a maximum depth of 8 feet. Mr. Jahier then stated that he and his wife settled on the style of pool commonly referred to as a "Lazy L," and the 10-foot diving board and diving stand were included in the package sold to them. He indicated that during the 40 years that the pool and diving board have been in their backyard, both have been used on hundreds of occasions and they never once received any complaints regarding the length, width or depth of the pool. Mr. Jahier avers that his grandson's accident is the first and only incident to occur involving the pool. He also stated that his grandson and his friends have used the pool several times over the years without incident or complaint and that his grandson even kept a bathing suit at their house for his use in the pool. Mr. Jahier indicated that the pool has remained in its same structural condition since its installation in 1961 by Algeria and that Thomas Algeria, the owner of Algeria, recommended the design, dimensions and depth of the pool, as well as warranted that all work would be completed in a competent and workmanlike manner.

In his affidavit, H. Roy Jaffe indicated that he is a professional engineer licensed in the state of New York and has over 35 years of experience engineering and designing residential and commercial swimming pools throughout Long Island and the state of New York. Mr. Jaffe also indicated that he examined the subject swimming pool and is fully familiar with the standards and requirements of swimming pool construction and design. He stated that the Town of Huntington does not have any statutory or regulatory construction requirements regarding the length, width, depth, configuration or signage of outdoor swimming pools. Mr. Jaffe explained that Section 87-75¹ and Article XI of Chapter 87 of the Town Code of Huntington address only the construction materials, drawings and plans for submission, water disposal, fences, and size and location of lot accommodating the pool, but not depth, width and length requirements. He then explained that the New York State Building Code does not have any width, depth, length, configuration or signage requirements regarding the installation of outdoor residential swimming pools or regulations about diving boards. Mr. Jaffe further opined that the in-ground outdoor swimming pool and diving board of defendants were not constructed or maintained in derogation of either the Huntington Town Code or the New York State Building Code.

Plaintiff, John Jahier, testified at his examination before trial that at the time of his accident he was a 17-year-old senior at Huntington High School. Mr. Jahier stated that he learned to swim at a very

¹ Town Code of Huntington § 87-75 states in pertinent part:

"[i]t shall be unlawful to construct, maintain, install or enlarge any outdoor water pool in any residential zone in the Town of Huntington except in compliance with all of the provisions of Article [XI of the Town Code]."

Jahier v Jahier
Index No. 03-18021
Page 3

young age, by age 13 he classified himself as a fairly good swimmer, and at the time of the accident he also classified himself as an intermediate-level diver. He explained that he had been using his grandparents' swimming pool ever since he was a young child and had brought many of his friends to swim in the pool throughout the years without any incident. Mr. Jahier testified that on the day of the accident he and two friends, Scott Robey and Drew Wright, decided to go swimming in his grandparents' pool. Mr. Jahier indicated that prior to the accident the boys were performing flips off the diving board, as well as jackknives and cannonballs while attempting to grab an inner tube that was floating in the deep end of the pool. He then stated that he usually dove into the pool at an angle of 45 to 60 degrees and at the time of the incident he dove head first into the deep end of the pool from the diving board with his arms extended in front of him. Mr. Jahier then explained that as he entered the water, his hands hit the bottom of the pool—the concrete slope—from the deep end, flew away from him, causing his arms to fold up underneath him, and the middle of the top of his head to strike the concrete bottom of the pool, resulting in quadriplegia. He testified that he had never injured himself diving into the pool prior to this incident nor was he aware of anyone being injured in his grandparents' pool prior to his injury. Mr. Jahier further testified that he did not read the warning signs located on the back of the diving board and that it is "common knowledge that if you hit a stationary object you are going to get hurt."

Nonparty witness Drew Wright testified at his examination before trial, in pertinent part, that the boys had been diving and swimming rotations, which included performing flips, cannonballs and pencil dives from the diving board. Mr. Wright stated that either Mr. Robey or plaintiff placed the black plastic inner tube in the center of the deep end of the pool and the boys began sitting in the inner tube after diving into the water. He explained that prior to the accident he observed plaintiff performing flips and cannonballs while jumping into the pool from the diving board and either side of the pool. Mr. Wright testified that immediately prior to the accident he witnessed plaintiff walking toward the diving board to prepare for his jump but did not witness the actual dive itself. He stated that he was alerted to the fact that something had gone wrong with plaintiff's dive when he heard Mr. Robey yell something happened to Mr. Jahier while jumping into the pool, whereupon Mr. Wright turned in time to see plaintiff's head pop up and noticed the blood flowing down from the top right side of his head. Mr. Wright testified that he immediately jumped back into the pool to assist Mr. Robey in keeping Mr. Jahier afloat while bringing him to the steps at the shallow end of the pool. He stated that plaintiff's body was in the center of the deep end of the pool when he emerged and that plaintiff indicated to them that "he was done." Mr. Wright stated that immediately after the accident Mr. Jahier had no bodily function and that Mr. Jahier's grandmother tried to comfort him while he and Mr. Robey kept Mr. Jahier floating in the pool until the EMS and police arrived. He further testified that he was also very good swimmer and that he, Mr. Robey, or Mr. Jahier were not doing anything reckless that would have foreseeably resulted in any of them being injured.

Nonparty witness Scott Robey at his examination before trial testified, in pertinent part, that Mr. Jahier's accident happened approximately 15 to 30 minutes after they began swimming and diving into the pool. He then stated that immediately prior to plaintiff's accident he observed Mr. Jahier get on the diving board and perform a regular, head-first, no rotation dive off the diving board, straight out into the water, but he did not see plaintiff's entrance into the water. Mr. Robey explained that he realized something happened when Mr. Jahier did not immediately emerge from the water after entering the pool and that when he saw plaintiff resurface in the center of the deep end of the pool, Mr. Jahier's arms were

Jahier v Jahier
Index No. 03-18021
Page 4

flailing; then his head broke the surface and there was blood flowing down from the top of his head. He testified that he immediately jumped into the pool because plaintiff was sinking to the bottom of the pool and he grabbed Mr. Jahier by his waist to keep him from sinking. Mr. Robey then testified that Mr. Wright jumped in to help him keep Mr. Jahier afloat and the two of them brought plaintiff to the steps in the shallow end of the pool. He stated that he placed a towel to Mr. Jahier's head to help control the bleeding while Mr. Wright called 911 and plaintiff's grandmother comforted him. Mr. Robey also stated that they kept plaintiff in the pool until the ambulance arrived and that Mr. Jahier stated to them that he had messed up and was going to be paralyzed. He further testified that although he considers himself a good swimmer and knows to use his hands to direct his body when he performs a head-first dive, his feet have hit and he has scraped his chest on the bottom of pools while diving from the diving board.

Denise A. Bekaert indicated in her affidavit that she is a licensed architect in the state of New York and that she inspected the subject swimming pool and diving board to ascertain whether they were in a dangerous condition and contributed to Mr. Jahier's injuries. Ms. Bekaert stated that she also interviewed plaintiff, Mr. Robey and Mr. Wright, as well as conducted detailed measurements of the pool, including the height, width, length, depth dimensions, degrees of slope of the pool floor and plumb of the pools walls. She then stated that she consulted with the NSPI standards for residential swimming pools, architectural graphic standards and swimming pool diving accidents and human factor analyses of case studies data. Ms. Bekaert stated that the pool at defendants' home was improperly configured for diving and failed to meet the minimum requirements for safe diving set forth by the NSPI. She explained that NSPI requires the water depth directly below the diving board to be 6 feet 10 inches and the water depth of defendants' swimming pool was 5 feet 2 inches, approximately 1 foot 8 inches less than the NSPI minimum requirement. Ms. Bekaert also explained that the slope of the floor was less than the NSPI requirement. The NSPI requires a maximum slope at a distance of 15 feet 6 inches from the end of the diving board to be 33 degrees, and defendants' was 41 degrees. Ms. Bekaert averred that the slope and configuration of the pool's bottom and wall did not comply with acceptable standards for providing a functionally safe diving depth and caused the subject swimming pool to be hazardous. She further opined that the deviations from the NSPI requirements were a substantial factor in causing plaintiff's accident and resulting injuries. Ms. Bekaert also stated that the 10-foot diving board that was located at the deep end of defendants' swimming pool was improper for the pool because it extended over the swimming pool by at least 2 feet 3 inches. This extension caused the deep area of the swimming pool to be inadequate to accommodate safe diving from the board because it resulted in the pool being too narrow and under NSPI standards; no diving board would have been allowed for this type of swimming pool.

On a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v NYU Medical Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the

Jahier v Jahier
Index No. 05-18021
Page 5

facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see, *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

It is fundamental that in order for a plaintiff to recover against a defendant in a negligence action, the plaintiff must prove that the defendant owed the plaintiff a duty and the breach of that duty resulted in the injuries sustained by the plaintiff (*Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]; *Atkins v Glen Falls City Sch. Dist.*, 53 NY2d 325, 441 NYS2d 644 [1981]; *Kimbar v Estis*, 1 NY2d 399, 153 NYS2d 197 [1956]). The owner of a private residential swimming pool has a duty to exercise reasonable care under the circumstances, including the likelihood of injury of others, the seriousness of such injuries and the burden of avoiding the risk in maintaining his property in a reasonable safe manner (*Price v Kowalski*, 258 AD2d 637, 685 NYS2d 800 [1999]; *Mesick v State of New York*, 118 AD2d 214, 504 NYS2d 279 [1986]; see also, *Kush v City of Buffalo*, 59 NY2d 26, 462 NYS2d 831 [1983]), as well as ensuring that the conditions are as safe as they appear to be (*Turcotte v Fell, supra*). However, a defendant will be relieved of liability where a superseding cause interrupts the causal chain of connection between the injuries and the defendant's negligence, including that the plaintiff's own conduct may act to absolve the defendant of liability (*Mesick v State of New York, supra*; see also, *Boltax v Joy Day Camp*, 67 NY2d 617, 499 NYS2d 660 [1986]), but the plaintiff's conduct must be of such a nature as to replace the defendant's negligence as the legal cause of the accident (*Kriz v Schum*, 75 NY2d 25, 550 NYS2d 584 [1989]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Pari v City of Kingston*, 41 NY2d 553, 394 NYS2d 161 [1977]). Therefore, if the risks of the activity are fully comprehended or perfectly obvious to the plaintiff, then the plaintiff by engaging in such activity has fully consented to the known, foreseeable risk inherent in the activity (*Marcano v City of New York*, 99 NY2d 548, 754 NYS2d 200 [2002]; *Morgan v State of New York*, 90 NY2d 471, 662 NYS2d 421 [1997]; *Maddox v City of New York*, 66 NY2d 270, 495 NYS2d [1985]; see also, Restatement [Second] of Torts § 496A, comment c; Restatement [Second] of Torts § 896 [2]). Furthermore, CPLR 1411 does not completely bar a plaintiff's right to recovery; instead it provides that the amount of the plaintiff's damages shall be diminished in the proportion which the culpable conduct attributable to plaintiff, including contributory negligence and assumption of the risk, bears to the culpable conduct which caused the damages (see also, *Whalen v Kawasaki Motors Corp.*, 92 NY2d 288, 608 NYS2d 435 [1998]; *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463 [1998]; *Arbegast v Bd. of Educ.*, 65 NY2d 161, 490 NYS2d 751 [1985]; *Taylor v Vill. of Ilion*, 265 AD2d 841, 695 NYS2d 467 [1999]).

In addition, although a landowner is under a duty to maintain its property in a reasonably safe condition (*McCord v Olympia & York Maiden Lane Company*, 8 AD3d 634, 779 NYS2d 542 [2004]; *Backiel v Citibank, N.A.*, 299 AD2d 504, 751 NYS2d 492 [2002]; *Zelonka v Town of Schodack* 245 AD2d 795, 665 NYS2d 757 [1998]), a landowner is not responsible for the negligent acts of an independent contractor where the landowner has no right to control the manner in which the work is performed (*Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149 [1993]; *Mercado v Slope Associates*, 246 AD2d 581, 667 NYS2d 289 [1998]; *Goodman v 78 West 47th Street Corp.*, 253 AD2d 384, 677 NYS2d 116 [1998]). Moreover, the fact that the landowner has the right to reenter and control the premises by itself, absent a showing that the defective condition was visible and longstanding, does not raise an issue of fact regarding constructive notice (*Fischer v Battery Building Maintenance Co.*, 135 AD2d 378, 521 NYS2d 678 [1987]; *Joyce v Manhattan College*, 1 AD3d 202, 767 NYS2d 216 [2003]).

Jahier v Jahier
Index No 03-18021
Page 6

Further, to constitute constructive notice, it must be shown that the defect was visible and existed for a sufficient amount of time prior to the accident for defendants to discover and remedy the situation (*see, Gordon v Am. Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Bernard v Waldbaums, Inc.*, 232 AD2d 596, 648 NYS2d 700 [1996]; *Hendricks v 691 Eighth Ave. Corp.*, 226 AD2d 192, 640 NYS2d 525 [1996]). However, the fact that defendants may have had a general awareness that a defective condition existed is not legally sufficient to constitute notice of the particular condition that caused plaintiff's injuries (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *Kennedy v Wegmans Food Markets, Inc.*, 90 NY2d 923, 664 NYS2d 259 [1997]; *Bernard v Waldbaum, Inc.*, *supra*).

Here, the defendants have made a prima facie showing of their entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, *supra*; *Winegrad v NYU Medical Ctr.*, *supra*; *Andre v Pomeroy*, *supra*). Defendants have submitted evidence to establish that they did not have actual or constructive notice of any defective condition regarding their swimming pool, since the swimming pool had been used for over 40 years without incident. No evidence has been submitted to refute defendants' testimony that they were unaware of the dangerous condition presented due to the design of their swimming pool, which was installed by an independent contractor without any direction or supervision by defendants (*see, Middleton v Dovale*, 4 AD3d 345, 771 NYS2d 538 [2003]; *Backiel v Citibank*, *supra*; *Mercado v Slope Associates*, *supra*; *Trujillo v Riverbay Corp.*, 153 AD2d 793, 545 NYS2d 2 [1989]). Additionally, nonparty witness Mr. Wright testified at his deposition that he did not readily observe any problems with the pool; in fact, he testified that he complimented plaintiff on how well the pool and its surrounding area were maintained. Consequently, it cannot be said that defendants breached their duty to maintain their premises in a reasonably safe manner nor were they put on notice of any defective condition or created the hazardous condition that resulted in plaintiff's injuries (*Rosenberg v Equit. Life Assur. Socy.*, 79 NY2d 663, 584 NYS2d 765 [1992]; *Backiel v Citibank*, *supra*; *cf., Juarez v Wavecrest Mgt. Team, Ltd.*, 88 NY2d 628, 649 NYS2d 115 [1996]; *Laecca v New York Univ.*, 7 AD3d 415, 777 NYS2d 433 [2004]). Furthermore, defendants have presented evidence by an expert stating that their swimming pool was not in derogation of the Huntington Town Code or the New York State Building Code at the time of Mr. Jahier's accident (*Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494 [1994]; *Palermo v Roman Catholic Diocese*, 20 AD3d 516, 799 NYS2d 248 [2005]).

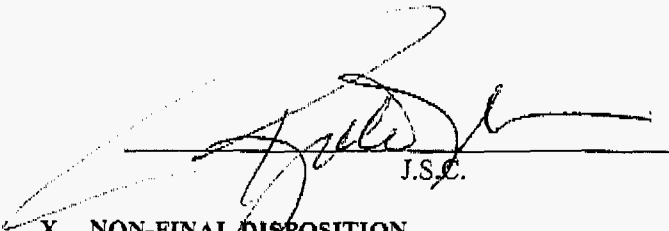
However, in opposition, plaintiff has raised sufficient questions of fact to warrant denial of defendants' motion for summary judgment (*Turcotte v Fell*, *supra*; *Zuckerman v City of New York*, *supra*; *Arbegast v Bd. of Educ.*, *supra*; *Fernandes v Lawrence*, 10 AD3d 382, 780 NYS2d 774 [2004]). Plaintiff has established that he dove from the diving board, which was located in deep end of the pool, straight out toward the deep end of the pool, when he struck his head on the bottom of the concrete floor of the pool. Although defendants allege that plaintiff's conduct was reckless because he was attempting to dive through the inner tube when his injuries occurred, all evidence submitted establishes that the inner tube was floating in the center of the deep end of the pool and that plaintiff simply dove into the pool without intending to dive through the inner tube. Therefore, it cannot be said that plaintiff, who swam in defendants' pool since he was a young child, acted reckless or failed to use common sense when he dove head first into the pool (*Howard v Poseidon Pools, Inc.*, 72 NY2d 972, 534 NYS2d 360 [1988]; *Finguerra v Conn.*, 25 AD2d 463, 676 NYS2d 154 [1998]; *Silverman v Zebersky*, 174 AD2d 615, 571 NYS2d 317 [1991]; *Scianguola v Mancuso*, 204 AD2d 708, 612 NYS2d 645 [1994]). Additionally, plaintiff has submitted an expert's affidavit, which attests to the fact that defendants'

Jahier v Jahier
Index No. 03-18021
Page 7

swimming pool was improperly configured for safe diving and failed to meet the minimum safety requirements for safe diving under industry standards, and this improper configuration constituted a substantial factor in causing plaintiff's injuries (*see generally, Trimarco v Klein*, 56 NY2d 98, 451 NYS2d 52 [1982]; *Price v Kowalski, supra*; Restatement [Second] of Torts § 295A, comments *a, b; cf., Diaz v New York Downtown Hosp.*, 99 NY2d 542, 754 NYS2d 195 [2002]; *Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494 [1994]. Thus, there is nothing in the record to establish that plaintiff, who was an experienced swimmer and diver, and based on his observations, dove into water that was not deep enough for the safe completion of his proposed dive or was behaving so recklessly as to absolve defendants of any liability (*see, Kriz v Schum, supra; Boltox v Joy Day Camp, supra; Testaverde v Lyman*, 17 AD3d 574, 793 NYS2d 182 [2005]; *Lionarons v Gen. Elec. Co.*, 215 AD2d 851, 626 NYS2d 321 [1995]).

Accordingly, defendants' motion for summary judgment dismissing the plaintiff's complaint is denied.

Dated: DEC 20 2006



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION