

McNally v Fire Is. Ferry Co., Inc.

2006 NY Slip Op 30637(U)

February 15, 2006

Supreme Court, Suffolk County

Docket Number: 01-12123

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-20-05 (#001)
12-1-05 (#002)
ADJ. DATE 12-1-05
Mot. Seq. #001 - MG
002 - XMotD

-----X
CATHERINE McNALLY, :
 :
 Plaintiff, :
 :
 - against - :
 :
 FIRE ISLAND FERRY COMPANY, INC and :
 TOWN OF ISLIP, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 34 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16-30; Answering Affidavits and supporting papers 31; Replying Affidavits and supporting papers 32-34; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant, Fire Island Ferries, Inc, s/h/a Fire Island Ferry Company, Inc. ("Fire Island Ferry"), for an order granting summary judgment dismissing the complaint of plaintiff, Catherine McNally, and all cross claims against is granted, and it is

ORDERED that this cross motion by defendant Town of Islip ("Town") for an order granting summary judgment dismissing plaintiff's complaint and all cross claims against it and granting summary judgment on its cross claims against defendant Fire Island Ferry is decided as follows.

Plaintiff instituted this action to recover damages allegedly suffered as a result of tripping and falling on May 27, 2000, on a dock owned and operated by the defendant Town. On that date, plaintiff took a ferry owned and operated by Fire Island Ferry to Fire Island, New York and spent the day with her family on her niece's boat. Plaintiff was returning from her niece's boat at approximately 5:15 p.m.

when she allegedly tripped and fell. Plaintiff instituted this action, alleging that she tripped and fell on a nail that was protruding from the dock's wooden surface and that defendant's were negligent in causing the dangerous condition or in failing to adequately maintain the dock. The defendants each answered the plaintiff's complaint, and filed cross-claims against each other for indemnification and contribution.

Defendant Fire Island Ferry now moves to dismiss plaintiff's complaint and the cross claims asserted by defendant Town, arguing that it did not own the dock in question and did not have any affirmative duty to maintain the dock and therefore it owed no duty to plaintiff which could have been breached. In addition, Fire Island Ferry argues the defect alleged was trivial in nature and in any event, the defendant did not have any notice that such a defect existed. Defendant Town also moves for summary judgment dismissing plaintiff's complaint and all cross claims against it and joins in the co-defendant's arguments that the defect was trivial in nature and that the Town did not create nor have notice of the alleged dangerous condition. Defendant Town also moves for summary judgment on its cross claims against Fire Island Ferry for indemnification, arguing that the ferry captain who piloted the boat which plaintiff took to and from Fire Island that day assumed an obligation to maintain the dock in question. Further, the Town argues that the plaintiff fell as she was on her way to board the vessel operated by Fire Island Ferry and therefore the injury occurred in connection with the operation of the ferry and Fire Island Ferry was required to indemnify the town under the terms of the contract executed between the two defendants.

Plaintiff opposes the motions by defendants, arguing that Fire Island Ferry undertook a duty to safely transport persons to and from Fire Island, which necessarily includes loading and unloading passengers. Plaintiff argues she was in the process of boarding the ferry when she tripped on a nail protruding from the dock and that the ferry captain undertook an affirmative duty to bang down any nails he saw sticking up on the dock and therefore had notice of the existence of such a defect. In opposition to the Town's motion, plaintiff points to the testimony of Mr. Ackerson, the Town's beach and dock manager on the date of plaintiff's accident. Mr. Ackerson, plaintiff argues, confirmed that nails protruding from the deck was a constant problem and that he had received written complaints concerning this issue in the past. Finally, plaintiff contends that whether such a defect was trivial in nature is a question of fact for the jury.

It is fundamental that to recover damages in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and that a resulting injury was proximately caused by the breach (*see, Turcotte v Fell*, 68 NYS2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of negligence in a slip and fall action, the plaintiffs are required to show that the defendant created the condition which caused the accident or that it had actual or constructive notice of the condition (*see, Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [1995]; *Pirillo v Longwood Assocs.*, 179 AD2d 744, 579 NYS2d 120 [1992]). Liability is predicated only on a failure of defendant to remedy the danger after actual or constructive notice of the condition (*see, Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a defendant] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646, 647 [1986]; *Bykofsky v Waldbaum's Supermarkets, Inc.*, 210 AD2d 280, 619 NYS2d 760 [1994]).

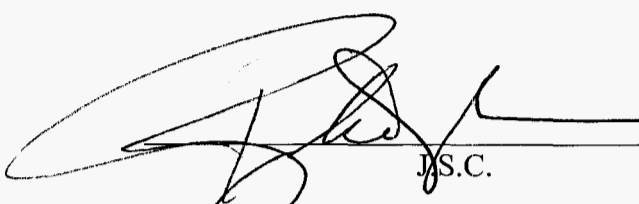
Turning to the case at bar, contrary to the argument of both plaintiff and defendant Town, no where in the deposition transcript does Fire Island Ferry Captain Hait state that he undertook a duty to maintain the dock in question or bang down any nails on the dock. Indeed, he specifically states he never had to make a repair to the dock and did not recall ever having hammered down a nail on the dock. Mr. Ackerson, the Dock and Beach Manager for the Town, also testified that he never saw someone from the Ferry bang down any nails on the dock. While Mr. Hait testified that he visually inspected the area where the boat docked to insure that it was safe to load and unload passengers, he did not see anything either before or after plaintiff fell which would indicate the dock was in an unsafe condition. Furthermore, the plain language of the contract indicates that the Ferry is only required to indemnify the Town in the event of some act or omission arising out of the Ferry's duties pursuant to the contract. No where in the contract does it state that the Ferry had a duty to maintain the dock in question. Moreover, the contract specifically prohibits Fire Island Ferry from making changes and alterations to the Town's docking facilities. Finally, it is clear from the deposition testimony of plaintiff as well as the ferry captain that the injury did not occur as plaintiff was boarding or disembarking the ferry, rather as she was walking or waiting on the dock owned and maintained by the Town. Therefore, based on the forgoing, the motion by Fire Island Ferry for summary judgment dismissing the plaintiff's complaint against it as well as any and all cross claims against it is granted.

In contrast, the defendant Town has not established that summary judgment should be granted dismissing the complaint against it. Clearly, the Town had an obligation to maintain the dock for it had an entire staff of people who had that responsibility as part of their job function. According to the deposition testimony of Mr. Ackerson, the dock and beach Manager, the dock masters and park attendants, under his direction, would bang down nails on a regular basis if a patron complained or if an inspection revealed the need. It was also the responsibility of his department to replace the nails if they continued to pop up after being nailed down. Moreover, the plaintiff has established that issues of fact exist concerning whether the town had notice of the alleged raised nail. Contrary to the Town's argument that it did not receive any actual or constructive notice of the alleged raised nail at issue, Mr. Ackerson testified that the raised nails were a constant problem, that he noticed raised nails during his daily inspections of the dock and that it was common for him to receive complaints about them. He also testified that park employees would need to hammer the nails down one to three days per week and on Saturdays and Sundays. While he did maintain a record of some of the complaints and subsequent nailings, the written records for the relevant time period are no longer in existence. Therefore, the court finds that because issues of fact exist as to whether the Town received notice of the alleged raised nail, lack of notice cannot serve as a basis for granting summary judgment dismissing plaintiff's complaint.

The Town also argues that the height of the alleged raised nail was trivial in nature and therefore not actionable. Courts have repeatedly held, however, that barring evidence that clearly demonstrates the trivial nature of the defect, "the issue of whether a dangerous or defective condition exists depends on the particular facts and circumstances of each case and is properly a question of fact for the jury" (*Riser v New York City Housing Authority*, 260 AD2d 564, 688 NYS2d 645, 646 [1999]; *see also Buckley v Sun and Surf Beach Club, Inc.*, 95 NY2d 914, 719 NYS2d 632 [2000]). The defendant Town has failed to produce evidence which conclusively disposes of this issue as a matter of law.

Therefore, consistent with the aforementioned, the cross motion by defendant Fire Island Ferry for an order granting it summary judgment dismissing plaintiff's complaint as well as the cross claims of defendant Town is granted. That part of the Town's cross motion seeking an order granting it summary judgment dismissing plaintiff's complaint is denied, that part of the Town's motion seeking an order granting summary judgment on its claims against Fire Island Ferry is denied and that part of the Town's motion seeking dismissal of all cross claims against it is granted as those claims are made moot by this order.

Dated: FEB 15 2006



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION