SHORT FORM ORDER

INDEX No. 04-21748
CAL. No. 06-01531-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 8/18/06
ADJ. DATE 10/20/06
Mot. Seq. # 002 - MG; CASEDISP

GERMAN MENDOZA, Plaintiff, - against - VILLAGE OF GREENPORT and THE TOWN OF SOUTHOLD, Defendants.	NICHOLS & CANE LLP Attorneys for Plaintiff 6800 Jericho Turnpike, Suite 120W Syosset, New York 11791 DEVITT SPELLMAN BARRETT, LLP Attorneys for Deft. Village of Greenport 50 Route 111 Smithtown, New York 11787

Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 23 - 27; Replying Affidavits and supporting papers 28 - 29; Other ____: (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Village of Greenport ("Village"), for an order pursuant to CPLR 3212, granting it summary judgment dismissing the plaintiff's complaint is granted.

Plaintiff, German Mendoza, commenced an action against the Village of Greenport and the Town of Southold ("Town") to recover damages for injuries he allegedly sustained on July 7, 2003 as a result of a trip and fall. The action was subsequently discontinued against defendant Town. Defendant Village now moves for summary judgment.

Plaintiff and his friends were playing full court, five on five basketball, at a public park known as Fifth Street Park or Herzog Park, Village of Greenport, Town of Southold, County of Suffolk, New York. Plaintiff was injured when his right foot became lodged in a depression and twisted while he was running to shoot the basketball into the hoop. Plaintiff fell forward, landing on his right shoulder and back, sustaining injuries.

Defendant Village now moves for summary judgment on the basis that plaintiff assumed the risk of being injured while participating in a sporting event. Defendant Village also contends that it did not

have a duty to warn or protect plaintiff against injuries resulting from the hole in the basketball court because it was open and obvious. In support, defendant submits the pleadings, plaintiff's 50-H hearing transcript, copies of the deposition transcript of plaintiff and defendant Village and photographs of the situs of the accident.

Plaintiff opposes the instant motion on the grounds that defendant Village created the dangerous condition as well as had actual notice of the condition and failed to take any corrective action to prevent plaintiff's injuries. Plaintiff also asserts that the hole and its dimensions were disguised thereby creating a trap-like nuisance. Plaintiff submits plaintiff's affidavit and an expert's affidavit.

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]). 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*, ***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 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]).

Fundamental to a plaintiff's recovery in a negligence action, plaintiff must establish that defendant owed plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see*, ***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]). It is also well established that participants in sporting or recreational activities are held to have consented to the risks inherently associated with engaging in such sporting or recreational events (***Turcotte v Fell***, *supra*; ***Paone v County of Suffolk***, 251 AD2d 563, 674 NYS2d 761 [1998]; ***Colucci v Nansen Park, Inc.***, 226 AD2d 336, 640 NYS2d 578 [1996]; *see also,* Prosser and Keaton, Torts §68, at 486-487 [5th ed]). The risks of the events include those that are apparent, known, reasonably foreseeable, as well as those associated with the construction of the playing field, which are open and obvious (***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Warren v Town of Hempstead***, 246 AD2d 536, 667 NYS2d 389 [1998]; ***McKey v City of New York***, 234 AD2d 114, 650 NYS2d 706 [1996]). 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]). However, the doctrine of assumption of the risk will not exculpate a landowner, who owes a duty of care to ensure that the conditions of the premises are as safe as they appear to be from liability for ordinary negligence in maintaining the playing field or if the risks are unassumed, concealed or increased (*see,* ***Siegel v City of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Benitez v New York City Bd of Educ.***, 73 NY2d 650,

543 NYS2d 29 [1989]; ***Russini v Mineola***, 184 AD2d 561, 584 NYS2d 622 [1992]; Restatement [Second] of Torts § 50, comment *b*).

Plaintiff testified that he had played basketball on the outdoor cement basketball court in Fifth Street Park, which is maintained by defendant Village on numerous occasions prior to his accident. Although plaintiff explained that usually he played on only half of the basketball court, on the side away from the water, he stated that at least once or twice he had played on the court's side closest to the water, where his injury occurred. Plaintiff further testified that prior to his injury he observed that the surface of the basketball court closest to the water had been patched with "blacktop" that was unraveling and there was a hole located in the ground where the "black stuff" was unraveling.

Based upon the foregoing, the defendant has met its prima facie burden entitling it to judgment as a matter of law (***Turcotte v Fell***, *supra*; ***Winegrad v NYU Medical Ctr***, *supra*). The plaintiff voluntarily chose to play basketball upon a surface which he knew to be faulty and in a defective state, thereby assuming the risks inherent in playing on the outdoor basketball court where he sustained his injuries, including those risks associated with the court's construction and any open and obvious conditions on the court (***Warren v Town of Hempstead***, *supra*; ***Totino v Nassau County Council of Boy Scouts***, 213 AD2d 710, 625 NYS2d 51 [1995]; ***Radwaner v USTA Nat'l Tennis Ctr., Inc.***, 189 AD2d 605, 592 NYS2d 307 [1993]). Notwithstanding the fact that the plaintiff's expert has opined that the use of a cold asphalt patch was an improper type of repair, which did not allow the asphalt to bond with the original concrete thereby creating a depression in the surface, the depression that was created was open and obvious to the plaintiff. Prior to the plaintiff's right foot becoming lodged in the hole in the court and twisting, resulting in tears to his patellar tendon and illiotibial band of the right knee, the plaintiff had been playing full court basketball for approximately 30 minutes and had gone under and in front of the basketball hoop closest to the water, where the depression was located, without incident. Therefore, it cannot be said that the plaintiff was not aware of the faulty condition or that he did not fully appreciate the risks associated with playing on the defective court (*see*, ***Maddox v City of New York***, *supra*). Moreover, since the injury-causing defect was not concealed from the plaintiff, it cannot be held that plaintiff's injury was due to a violation of the defendant's duty to exercise ordinary reasonable care to protect the plaintiff from any unassumed, concealed or unreasonably increased risks associated with playing basketball on an open basketball court (***Owen v R.J.S. Safety Equip.***, 79 NY2d 967, 582 NYS2d 998 [1992]; ***Benitez v New York City Bd of Educ.***, *supra*).

Accordingly, defendant Village's motion for summary judgment is granted.

Dated: MAR 05 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**