

<b>Ortiz v City of New York</b>
2007 NY Slip Op 31996(U)
July 5, 2007
Supreme Court, Queens County
Docket Number: 0028087/2004
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X  
ANTONIO ORTIZ, an infant, by his mother,  
and natural guardian, DIANA ORTIZ, and  
DIANA ORTIZ, individually,

Plaintiff(s),

- against -

Index  
Number: 28087/04

Motion  
Date: 06/19/07

THE CITY OF NEW YORK, THE NEW YORK CITY  
PARKS DEPARTMENT, THE NEW YORK CITY  
DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
NEW YORK CITY AGENCY PROPERTIES and  
WORKS LITTLE LEAGUE,

Motion  
Cal. Number: 12  
Motion Seq. No. 6

Defendant(s).

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The following papers numbered 1 to 11 read on this motion by  
plaintiffs to reargue.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-6
Affirmation in Opposition-Exhibits.....	7-9
Reply Affirmation-Service.....	10-11

Upon the foregoing papers it is ordered that the motion is  
decided as follows:

Motion by plaintiffs to reargue the order of this Court  
issued on January 29, 2007 granting the motion of Works and  
cross-motion of the City for summary judgment is granted. Upon  
reargument, the Court recalls and vacates that portion of its  
prior order which granted the City's cross-motion for summary  
judgment and substitutes the following order in its place and  
stead.

Cross-motion by the City for summary judgment is denied. The cross-motion is untimely, since plaintiff filed a Note of Issue on May 1, 2006 and the instant cross-motion was not served until January 12, 2007, more than four months after the 120-day period for making summary judgment motions (see CPLR 3212 [a]).

The City's explanation for its failure to make the instant cross-motion in a timely fashion - namely, that the City has such an enormous caseload that it "faces a significant challenge in attempting to make all summary judgment motions timely" - does not constitute good cause so as to allow the instant cross-motion on such ground.

This Court overlooked the fact that the cross-motion is not properly a cross-motion, since it does not seek relief against a moving party (see CPLR 2215). Therefore, this Court deems the notice of cross-motion a notice of motion. Consequently, since the City may not "piggyback" its untimely motion onto Works' timely motion, its motion, erroneously denominated a "cross-motion", must be denied as untimely (see Gaines v. Shell-Mar Foods, Inc., 21 AD 3d 986 [2<sup>nd</sup> Dept 2005]).

Since the City's motion is not properly a cross-motion, the exception set forth in Filannino v. Triborough Bridge and Tunnel Authority (34 AD 3d 280 [1<sup>st</sup> Dept 2006]), cited by this Court in its prior order, is inapplicable herein. The rationale for allowing an untimely cross-motion for summary judgment notwithstanding the absence of good cause where it seeks the identical relief sought by a timely motion is that the court, in deciding a timely motion, may search the record and grant summary judgment to any party even in the absence of a cross-motion (see id.). However, as the court in Filannino noted, the court's search of the record is limited to those issues that are the subject of the timely motion. Here, plaintiffs made no motion. Rather the timely motion was made by Works. Upon the authority of Gaines, this Court holds that the City's untimely motion may not be considered.

In all other respects, the Court adheres to its prior decision with respect to Works.

The risks assumed by voluntary participants in sporting events include those conditions associated with the construction of the playing field and any open and obvious conditions on it ( see Riquelme v. City of New York, 251 AD 2d 393 [2<sup>nd</sup> Dept 1998]; Reynolds v. Jefferson Valley Raquet Club, 238 AD 2d 493 [2<sup>nd</sup> Dept 1997]). The doctrine of assumption of risk applies to any readily observable condition or defect in the area where the sport was played (see Sanchez v. City of New York, 25 AD 3d 776 [2<sup>nd</sup> Dept

2006])). The backstop is a large and prominent structure dominating a baseball field, and it cannot be argued that it was not within the vision of plaintiff and was not open and obvious to him, especially since he had experience playing on that field. The concrete base of the backstop is approximately 2 to 2 ½ feet high.

Plaintiff's counsel asserts that this Court incorrectly stated that plaintiff attempted to catch a "fly ball behind the plate during a game," whereas he retrieved a ball that had rolled behind him during warmups. In the first instance, this Court made no such statement in its order, but rather stated that plaintiff "testified . . . that he was running to catch a ball when he tripped and fell, coming into contact with a concrete wall at the base of a wire mesh back stop behind home plate." Plaintiff testified that during the half-hour of practice before the game, he was behind home plate. He stated, "My uncle was hitting down to the ground and I was catching" (deposition p.21). He also said, "I was catching the ball on the left-hand side of my uncle . . . There was another ball coming to the right side. So it was rolling. I handed him the ball and jogged to the ball and tripped and fell" (p. 21). When asked, "When you fell, did you come into contact with something?" he answered, "The wall behind home plate." Whether plaintiff ran or "jogged" and whether he "caught" or "retrieved" a ball is of no significance. Counsel argues that plaintiff could not have assumed the risk since a baseball game was not being played at the time. This argument is without merit. Plaintiff was admittedly engaged in athletic activity associated with the Little League baseball game. Whether his accident occurred during the actual game or during pre-game practice has no bearing upon the issue of assumption of risk.

Although a player may not be held to have assumed the risk with respect to a dangerous condition over and above the usual dangers inherent in the sport (see Clark v. State of New York, 245 AD 2d 413 [2<sup>nd</sup> Dept 1997]), there was no evidence or showing that the concrete base was a defect or a dangerous condition. Counsel contends that the holding of this Court conflicts with cases surviving summary judgment which involved unpadded barriers and defective borders. In this regard, counsel cites Stackwick v. Young Men's Christian Association of Greater Rochester (242 AD 2d 878 [2<sup>nd</sup> Dept 1997]). In that case, the plaintiff was injured when he lost his balance while playing a game of basketball and struck a cement wall. The trial court granted defendant's motion for summary judgment and denied plaintiff's cross-motion for summary judgment on the issue of liability, finding that plaintiff assumed the risk. In reversing that decision, the Second Department held that the submissions raised an issue of fact as to whether the lack of padding on the wall created a risk

beyond that inherent in the sport. However, the submissions which raised an issue of fact in that case were an expert's affidavit opining that it was negligent to fail to pad the wall located only seven feet beyond the end of the court and evidence that several other YMCAs had padding.

Similarly, in Greenburg v. Peekskill City School District (255 AD 2d 487 [2<sup>nd</sup> Dept 1998]), the Second Department, found that there was an issue of fact as to whether the lack of padding on the wall and dimensions of the basketball court created a dangerous condition beyond the usual dangers inherent in the sport based upon the submission of an expert's opinion that the wall should have been padded because the out-of-bounds area beyond the endline was less than the minimum safety standard of three feet.

The other Second Department cases cited by plaintiffs' counsel (Chan v. City of Yonkers, 34 AD 3d 540 [2<sup>nd</sup> Dept 2006]; Clark v. State of New York, 245 AD 2d 413 [2<sup>nd</sup> Dept 1997]), are not instructive, since those cases do not reveal what submissions formed the basis of the Second Department's rulings that issues of fact were present precluding the granting of summary judgment. However, in Chan, there was also an issue of inadequate supervision and a question of fact existed as to whether plaintiff's gym teacher gave adequate safety instructions, given that the gym teacher had previously expressed concern as to the lack of padding on the gym walls.

In the instant matter, there was no expert showing that the concrete base of the back stop was improper or dangerous. The unrebutted deposition testimony indicates that there was no history of injuries caused by the concrete base of the backstop which could raise a question of fact as to whether it posed a danger beyond that normally associated with the sport. The only testimony as to the possible hazardous condition of the cement base was given by Little League coach Ronald Layer, who testified in his deposition that he thought that the concrete base looked a little bit too high. When asked, "When you say too big, meaning that it could be dangerous to some of the players who could come into contact with the concrete base?" he replied, "I thought so." Layer, however, is not an expert and merely gave his lay opinion. Moreover, he did not articulate in his own words that he thought the concrete base was dangerous because players could "come into contact" with it. These words were those of plaintiff's counsel. Layer articulates, in his own words, the basis of the concern he had about the concrete base prior to the accident when asked again whether he had made a mental note of the concrete base prior to plaintiff's accident. He stated that he had, and that his concern was that a ball pitched wildly could hit the cement and bounce back to the catcher. He did not envision that a player

would stoop to pick up a ball, trip and fall face first.

As to the proximity of the backstop to home plate, Layer stated that the distance was approximately eight to 10 feet and that on other fields that he played on it was about 10 to 12. However, he did not opine that this distance was improper or dangerous or ascribe any causal relationship between the distance of the backstop to home plate and the accident. His conjectural, lay opinion that he did not believe that plaintiff's injuries would have been as severe had the concrete base been smaller is of no probative value and does not raise an issue of fact.

Unlike the basketball cases cited by plaintiff, there was no showing, on this record, that the distance between home plate and the backstop was less than any standard minimum. Moreover, the facts of this case render the distance irrelevant, since plaintiff merely tripped while running to retrieve a ball that had rolled behind home plate and fell face first, striking the backstop. Also, there was no affidavit or deposition testimony of any expert opining that plaintiff's injuries would have been less severe had the cement wall been lower or not present.

Moreover, unlike the cases involving basketball players running into the wall beyond the end of the court, the record on the underlying motion and on the instant motion indicate that there has never been an incident involving a player being injured by contact with the cement base of the backstop of Loring Field and that the coaches never concerned themselves with the backstop.

Playing baseball or any other sport upon a playing field entails risks of injury. Players do trip and fall, and when they do so they fall upon the ground or some other physical aspect of the playing field resulting, sometimes, in injury. They need not take note of every rock, every surface, every structure of the field and appreciate every permutation of harm that might befall them in order to be considered to have assumed the risk. Unless the sporting activity is played in the vacuum of space, or the field is entirely encased in a protective cocoon, a player who assumes the risk of tripping and falling also assumes the companion risk that he will fall upon a hard surface or object and suffer injury. The risk of injury assumed by a player includes those open and visible conditions of the construction of the playing field(see Riquelme v. City of New York, 251 AD 2d 393, supra). It was the burden of plaintiffs to establish that the base of the backstop posed an unreasonable risk beyond those attending the game of baseball. They have failed to do so.

Accordingly, this Court adheres to that part of its order issued on January 29, 2007 which granted the motion by Works for summary judgment, dismissing the complaint and all cross-claims against it.

Dated: July 5, 2007

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KEVIN J. KERRIGAN, J.S.C.