Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice IA Part 14

MARIA BALAN, et al. x

- against -

JACOB BORENSTEIN, et al.

x

Index Number 24180 2005

Motion Date July 31, 2007

Motion Cal. Number 2

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion by defendants to dismiss the complaint pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-9

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiffs in this negligence action seek damages for personal injuries sustained by Maria Balan ("plaintiff") on April 22, 2003, when she tripped and fell on debris while walking through the backyard of premises located at 70-41 136th Street, in Queens (premises). Defendants move for dismissal of the complaint on the grounds that: they owed no duty to plaintiff because the dangers were obvious and plaintiff's fall was not foreseeable, and the plaintiff was a trespasser at the time of the accident. Defendants further contend that plaintiff was aware of or should have been aware of the risks associated with her behavior; they deny that the presence of the debris on their property resulting from the ongoing renovation project was inherently dangerous but assert that, if the condition was dangerous, plaintiff assumed any risk by acting without authority to do so.

Plaintiffs oppose the motion and argue that foreseeability of a potential party on a landowner's property is sufficient to impose a duty upon the landowner to warn of dangerous conditions exiting on the property, such as the cement, wood and other debris from the renovation project. Plaintiffs further argue that a property owner must use reasonable care to keep their property in a safe condition and the duty is not affected by plaintiff's status as a trespasser or plaintiff's conduct upon visiting defendants' property.

In support of the motion, defendants submitted the transcripts of the examination before trial testimony of plaintiff describing how she fell and that of Jacob Borenstein, an owner, who described the condition of the area where plaintiff fell and identified relevant photographs thereof. Plaintiff testified that, for three years prior to the accident, she had routinely entered defendants' driveway in order to get to the home of her friend, Malka; that the driveway served as a "shortcut" to Malka's house; that she (plaintiff) never asked for permission to use the driveway nor did she even know the owners of the premises and did not know of anyone else who used the driveway as a shortcut to access other homes.

On the date in question, plaintiff stated that she entered the backyard and observed that there was a wooden fence in place and steps leading from the backyard on 137th Street to the backyard on 136th Street where the accident occurred; she passed the garage and stepped into the driveway area, which ran the length of the house; the driveway contained "rocks, debris and broken cement" and there was no machinery on site, and no piles of dirt, stone or stacks of lumber; there were no warning signs posted, and there were no cones or ribbons blocking her way; while parts of the driveway were broken up, the part of the driveway which was closest to the public sidewalk and street was not broken up; she observed a hole in front of her and, as she attempted to step around it, her foot got caught on debris which caused her to fall; she was trying to walk around rocks when she fell; she tripped on what she believed to be a piece of wood. After falling, plaintiff testified, she got up and continued to her friend's house; she did not inform the homeowners that she had fallen.

Defendant Borenstein testified that the home had a driveway which was approximately 15 feet wide and 80 feet long and ran from the front of the house to the rear of the house where it meets the garage; it is a shared driveway with the neighboring house and a gate which separates defendants' home from the property which abuts it; the gate would often be kept tied but is not locked; the

only other people who permissibly use the gate were friends and family; he did not know plaintiff at the time of her fall and did not give Malka permission to use the "shortcut"; while he was friendly with Malka's family, he did not know if she or her family members used the shortcut in his backyard. Borenstein stated that he believes that he was on vacation on April 22, 2003; that there was construction going on in his driveway; they were digging out a rear entrance to the neighboring house which required digging and removing dirt to make a basement entrance and would include the replacing of the entire driveway; the renovation began on April 3, 2003; the first step was to install the basement steps which required that a container be placed in the driveway; there was a break in the project when his mother-in-law became ill, so the project was put on hold after the rear steps were completed; the driveway was broken up starting April 3, 2003 and the project was not completed until August or September, 2003; there was no wooden debris on the driveway prior to the project beginning; there was wood from concrete forms and, he believes, the concrete had been delivered on April 15th and was removed sometime thereafter; the driveway was made of concrete; he did not cordon off his driveway from the time that the project began, nor did he place any warning signs. Defendant Borenstein further testified that there were no laborers on the property on the date of plaintiff's fall; he had not received any violations regarding the condition of the property, and was unaware that someone had fallen on the premises; the work was generally performed in a neat fashion with the dirt that was dug up placed in the container; the container company had come to pick up the container but, due to its excessive weight, could not remove the container; when the container truck was in the driveway, it damaged the driveway due to the weight of the truck; the container was in the driveway from April 3rd to April 15th.

Finally, photographs depicting the general condition of the backyard/driveway were submitted.

An owner is entitled to summary judgment in a premises liability action where they establish that they owed no duty to the injured party (see e.g. Hinchey v White Willow, LLC, 42 AD3d 483 [2007]). Although a duty may be defined based upon the facts of the case, the court must determine, as a matter of law, whether any duty exists in the first instance (see Rivera v Nelson Realty, LLC., 7 NY3d 530 [2006]; Tagle v Jakob, 97 NY2d 165 [2001]).

The common law rule was that the nature of the duty owed by a landowner depended upon the status of the potential plaintiff on the land (citations omitted). This rule was modified

by the Court of Appeals' decision in Basso v Miller, (40 NY2d 233 [1976]), wherein it was held that there was a single standard of "reasonable care under the circumstances," regardless of the status of the injured party (Id.). Thus, the fact that the injured plaintiff in the instant case did not have permission to travel through defendants' backyard does not, alone, mean the defendant-owners had no duty to her. The question is whether it was foreseeable that someone might trespass and enter the backyard area and, if so, whether it would be reasonable to require a landowner to take steps to remedy or warn of the alleged dangerous condition under the circumstances (Basso v Miller, supra).

The general rule is that a landowner has no duty to warn or otherwise protect a plaintiff from a condition that poses no reasonably foreseeable hazard, to wit, a condition that is open and obvious and not inherently dangerous (see Cupo v Karfunkel, 1 AD3d 48 [2003]; see also Testaverde v Lyman, 17 AD3d 574 [2005]; Tagle v Jakob, supra; Popek v State of New York, 279 AD2d 622 [2001]; Rice v New York City Hous. Auth., 239 AD2d 400 [1997]; de Pena v New York City Tr. Auth., 236 AD2d 209 [1997]; Diven v Village of Hastings-On-Hudson, 156 AD2d 538 [1989]; Barnaby v Rice, 75 AD2d 179 [1980], affd 53 NY2d 720 [1981]). Defendants contend that they had no duty to warn of a dangerous condition respecting walking amongst the debris, as the danger of doing so is open and obvious and readily ascertainable by the use of one's senses. The testimony and the photographs establish that the condition of defendants' backyard/driveway was open and obvious to any user. Based upon the evidence submitted on the motion, the condition of the sidewalk was readily observable.

Apart from the duty to warn of dangerous conditions on the property, however, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it (see Basso v Miller, supra). A landowner "must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (Peralta v Henriquez, 100 NY2d 139, 144 [2003], quoting Basso v Miller, 40 NY2d 233, 241 [1976]). Thus, where a plaintiff has presented evidence that a dangerous condition exists on the property, the burden shifts to the landowner to demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk (Cupo v Karfunkel, supra). Evidence that the dangerous condition was open and obvious cannot relieve

the landowner of this burden. Indeed, the open and obvious nature of an allegedly dangerous condition is relevant to the issue of comparative fault of the injured plaintiff. It does not altogether preclude a finding of liability against the landowner (Id.).

It bears emphasis that a court is not precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous (see e.g. Gibbons v Lido & Point Lookout Fire Dist., 293 AD2d 646 [2002] [cement parking block on floor of a firehouse]; Connor v Taylor Rental Ctr., 278 AD2d 270 [2000] [forklift in a marked stall in a parking lot]; Plessias v Scalia Home for Funerals, 271 AD2d 423 [2000] [concrete parking divider]; Maravalli v Home Depot U.S.A., 266 AD2d 437 [1999] [sink vanity on the floor of the store aisle]). In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property.

In the instant case, the submissions raise issues of fact as to whether defendants fulfilled their obligation to maintain the yard in a reasonably safe condition. The open and obvious condition of the backyard does not absolve defendants of liability but instead presents an issue of fact as to the injured plaintiff's comparative fault. Accordingly, the motion for summary judgment dismissing the complaint is denied.

Dated: October 5, 2007

J.S.C.