

Goldfine v County of Nassau

2007 NY Slip Op 33811(U)

November 19, 2007

Supreme Court, Nassau County

Docket Number: 0274-05/

Judge: Daniel Martin

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SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK**

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

BRIAN E. GOLDFINE.
Plaintiff.*- against -*
TRIAL/IAS, PART 31
NASSAU COUNTY
Sequence No.: *003 & 004*

Index No.: 010274/05

XXX
COUNTY OF NASSAU and LATIN AMERICAN
SOCCER/MEXICAN SOCCER LEAGUE.
Defendants.

THE COUNTY OF NASSAU.
Third-Party Plaintiff.*- against -***JULIO SANCHEZ.****Third-Party Defendant.**

The following named papers have been read on this motion:

	Papers Numbered
Notices of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Defendant Latin American Soccer/Mexican Soccer League (hereinafter "League") and defendant County of Nassau separately move for summary judgment dismissing the complaint and all cross-claims asserted against these defendants. The motions are both granted.

The following facts are undisputed. Plaintiff was the goalkeeper on a soccer team which competed in defendant League. Defendant County operates and maintains Cantiague Park. On May 16, 2004 while plaintiff was keeping goal for his team in a game against another team in the League at Cantiague Park, a teammate of plaintiff's became involved in a fight with an opposing player which occurred as a result of a play in the game. Plaintiff attempted to pull his teammate away from the player from the other team when another opposing player, third-party defendant Julio Sanchez, hit plaintiff and kicked him in the face. Mr. Sanchez was arrested and was later

“prosecuted, convicted, placed on probation and ordered to pay restitution to plaintiff”. Plaintiff testified at his 50-H hearing that he has in fact received restitution payments from third-party defendant.

Plaintiff commenced the instant action against defendants, asserting causes of action for negligence. Defendants have both answered, asserting cross-claims against each other and defendant County having commenced a third-party action against Mr. Sanchez for contribution/indemnification. Both defendants move for summary judgment dismissing the complaint and the cross-claims asserted against them.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. See, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Any party opposing a motion for summary judgment must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

Defendant County’s Motion

In his notice of claim plaintiff alleged that defendant County failed to provide security for the games pursuant to the League’s “license agreement with the County.” At his 50-H hearing plaintiff testified that his team’s coach informed him that security was to be provided at the games but did not know who was responsible for same. Plaintiff also testified that prior to the incident there were no incidents of pushing and shoving, no verbal arguments and no fighting during the game. (See, plaintiff’s 50-H hearing transcript, pp. 25, 31, 38-39).

In his supporting affidavit, however, Mark Lamarr, who is employed by defendant County as Cantiague’s manager avers that:

- 1) the County issues permits to the various leagues that use Cantiague for competition;
- 2) the County does not provide security for any games held by these leagues on Cantiague’s fields and did not on the date of the incident;
- 3) where a league uses one of Cantiague’s fields, it is that league’s responsibility to enforce rules and control participants and spectators; and
- 4) he is not aware of any rule, document, policy or procedure of the County which required the County to provide security at league games held at Cantiague.

Thus, defendant County asserts (and defendant League adopts this position) that it owed no duty to plaintiff to protect him from injury on the municipal property unless a special relationship existed between plaintiff and the County. See, Weiner v. Metropolitan Transit Authority, 55 N.Y.2d 175 (1982)

The court finds that on the record before it that defendant County has, if at least unintentionally, demonstrated *prima facie* entitlement to summary judgment. A municipality is not required to protect plaintiff against unforeseeable and unexpected assaults in one of its parks. See, Tannenbaum v. Town of Hempstead, 255 A.D.2d 309 (2nd Dep’t 1998). Where a plaintiff

is assaulted in a municipal park and the record reflects that the assault was spontaneous and unexpected, the court will find that the municipality has met its *prima facie* burden. See, Tannenbaum v. Town of Hempstead, supra.; Thomas v. U.S. Soccer Federation, Inc. 236 A.D.2d 600 (2nd Dep't 1997); Elba v. Billie's 1890 Saloon, Inc., 227 A.D.2d 438 (2nd Dep't 1996).

Defendant County having met its initial burden, the burden now shifts to plaintiff to demonstrate a triable issue of fact. Zuckerman v. City of New York, supra.

In opposition to the County's motion plaintiff first asserts that the motion should be denied because the County, in permitting individuals to use its parks, owes plaintiff a duty to maintain the park in a reasonably safe condition and to prevent ultrahazardous and criminal activity of which it has knowledge. See, Marino v. State of New York, 16 A.D.3d 386 (2nd Dep't 2005). Based upon the holding in Tannenbaum set forth above, the court views a spontaneous and unexpected assault such as that alleged by plaintiff to be ultrahazardous or criminal activity of which the County had no knowledge in order to impose a duty upon the County as asserted by plaintiff. Nowhere in his opposition papers does plaintiff attempt to demonstrate that there is evidence that defendant County had any knowledge that such an assault was likely to happen or was not spontaneous.

Plaintiff further contends that the motion should be denied because the County issued its permit to the League in violation of its own guidelines which require defendant League to have and maintain liability insurance. Such has nothing to do with the liability of defendant County.

Plaintiff's final position in opposition to the motion that defendant County improperly bases the motion on counsel's affirmation is without merit, defendant having demonstrated the facts herein in plaintiff's bill of particulars, plaintiff's 50-H transcript and the affidavit of Cantiague's manager.

Defendant County's motion is therefore granted.

Defendant League's Motion

Defendant League takes the position that in addition to the position of the County set forth above, that the actions of Mr. Sanchez constitute an intervening criminal act which is the proximate cause of plaintiff's injuries and for which the League may not be held liable. At his 50-H hearing plaintiff testified that there had been no rough play or fights during the game prior to Mr. Sanchez's assault and that the incident which caused his injuries occurred quickly.

Even were it found that the League owed plaintiff a duty of care, where the intervening intentional or criminal acts of a third-person causes plaintiff's injuries, liability will turn on whether that conduct on the part of the third-party is a normal or foreseeable result of the situation created by defendant League's breach of a duty owed to plaintiff. See, Thomas v. U.S. Soccer Federation, Inc., supra. Based upon plaintiff's own testimony, the court concludes that defendant League has met its burden of demonstrating that it was not foreseeable that the assault would occur as a result of defendant League's purported negligence in failing to provide security.

In opposition to this motion plaintiff first asserts that an issue of fact exists as to whether the assault was foreseeable and whether defendant League had the duty to therefore protect plaintiff against such an act. In the Thomas case cited above, the Appellate Division, Second Department held the sponsors of the soccer league in which plaintiff played could not be held liable for injuries he sustained when an opposing player and several members of the audience attacked plaintiff and there was no evidence that the attack might occur during the course of the game. Such is precisely the case here.

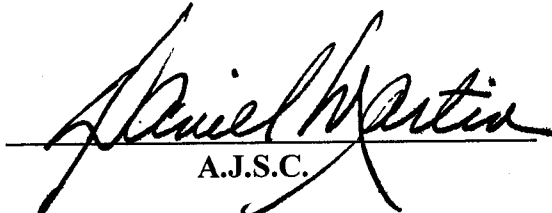
On these same grounds plaintiff's position that defendant's negligence need not be the sole cause of plaintiff's injuries is unavailing. Lastly, as set forth above, the court again rejects plaintiff's position that defendant League failed to meet its burden by submission of admissible evidence.

Defendant League's motion is therefore granted.

Based upon the foregoing, the complaint, as well as any cross-claims and the third party complaint are all hereby dismissed.

So Ordered.

Dated: November 19, 2007


A.J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE