

Richards v East Hampton Bowling Corp.

2007 NY Slip Op 34011(U)

December 16, 2007

Supreme Court, Suffolk County

Docket Number: 0008926/2003

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 8-10-07
ADJ. DATE 9-10-07
Mot. Seq. # 002 - MG; CASEDISP

-----X	
KYRA RICHARDS, by her mother and natural guardian EILEEN FLYNN RICHARDS and EILEEN FLYNN RICHARDS, individually,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
EAST HAMPTON BOWLING CORP. and CP ASSOCIATES, INC.,	:
	:
Defendants.	:
-----X	

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Upon the following papers numbered 1 to 1-24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14-21; Replying Affidavits and supporting papers 22-25; Other memorandum of law; sur reply; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing plaintiffs' complaint is granted.

This action was commenced to recover damages, personally and derivatively, for injuries sustained by infant plaintiff, Kyra Richards, who allegedly crushed her right middle finger as a result of a fall while holding a bowling ball. Infant plaintiff was injured on April 10, 2000, while attending a birthday party at a bowling alley operated by defendant East Hampton Bowling Corp. The bowling alley is on premises located at 71 Montauk Highway, East Hampton, which is owned by defendant CP Associates. The bill of particulars alleges that defendants were negligent, among other things, in setting up an infant birthday bowling party, and in providing infant plaintiff with a bowling ball that was too heavy for a young child to use safely. A prior order was issued by this Court on October 8, 2003, dismissing plaintiffs' claims against defendants for products liability and breach of warranty.

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Defendants now moves for summary judgment dismissing plaintiffs' complaint on the grounds that plaintiffs cannot establish a prima facie case of negligence, and that plaintiffs have failed to exclude other possible causes of the accident. Defendants' submissions in support of their motion include copies of the pleadings and excerpts from the transcripts of the parties' deposition testimony. Plaintiffs oppose the motion, arguing that infant plaintiff's injury was caused by an adult bowling ball and that defendants failed to follow procedure in setting up the children's bowling birthday party. In opposition, plaintiffs submitted, among other things, affidavits by infant plaintiff, plaintiff Eileen Flynn Richards, and Ms. Katherine Briefs, who hosted the birthday party. Plaintiffs also submitted excerpts from the deposition of Craig Patterson, President of East Hampton Bowling and C.P Associates, and medical records regarding infant plaintiff's treatment at Southampton Hospital. The Court notes that the sur reply filed by plaintiff was not considered in this determination (*see*, CPLR 2214; *Flores v Stankiewicz*, 35 AD3d 804, 827 NYS2d 281 [2006]).

Infant plaintiff, who was five years old at the time of the accident, testified at an examination before trial that she believed that the accident occurred as she was bowling. She testified that she picked up the bowling ball with two hands, because it was heavy, and then fell. She testified that when she fell, the bowling ball dropped on her middle finger. Infant plaintiff also testified that she does not remember where she picked up the bowling ball. She testified that she does not remember what caused her to fall or where she fell, except that it was on a wooden section of the bowling alley.

At her examination before trial, plaintiff Eileen Flynn Richards testified that she was not present when the alleged incident occurred. Ms. Richards testified that there were five children present with four adults at the bowling alley birthday party. She testified that when she returned to the bowling alley, her oldest daughter informed her that infant plaintiff was injured. She further testified that she did not see the bowling ball that infant plaintiff was using at the time of the accident.

At his examination before trial, Craig Patterson testified that depending on the ages of the children attending the party, six-pound or eight-pound bowling balls would be provided. He testified that for birthday parties, the bowling alley employees would set up the lanes and put the bowling balls on the ball return. He further testified that the ball returns are emptied and cleaned on a regular basis.

Infant plaintiff's affidavit states that the weight of the ball dragged her down and caused her to fall forward. The affidavit states that when infant plaintiff fell, the ball landed on her finger, crushing it. Similarly, Ms. Briefs' affidavit avers that infant plaintiff picked up a very heavy adult bowling ball and that the heaviness of the bowling ball was a substantial factor in causing the accident. However, a prior written and signed statement by Ms. Briefs states that infant plaintiff tripped over the ball return as she was walking from the left lane to the right lane.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing 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 opposing 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]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see, Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704, *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. “Proof of negligence in the air, so to speak, will not do” (*Martin v Herzog*, 228 NY 164, 170, 126 NE 814 [1920], quoting Pollock, Torts (10 th Ed.), p. 472). And while proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant’s negligence was a substantial cause of the event which produced his or her injury (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see, Maheshwari v City of New York*, 2 NY3d 288, 778 NYS2d 442 [2004]; *Forman v City of White Plains*, 5 AD3d 434, 773 NYS2d 102 [2004]).

Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see, Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 500 NYS2d 95 [1986]; *Bardi v City of New York*, 293 AD2d 505, 739 NYS2d 747, *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). A plaintiff is not required to prove the exact nature of the defendant’s negligence (*see, Gayle v City of New York*, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event (*see, Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550, 684 NYS2d 139 [1998]; *Bernstein v City of New York*, 69 NY2d 1020, 517 NYS2d 908 [1987]; *Schneider v Kings Hwy. Hosp. Ctr.*, *supra*) to meet this burden. Rather, a plaintiff must offer evidence showing that it was “more likely” or “more reasonable” that the alleged injury was caused by the defendant’s negligence than by some other agency (*Gayle v City of New York*, *supra*, at 937, 680 NYS2d 900; *see, Grob v Kings Realty Assocs.*, 4 AD3d 394, 771 NYS2d 384 [2004]; *New York Tele. Co. v Harrison & Burrowes Bridge Contrs.*, 3 AD3d 606, 771 NYS2d 187 [2004]; *Collins v City of New York*, 305 AD2d 529, 759 NYS2d 349 [2003]). Plaintiff’s evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant’s negligence are sufficiently remote (*see, Gayle v City of New York*, *supra*; *Bernstein v City of New York*, *supra*; *Bardi v City of New York*, *supra*).

Defendants established their entitlement to judgment as a matter of law by submitting deposition testimony showing that infant plaintiff is unable to identify what caused her to fall or the area in the bowling alley where she fell (*see, Pluhar v Town of Southampton*, 29 AD3d 975, 816 NYS2d 176 [2006]; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 814 NYS2d 178 [2006]; *Rodriguez v Cafaro*, 17 AD3d 658, 794 NYS2d 113 [2005]; *LaFemina v Brambell*, 2 AD3d 409, 767 NYS2d 795 [2003]; *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570, 754 NYS2d 31 [2003]; *Bongiorno v Penske Auto Ctr.*, 289 AD2d 520, 735 NYS2d 617 [2001]). Defendants have demonstrated that there is no causal relationship between the weight of the bowling ball and the happening of the accident (*see,*

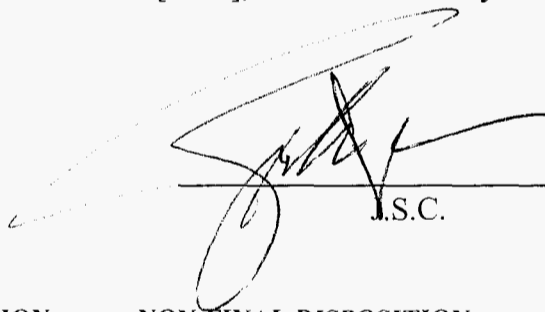
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Gordon v New York City Transit Auth., 267 AD2d 201, 699 NYS2d 449 [1999]). The burden, therefore, shifted to plaintiffs to raise a triable issue as to whether defendants' alleged negligence was a proximate cause of infant plaintiff's accident (see, *Derdiarian v Felix Contr. Corp.*, *supra*; *Hartman v Mountain Val. Brew Pub.*, *supra*; see generally, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, plaintiffs attempt to create an issue of fact as to whether infant plaintiff's fall was due to the weight of the bowling ball. Infant plaintiff initially testified that she did not remember what caused her to fall. However, in an affidavit submitted in opposition to the motion, infant plaintiff now avers that the weight of the ball caused her to fall. This self-serving affidavit contradicts infant plaintiff's earlier deposition testimony and appears to be an attempt to create a feigned factual issue designed to avoid the consequences of her deposition testimony (see, *Koller v Leone*, 299 AD2d 396, 751 NYS2d 266 [2002]). Similarly, Ms. Briefs' affidavit states that the heaviness of the bowling ball was a substantial factor causing infant plaintiff's fall. However, her earlier written statement indicates that infant plaintiff tripped over the ball return. Ms. Briefs' inconsistent statements and bald conclusory assertions are insufficient to defeat defendants' motion for summary judgment (see, *Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 728 NYS2d 33 [2001], *app. den.* 97 NY2d 610, 740 NYS2d 694 [2001]; *Parisi Enters. Inc. Profit Sharing Trust v Settimo*, 198 AD2d 272, 603 NYS2d 571 [1993]).

Furthermore, plaintiff failed to submit evidence showing that other possible causes for the fall, like a simple misstep or loss of balance, were sufficiently remote (see, *O'Connor v Lakeview Assocs., LLC*, 306 AD2d 518, 761 NYS2d 858 [2003]; *Holliday v Hudson Armored Car & Courier Serv.*, 301 AD2d 392, 753 NYS2d 470, *lv dismissed in part, denied in part* 100 NY2d 636, 769 NYS2d 196 [2003]; *cf.*, *Stanojevic v Scotto Bros. Rest. Enters.*, 16 AD3d 575, 792 NYS2d 147 [2005]). Thus, as there is no evidence from which a jury could rationally conclude that infant plaintiff's fall was more likely due to the heaviness of the bowling ball than to a sudden loss of balance or a misstep, the motion by defendant for summary judgment dismissing the complaint against them is granted (see, *Manning v 6638 18th Ave. Realty Corp.*, *supra*; *Hennington v Ellington*, 22 AD3d 721, 804 NYS2d 395 [2005]; *Rygel v 8750 Bay Parkway, LLC*, 16 AD3d 572, 792 NYS2d 160 [2005]; *Bitterman v Grotyohann*, 295 AD2d 383, 743 NYS2d 167 [2002]).

Dated: DEC 06 2007



 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION