Golub v Northport-East Northport Union Free School Dist.
2008 NY Slip Op 30295(U)
January 28, 2008
Supreme Court, Suffolk County
Docket Number: 0019714/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-19714
CAL. No. 07-01397-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 8-20-07
ADJ. DATE 10-11-07
Mot. Seq. # 002 - MG
003 - XMG; CASEDISP

SUSAN GOLUB, individually and as parent and natural guardian having legal custody of MICHAEL GOLUB, an infant,

Plaintiffs,

- against -

NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT a/k/a and/or f/k/a BOARD OF EDUCATION, UNION FREE SCHOOL DISTRICT NO. 4 and PARKLINE ASPHALT MAINTENANCE, INC.,

Defendants.

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Upon the following papers numbered 1 to 54 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25 ; Notice of Cross Motion and supporting papers 26 -39 ; Answering Affidavits and supporting papers 40 - 43; 44 - 47 ; Replying Affidavits and supporting papers 51 - 52; 53 -54 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Northport-East Northport Union Free School District for, inter alia, summary judgment dismissing the claims against it is granted; and it is

ORDERED that the cross motion by defendant Park Line Asphalt Maintenance, Inc. for summary judgment in its favor is granted.

Plaintiff Susan Golub, individually and on behalf of her son, plaintiff Michael Golub, commenced this action to recover damages for injuries suffered by her son on August 17, 2004, when he fell while riding his bicycle in the parking lot of an elementary school owned by defendant

Northport-East Northport Union Free School District (hereinafter the School District). Defendant Park Line Asphalt Maintenance (hereinafter Park Line), a paving contractor, was hired by the School District in 2004 to repair and sealcoat the asphalt-paved parking lot at the elementary school. The bills of particulars served on defendants allege, in relevant part, that "tarring, re-sealing, maintaining and/or otherwise re-surfacing the parking lot" created a trap-like condition on the school's premises. The bills allege that defendants were negligent, among other things, in creating and permitting this trap-like condition to exist on the premises, and in failing to warn of such condition.

The School District now moves for, inter alia, summary judgment dismissing the complaint on the ground that there is no evidence that Michael's injury was caused by a dangerous condition on the premises. Alternatively, the School District argues that it is entitled to judgment dismissing plaintiffs' claim, as well as the cross claims for indemnification and contribution, on the bases that it lacked notice of the alleged dangerous condition, that its alleged negligence was not a proximate cause of the accident, and that the action is barred under General Obligations Law § 9-103. The School District's submissions in support of the motion include copies of the pleadings, transcripts of the parties' deposition testimony, and copies of estimates and invoices submitted to it by Park Line in connection with the repair and sealcoating projects at the school, known as the Fifth Avenue Elementary School. The School District also submits an affidavit by Anthony Resca, who is employed by the School District as the Superintendent of Buildings and Grounds. Mr. Resca avers, in part, that his review of School District's maintenance records indicates that, during the three-year period prior to Michael Golub's accident, no complaints were received regarding the condition of the subject parking lot. He further asserts that the records show that no district employees performed work on the parking lot during this three-year period, that Park Line was the only outside contractor hired to perform work on the lot during this time frame, and that Park Line performed its asphalt repair work in August 2004.

Park Line also moves for summary judgment dismissing the claim against it on the ground that there is no evidence in the record that a hazardous condition existed in the parking lot. Park Line also argues that, while it was hired by the School District to perform paving work in the subject parking lot, it did not owe a duty of care to plaintiffs. In support of the cross motion, Park Line submits, among other things, transcripts of the parties' deposition testimony and a transcript of Michael Golub's testimony at a 50-h hearing.

Plaintiffs oppose the motions, arguing that an issue of fact exist as to whether the asphalt repair work performed by Park Line four days before the incident date created a dangerous condition in the parking lot. In opposition, plaintiffs submit copies of photographs purporting to depict the left sneaker worn by Michael Golub on the date of the accident, and an affidavit by Jordan Placella. The Court notes that it did not consider the sur-reply papers submitted by Park Line in its determination of the motions.

Plaintiff Michael Golub, who was 11 years old when the accident occurred, testified at an examination before trial that he and a friend, Jordan Placella, had been riding their bicycles and playing on a playground at the school before the accident. He testified that after leaving the playground, he rode his bicycle through a grassy area, over a curb and into the subject parking lot. Michael, who described his bicycle as a "trick bicycle" on which he could perform various stunts, testified that he "rode a little bit" in the parking lot and then "slipped." He testified that when he fell off of the bicycle, the lower part of his body landed on the parking lot surface, and his upper body and face struck a curb. When

questioned about how the accident occurred, Michael testified that he did not know why he crashed or what caused the bicycle to go out of control. He also testified that he was familiar with the parking lot, having previously been a student at the Fifth Avenue Elementary School; that he did not notice anything different about the appearance of the parking lot on the date of the incident; and that he observed some tar on his shoes, shirt and bicycle after the fall.

Susan Golub testified, in relevant part, that she did not observe her son's accident, but arrived at the scene shortly after it occurred. She testified that she did not look at the actual spot where the accident happened on that date, but that her son pointed out the spot when she returned about a week later to take photographs of the area. She testified that she did not observe anyone working in the parking lot on the date of the accident or at any time that summer. She also testified that she saw tar on Michael's sneaker and shirt after the accident. Richard Mailand, President of Park Line, testified at a deposition that Park Line was hired by the School District to perform paving work at the Fifth Avenue Elementary School. He testified that on August 13, 2004, Park Line employees performed repair work on the asphalt parking lot, and that such work consisted of installing hot asphalt patches in areas designated by the School District. He testified that the asphalt patches become hard once they are compacted by a roller, and that all such repair work was completed on August 13. Mr. Mailand further testified that no tar was applied to the parking lot on August 13, and that Park Line applied sealcoating and painted parking lines on the subject lot in September 2004.

Finally, James Hoffman, who is employed as the head custodian at the Fifth Avenue Elementary School, testified at a deposition that he was working at the time of the subject accident. He testified that he did not see the accident, but that he spoke with Michael after the fall, as Michael was waiting for his mother to arrive at the school. Mr. Hoffman testified that he inspected the spot where Michael told him the accident occurred, and that there were no asphalt patches in that area of the parking lot.

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 [2d Dept], *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 demonstrate 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 [2d Dept 2004]).

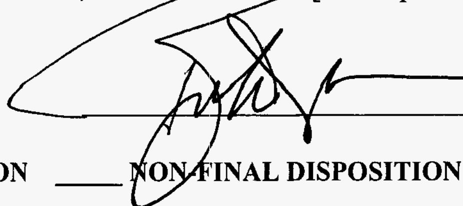
Further, to establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see,* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *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, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Highway 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 Assoc.***, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2d Dept 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*).

Here, defendants established their entitlement to judgment as a matter of law by submitting deposition testimony showing that Michael Golub is unable to identify what, if anything, caused the bicycle to slip out from underneath him while he was riding in the parking lot (*see,* ***DeSantis v Lessings, Inc.***, __ AD3d __, 2007 WL 4465521 [2d Dept, Dec. 18, 2007]; ***Pluhar v Town of Southampton***, 29 AD3d 975, 816 NYS2d 176 [2d Dept 2006]; ***Penn v Fleet Bank***, 12 AD3d 584, 785 NYS2d 107 [2d Dept 2004], *lv denied* 5 NY3d 704, 801 NYS2d 2 [2005]). The burden, therefore, shifted to plaintiffs to present competent evidence raising a triable issue as to whether defendants' alleged negligence was a proximate cause of Michael Golub's accident (*see,* ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]).

Plaintiffs failed to submit evidence showing that other possible causes for losing control of the bicycle, like sand or stones on the pavement or a sudden turn of the handlebars, were sufficiently remote (*see,* ***Manning v 6638 18th Ave. Realty Corp.***, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]; ***Figueroa v City of New York***, 5 AD3d 432, 773 NYS2d 66 [2d Dept 2004]; ***O'Connor v Lakeview Assoc.***, 306 AD2d 518, 761 NYS2d 858 [2d Dept 2003]; *cf.*, ***North Am. Specialty Ins. Co. v Schwanter***, 39 AD3d 511, 833 NYS2d 196 [2d Dept 2007]). The bare, conclusory affidavit by Jordan Placella, which clearly was designed to avoid the consequence of Michael Golub's deposition testimony, is insufficient to defeat summary judgment (*see* ***Denicola v Costello***, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007]; ***Koller v Leone***, 299 AD2d 396, 751 NYS2d 266 [2d Dept 2002]). Further, the photographs of Michael Golub's sneaker offered by plaintiffs were not considered in the Court's determination of the motions, as they were not authenticated (*see,* ***Labella v Willis Seafood***, 296 AD2d 382, 744 NYS2d 504 [2d Dept 2002]; *cf.*, ***DiNapoli v Huntington Hosp.***, 303 AD2d 359, 755 NYS2d 655 [2d Dept 2003]). In any event, the mere fact that Michael noticed tar on his sneaker and shirt after the accident is insufficient to raise a triable issue of fact (*see,* ***Kuchman v Olympia & York,USA***, 238 AD2d 331, 656 NYS2d 323 [2d Dept 1997]). Thus, summary judgment is granted in favor of defendants, as the evidence in the record is such that a jury would be forced to speculate as to the cause of Michael Golub's accident (*see,* ***Karwowski v New York City Tr. Auth.***, 44 AD3d 826, 844 NYS2d 96 [2d Dept 2007]; ***Penn v Fleet Bank***, *supra*; ***Christopher v New York City Tr. Auth.***, 300 AD2d 336, 752 NYS2d 76 [2d Dept 2002]; ***Robinson v Lupo***, 261 AD2d 525, 690 NYS2d 640 [2d Dept 1999]).

Dated: JAN 28 2008



J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION