

Ellis v City of New York
2008 NY Slip Op 30390(U)
February 11, 2008
Supreme Court, New York County
Docket Number: 0115168/2005
Judge: Carol R. Edmead
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HON. CAROL EDMEAD

PRESENT:

PART 35

Justice

Index Number : 115168/2005

ELLIS, LESLIE

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/31/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

FEB 11 2008

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendants The City of New York and CVJ Corporation, for an order granting summary judgment pursuant to CPLR 3212, dismissing the complaint of plaintiffs Leslie Ellis and Howard Ellis, **is granted in its entirety**, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

Dated: 2/11/08

[Signature]

HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 35

 LESLIE ELLIS and HOWARD ELLIS,

Plaintiffs,

-against-

THE CITY OF NEW YORK and CVJ CORPORATION,

Defendants.

EDMEAD, J.S.C.

Index No. 115168/05

DECISION/ORDER

MEMORANDUM DECISION

This action arises out of an incident which occurred on February 19, 2005 in Central Park during an art exhibit entitled "The Gates." For sixteen days, "The Gates" was displayed in Central Park. As art installations go, it cannot be disputed that "The Gates" installation was among the most visible ever created. "The Gates" was comprised of 7,503 orange fabric curtains, individually hung over the pathways and walkways of Central Park on two vertical poles. The poles, two for each orange curtain, or Gate, rested within steel bases, or pedestals, which were placed on the ground.

Defendant CVJ Corporation ("CVJ") is owned by the two artists who built "The Gates," Christo and Jeanne-Claude.

Plaintiff Leslie Ellis ("plaintiff") alleges that she tripped over one of these bases after she completed a cell phone call, which she went off the path to take.

Defendants The City of New York (the "City") and CVJ (collectively, the "defendants")¹ now move for an order granting summary judgment pursuant to CPLR 3212, dismissing the

¹ CVJ has assumed the defense and indemnity of the City, as the City did not actively participate in the installation of "The Gates."

complaint of plaintiff and Howard Ellis (collectively, "plaintiffs"), on the grounds that the object over which plaintiff allegedly fell was so open, obvious and not inherently dangerous that defendants cannot be held liable for any consequences of plaintiff's own lack of care about the defendant's art installation.

Plaintiff's 50-H Testimony

Plaintiff had traversed the pathway where her accident occurred, earlier that same day on her way to the Metropolitan Museum of Art (p.13). Before going to the Museum, plaintiff toured part of the exhibit, but she did not consciously observe the pedestals; she was looking up. Her earlier tour of the exhibit was several hours before her tour that resulted in her accident (p. 33).

Immediately prior to the accident, her tripping over the base of a Gate, plaintiff was looking at the curtain part of a Gate and the pedestrians because it was very crowded (p. 14).

Just prior to her accident, plaintiff had received a call on her cell phone. Because it was so crowded on the pathway, she stepped off of the path to take the call. She completed the call and returned to the path; that is when she tripped (pp. 19-20).

Plaintiff's Deposition

Plaintiff entered Central Park at 72nd Street and Fifth Avenue (p. 15). She continued on the path in a northerly direction, observing the exhibit, until she reached 79th Street (pp. 16-17). At 79th Street and Fifth Avenue, plaintiff exited the park and went to the Museum, where she remained for more than an hour (p. 19). When she left the Museum, plaintiff re-entered the park at 79th Street and Fifth Avenue. She traversed along a different path in a southwesterly direction, where the exhibit was displayed, keeping Fifth Avenue in sight (p. 21). She visited a building in the park selling "The Gates" memorabilia, used the restroom, purchased a book, and returned to

the path that she had originally been on in the first place, when she first entered Central Park, so that she was walking towards 72nd Street again (pp. 23-24). While walking on the pathway she had originally been on when she first entered Central Park, she received a cell phone call (p. 29). Her accident occurred immediately after her cell phone call was completed (p. 34). Immediately after completing her cell phone call, plaintiff took one step with her right foot and tripped on the base of a Gate (pp. 36-37). At the time she tripped, plaintiff was looking into the path, because it was very crowded (p. 38).

Deposition Testimony of Police Officer Damien Clarke

Officer Clarke was assigned to a Central Park detail on the date of plaintiff's accident, and he completed the "Aided Report" prepared after plaintiff's accident (p.5). Officer Clarke was advised that someone was injured; he walked over to plaintiff, and saw plaintiff down on the ground, with scrapes on her knee. Plaintiff told him she had fallen (pp. 7-8). Plaintiff said that she was on the phone and tripped and hit her knee (p. 9). In the bottom of the Aided Report, Officer Clarke noted: stated she was on the phone when she tripped and hit her left knee which may have caused a fracture. Taken to New York Hospital (p. 12). She said that she was talking on the phone walking and tripped and fell and hit her knee. It is Officer Clarke's understanding, based on his conversation with plaintiff, that she was still on the phone when she physically fell (pp. 27-28).

Officer Clarke's testimony that plaintiff said that she was on the phone and tripped and hit her knee is based on his recollection, one and two, the Aided Report (p. 16). Officer Clarke filled out the aided card at the scene of the accident; plaintiff was in the ambulance when he filled it out (pp. 16-17). Less than one half hour elapsed between the time plaintiff made her

statements to him and the time he filled out the aided card. He did not write down the information simultaneous to plaintiff speaking with him (pp. 17-18).

Based on his conversation with plaintiff, it was Officer Clarke's understanding that she fell somewhere close to the curb (pp. 28-29).

Plaintiff was less than five feet from the base of a Gate. Plaintiff never indicated to Officer Clarke that she fell over or tripped over either the orange post or the base of that post, or that the base or post was in any way involved in her accident (pp. 30-31).

Deposition Testimony of Jonathan Henery

Jonathan Henery ("Henery") is vice president of CVJ (p. 5). Each Gate had two orange, vertical poles, one on either side of the fabric, and a base weighing between 600 and 800 pounds. There is a base on each vertical pole. That is how the Gates were held in place. Underneath, hidden by the pole, there was a sleeve that hid a steel leveling plate with four bolts and one pivot bolt into the plate. That is what kept the poles perfectly vertical. And, they were attached to that aluminum sleeve bolted to the leveling plate, inserted into the vinyl pole, and bolted through. The base was charcoal gray pp. 12-13. All aesthetic and engineering decisions were made by CVJ (P. 13).

Henery is not aware of any other accidents involving the steel bases other than plaintiff's accident (p. 16).

At all times during the day, 300 uniformed "monitors" kept an eye on the Gates. They were all within eyesight of each other. They answered questions from the public, and basically served as ambassadors of the work of art to the visiting public. They also were in contact with the supervisors, who had walkie-talkies. The monitors did not exercise any crowd control duties

(pp. 31-32).

Henery believes that the Gates were totally visible. The bases were on the side of the walkways. They did not impede anybody's ability to use the walkways, and they were "dead obvious" (p. 33). Henery believed "[t]he 16-foot-tall gates served as a warning sign that there's something there" (p. 35).

Deposition Testimony of Jeanne-Claude

Concerning the base of the poles, Jeanne-Claude and Christo decided to paint the base so that it would be "in harmony" with the other steel elements in Central Park. They decided to paint the base because the chief director of construction told them that the steel might rust, and, aesthetically, they did not want that (p. 10).

The monitors were not instructed to keep pedestrians away from the steel base areas of the Gates (p. 24).

Defendants' Contentions

The base that plaintiff tripped over was open, obvious and not inherently dangerous. And, plaintiff was the sole proximate cause of her accident. Although it is clear from Officer Clarke's deposition that plaintiff was on her cell phone at the time of the accident, whether she was or was not does not change the fact that she was the sole proximate cause of her accident.

Plaintiffs' Opposition

In her affidavit, plaintiff reiterates that she was not on the cell phone when her accident occurred. And, she was unable to see the base of the Gate because of the position of the sun which cast long shadows over the walkway; the sun was not shining directly on the base. Moreover, the orange fabric of the Gates themselves were swaying in the breeze, making the

shadows cast by the Gate also move. Finally, the pathways were extremely crowded.

The conflicting testimony of defendants' witnesses as to whether the intent was to make the base of the Gate blend in with the asphalt on the ground, raises an issue of fact.

The issue herein is not whether the base would be open and obvious in the middle of the pathway, but whether it would be open and obvious to a person in plaintiff's position, while looking up at the Gate. The issue of comparative fault is only one issue requiring denial of summary judgment.

The other issue is whether CVJ in fact did reasonably maintain the area.

Defendants' Reply

Contrary to plaintiffs' contention, there is nothing unusual about the circumstances in this case. The only unusual fact is that four million persons visited and observed "The Gates," and plaintiff was the only one who tripped over a base of a Gate.

The fact that plaintiff argues that she did not consciously observe the Gate base because she was looking up is of no moment; the Gates and their bases were readily observable.

Plaintiffs further refer to the testimony of Henery, noting that Henery testified there were no tests done to determine whether the bases would pose a tripping hazard for pedestrians. Defendants submit that there were no such tests because it was clear and obvious that the base would not present a tripping hazard. Henery's testimony was that the base was primarily to prevent the poles and the Gates themselves from falling over, and that each base had a 16-foot orange pole sticking up out of it.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbindler*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Open and Obvious

There is no bright line test for determining what is open and obvious. The test is whether "[a]ny observer reasonably using his or her senses would see" the condition (*Tagle v Jakob*, 97 NY2d 165, 170 [2001]).

The First Department recently held in *Shulman v Old Navy/The Gap, Inc.*, 45 AD3d 475, 845 NYS2d 341, 342 (1st Dept 2007) that "[W]hile the issue whether a condition is a hazard or open and obvious is usually a question of fact, a court may determine the condition to be open and obvious 'when the established facts compel that conclusion' (*Tagle v. Jakob*, 97 N.Y.2d 165, 169, 737 N.Y.S.2d 331, 763 N.E.2d 107 [2001]).... Indeed, a court is not 'precluded from granting summary judgment....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*' (*Cupo v. Karfunkel*, 1 A.D.3d 48, 52, 767 N.Y.S.2d 40 [2003]; *see also Brown v. Basics USA*, 3 A.D.3d 546, 771 N.Y.S.2d 525 [2004] [mannequin on which plaintiff allegedly tripped was readily observable and not an inherently dangerous condition]."

In the instant case, this court finds that the condition of which plaintiff complains, the base of the Gate, was open and obvious and not inherently dangerous (*see e.g. Gafner v Chelsea Piers, L.P.*, 27 A.D.3d 353, 812 N.Y.S.2d 490 [2006], *lv. denied* 8 N.Y.3d 802, 830 N.Y.S.2d 698, 862 N.E.2d 790 [2007]). And, defendants had no duty to warn plaintiff of an open and obvious danger of which she should have been aware as the result of ordinary observation or as a matter of common sense (*see O'Boy v Motor Coach Indus., Inc.*, 39 AD3d 512 [2007]).

Tripping over the base of a Gate is, to a degree, analogous to tripping over the base of a

clothing rack, except that in the instant case, the size of the base of a Gate is exponentially far greater and more obvious. In *Chiranky v Marshall's, Inc.*, 273 AD2d 699 (2d Dept 2000), the injured plaintiff fell when her foot got caught on the bottom rail of a mobile clothes rack located in an aisle in the defendant's department store. The injured plaintiff testified at her deposition that she did not observe the rack at any point in time before the accident. The Second Department found that the rack was not an inherently dangerous condition. Moreover, since the rack was readily observable by the reasonable use of one's senses, the defendant had no duty to warn the injured plaintiff of the condition (*see, Maravalli v Home Depot*, 266 AD2d 437; *Reuscher v Pergament Home Ctrs.*, 247 AD2d 603; *Hatch v Rog Glo*, 239 AD2d 771; *Sewer v Fat Albert's Warehouse*, 235 AD2d 414).

Plaintiffs' reliance on *Centeno v Regine's Originals, Inc.*, 5 AD3d 210, 773 NYS2d 62 (1st Dept 2004), is misplaced. In *Centeno*, plaintiff while clothes shopping for her son, approached a rack of clothing, *the base of which was covered with clothing* that lay scattered on the floor. On the base of the rack, which was rectangular, stood a vertical pole that had a horizontal bar for clothing. When plaintiff, wearing sneakers at the time, attempted to step over the clothing, her foot hit the covered base of the rack, causing her to trip and fall and sustain injuries to her right knee. After her fall, plaintiff's husband pushed the fallen clothing away and observed the beige, wooden, rectangular base, which was "turned at an angle, and . . . extend[ed] into the area between the racks that [she had been] walking in." The First Department distinguishes *Shulman* from *Centeno* pointing out that the plaintiff in *Centeno* was unaware that there was anything beneath the clothing. In *Shulman*, court pointed out that plaintiff admitted that she knew the bracket was there, and indeed its presence, even if obscured, was obvious

because of the presence of like brackets and racks throughout the store. In the instant case, the base of the Gate was not covered in any manner that would obscure.

Even if as plaintiff argues, the color of the base caused the base to blend in with the asphalt on the ground, plaintiff cannot argue - in good conscious - that she did not know the base was there, and indeed its presence, even if obscured, was obvious because of the presence of thousands of like bases of the Gates throughout Central Park.

Further, for this argument to be credible and to create an issue of fact, the sheer size of the base of a Gate - 600-800 pounds - would have to be ignored.

Plaintiff further argues that she was unable to see the base of the Gate because of the position of the sun which cast long shadows over the walkway; the sun was not shining directly on the base. Moreover, the orange fabric of the Gates themselves were swaying in the breeze, making the shadows cast by the Gate also move. And, she was looking at the Gate. Finally, the pathways were extremely crowded.

In *Mauriello v Port Auth. Of N.Y. and N.J.*, 8 AD3d 200, 779, NYS2d 199 (1ST Dept 2004), the First Department has held that "[W]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses (*Tarricone v State of New York*, 175 AD2d 308, 309 [1991], lv denied 78 NY2d 862 [1991]) may be rendered a trap for the unwary where the condition is obscured by crowds or the plaintiff's attention is otherwise distracted (see *Sanchez v Toys "R" Us*, 303 AD2d 165 [2003] [fall over low 3-foot-by-4-foot rack two days before Christmas]; *Thornhill v Toys "R" Us NYTEX*, 183 AD2d 1071 [1992] [raised platform obscured by clothing rack and cart]; *De Conno v Golub Corp.*, 255 AD2d 734 [1998] [orange marker cone

appearing suddenly to patron rounding corner]).”

For this argument to be plausible in the instant case, sufficient to overcome defendants’ entitlement to summary judgment, again, the court would have to ignore the sheer size of each base - 600-800 pounds - and the vast number of bases - thousands - throughout Central Park.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants The City of New York and CVJ Corporation, for an order granting summary judgment pursuant to CPLR 3212, dismissing the complaint of plaintiffs Leslie Ellis and Howard Ellis, **is granted in its entirety**, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

Dated: February 11, 2008

FILED
FEB 11 2008
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