

Castro v Town of Islip
2008 NY Slip Op 30923(U)
March 27, 2008
Supreme Court, Suffolk County
Docket Number: 0005653/2006
Judge: Ralph F. Costello
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 11/29/07
ADJ. DATE 2/5/08
Mot. Seq. # 001 - MD

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NICHOLAS CASTRO, an infant by his mother and :	TARTAMELLA, TARTAMELLA
natural guardian, MICHELE CANTON, and :	& FRESOLONE
MICHELE CANTON, individually, :	Attorneys for Plaintiffs
:	235 Brookside Drive
Plaintiffs, :	Hauppauge, New York 11788
:	:
- against - :	ZAKLUKIEWICZ, PUZO & MORRISSEY
:	Attorneys for Defendant
TOWN OF ISLIP, :	2701 Sunrise Highway, P.O. Box 389
:	Islip Terrace, New York 11752
Defendant. :	:
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 11 - 15; Replying Affidavits and supporting papers 16-17; 18; Other 19-20 (stipulations of adjournment); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant, Town of Islip, for summary judgment dismissing the complaint against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Nicholas Castro, an infant, by his mother and natural guardian, Michele Canton, and Michele Canton, individually. Plaintiff was injured on July 29, 2005, at the Ronkonkoma Beach Recreation Center, Ronkonkoma, New York, as a result of falling off of a gate. Plaintiff alleges that he was standing on the gate, was willingly pushed by a fellow camper, and that his foot went through a defective part of the gate, viz., where the chain link was not connected to the horizontal pole on the bottom. As a result of his foot going through the open area as he was being pushed, he fell and sustained a broken ankle.

Defendant avers that it bears no liability for plaintiff's injury. In support thereof, defendant submits, *inter alia*, copies of the pleadings, the bill of particulars, photographs of the gate, and copies of the transcripts of the deposition testimony given by plaintiff, his mother and that of camp counselor, Michael Gilbert.



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Plaintiff testified that on the day of the accident he was a camper at the above-named location. He and about seven other boys were grouped together, and their counselor was Mike (Michael Gilbert). Plaintiff had been enrolled at the camp since early July 2005 and had been enrolled at the camp the summer before. On the day of the incident, just prior to the incident, the boys had finished an activity. Several received permission to get some water and proceeded to do so. Plaintiff and another boy, Eric, declined to do so and stayed in the general area. As they were waiting for the boys to return, they went over to the tennis courts (which were close to where they were initially waiting), and plaintiff got on the gate which permitted access to the courts. Eric pushed him, causing the gate to swing, and as the gate swung, plaintiff's foot went through the hole in the chain link, causing him to fall and sustain a broken ankle. Plaintiff continued that twice that day Mike, his counselor, told him not to swing on the gate. In particular, the testimony of April 2, 2007 was as follows:

Q You said Mike told you twice not to swing on the gate, right?

A Yes.

Q Was that before you started swinging on the gate or while you were swinging on the gate?

A I don't recall.

Q Do you remember when he told you not to swing on the gate where he was?

A He was in the field.

Q He was in the field?

A Yes.

Q Was that while the tag game was going on?

A Well, he told us right when we were going to the field.

Q He told you not to swing on the gate when you were going over to the field?

A Yes.

In his deposition testimony of November 8, 2005, plaintiff testified that he was told not to go on the gate. Specifically, the testimony is as follows:

Q Did he tell you not to swing on that fence before?

A Yes, he told me when we were going to there and when we were at the field.



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Q He told you not to swing on it?

A Yes.

Q How many times did he tell you that ?

A Two all together.

Q Twice?

A Yes.

Q On the day you fell, twice?

A Yes.

Q This was before you fell he told you not to swing on it?

A Yes.

Q Did anybody ever tell you before this fall, not on that day, on other days, did they ever tell you not to swing on that fence?

A Yes.

Plaintiff continued that Eric swung the gate "hard." Specifically, he testified to the following:

Q Did Eric swing the gate hard?

A Yes.


Q Or was it easy?

A He swung it hard.

Q When he swung the gate what happened?

A My foot slipped from the rod and my foot fell in the hole and then it hit the--- there's a concrete—you know how you step down? So, it hit that and then the fence came back out a little and my ankle was still in it.

It is clear from plaintiff's testimony that he and Eric, voluntarily, against the camp counselor(s) instruction, proceeded over to the gate, he got up on it, was pushed "hard," his foot went through the links, and he sustained an injury.



Michael Gilbert testified that he was the counselor assigned to the seven-to eight-year-old boys on the day of the incident. He indicated that on the day of the incident, as well as on other occasions, he had instructed plaintiff to refrain from climbing on the gate/fence. In fact, on the day in question, he told plaintiff not to go on the gate as he observed him walking toward and approaching the gate. He continued that he told the boys to get off of the gate when he saw Nicholas on it just a few seconds later. Thereafter, he immediately turned around and went to pick up something he had left on the field. Within seconds he heard a scream and turned, saw plaintiff on the ground, and went to his assistance. On prior occasions, when Mr. Gilbert had instructed plaintiff and others to get off of the gate, he had to position himself close to the gate in order to prevent the campers from swinging on the gate. Specifically, he testified to the following:

Q When you saw this going on, what did you do, by way of instruction?

A I would go over to them, get them off the gate, take them away from the gate and tell them not to go near. Well, not to play on it, not to be swinging on the gate like that.

He continued:

Q On those several occasions when you told them not to swing on the gate and on those couple of occasions where you physically stopped them from swinging on the gate, what was your concern?


A I was concerned that they would fall off or through and hit the ground, which was hard, and they could injure themselves.

Q You were concerned about them falling off of the gate?

A I was concerned about them falling off of the gate.

Mr. Gilbert continued that “I didn’t want them on it at all.”

It is well settled that on a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails in meeting this burden, summary judgment must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party, who must establish the existence of material issues of fact requiring trial (see, Romano v St. Vincent’s Medical Center, 178 AD2d 467 [2nd Dept 1984]). However, mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient (see, Zuckerman v City of New York, 49 NY2d 557 [1980]). In order to grant summary judgment, it must clearly appear that no material issue of fact has been presented. Issue finding rather than issue determination is the key (see, Schulz v Esposito, 210 AD2d 307 [2nd Dept 1994]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where the material issue of fact is “arguable,” summary judgment must be denied (see, Salino



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v IPT Trucking, 203 AD2d 352 [2nd Dept 1994]).

Here, defendant asserts/concludes *inter alia* that the Town was not negligent, as the children were properly supervised, that the plaintiff was able to appreciate the dangers associated with swinging on the gate, and that the alleged gap in the fence, *viz.*, possible defective condition, was not the proximate cause of plaintiff's injury; rather, his swinging on the gate was the proximate cause. All of the assertions by defendant are conclusory and do not rise to the level needed to establish the absence of any material facts. In fact, whether the children were provided adequate supervision, given the fact that Mr. Gilbert feared a child's sustaining an injury as a result of swinging on the gate, and had reacted differently on prior occasions, by removing children from the gate, is clearly a key factual issue that needs to be determined (see, Boltax v Joy Day Camp, 67 NY2D 617 [1986]; Schuyler v Bd of Educ., 18 AD2d 406 [3rd Dept 1963]).

Defendant has failed meet its initial burden and thus demonstrate its *prima facie* entitlement to summary judgment as a matter of law by presenting evidence that there are no material facts in dispute.

Accordingly, defendant's motion for summary judgment is denied.

Dated:

March 27, 2008

HON. RALPH F. COSTELLO

Ralph F. Costello
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION