

Saccaro v St. George's Golf & Country Club Inc.

2008 NY Slip Op 32104(U)

June 30, 2008

Supreme Court, Suffolk County

Docket Number: 0021573/2004

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 3-5-08 (003)
MOTION DATE 3-28-08 (004)
ADJ. DATE 5-15-08
MNEMONIC: # 003 - MG
004 - XMD

-----X

ALYSONDRA SACCARO, an infant under the :
age of 14 years by her parent and natural :
guardian, MADELEINE ROBINSON and :
MADELEINE ROBINSON, :

Plaintiffs, :

- against - :

ST. GEORGE'S GOLF & COUNTRY CLUB :
INC. and RYAN O'CARROLL, an infant under :
the age of 14 years by his parent and natural :
guardian, WINDY O'CARROLL, :

Defendants. :

-----X

ST. GEORGE'S GOLF & COUNTRY CLUB :
INC., :

Third-Party Plaintiff, :

- against - :

MICHAEL O'CARROLL, :

Third-Party Defendant. :

-----X

RYAN O'CARROLL, an infant under the age :
of 14 years by his parent and natural guardian, :
WINDY O'CARROLL, :

Second Third Party Plaintiffs, :

- against - :

MICHAEL O'CARROLL, :

Second Third-Party Defendant.:

-----X

Upon the following papers numbered 1 to 24 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 11; Notice of Cross-Motion and supporting papers (004) 12-14; Answering Affidavits and supporting papers 15-18; 19-20; Replying Affidavits and supporting papers 21-24; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the defendant/third-party plaintiff, St. George's Golf and Country Club, pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it on the basis that it has no liability for the within occurrence, is granted and the complaint of this action and any and all cross-claims asserted against it, and the third-party complaint, are dismissed with prejudice; and it is further

ORDERED that this cross-motion (004) by the defendants/second third-party plaintiffs, Ryan O'Carroll and Windy O'Carroll, pursuant to CPLR 3025(b) granting leave to serve an amended answer is denied without prejudice with leave to renew upon submission of the pleadings and the proposed amended answer; and pursuant to CPLR 3211 and 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them, is denied without prejudice with leave to renew upon determination of an application to serve an amended answer.

This is an action sounding in negligence wherein the infant plaintiff, Alysondra Saccaro, (hereinafter Alysondra) and her mother, Madeleine Robinson, seek damages for injuries claimed to have been sustained by the infant plaintiff on January 29, 2000 at St. George's Golf & Country Club (hereinafter St. George's) at around 12:00 midnight. It is asserted that the infant was a passenger on a toboggan/sled along with Alana Saccaro (hereinafter Alana) and Barbara Casey on hills located on the premises of St. George's. It is claimed that Ryan O'Carroll (hereinafter Ryan) pushed the toboggan while the occupants were sleigh riding down a snowy hill and that Alysondra came into contact with a "ball washer" pipe which was concealed by snow. The plaintiffs allege negligence against St. George's asserting this ball washer was a dangerous and defective condition protruding 33 inches from the ground, causing the infant plaintiff to sustain injury. They further allege that the infant defendant, Ryan, was negligent and acted in disregard of the safety of the infant plaintiff in that he abruptly put into motion the toboggan upon which Alysondra was a passenger. The second cause of action asserts a derivative claim on behalf of Madeleine Robinson against the infant defendant, Ryan, and St. George's.

A third-party action was brought by St. George's against Michael O'Carroll, father of Ryan, wherein it seeks indemnification from Michael O'Carroll for any recovery by Alysondra Saccaro in the main action.

A second third-party action has been commenced on behalf of the infant Ryan by Windy O'Carroll against Michael O'Carroll, his father, asserting a claim of negligent supervision of Ryan by Michael O'Carroll, wherein he seeks judgment against Michael O'Carroll relative to any recovery by Alysondra in the main action.

In motion (003), the defendant/third-party plaintiff, St. George's, seeks summary judgment dismissing the complaint and all cross-claims asserted against it on the basis that it has no liability for the within occurrence, asserting, inter alia, that this action is barred by General Obligations Law §9-103.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (**Sillman v Twentieth Century-Fox Film Corporation**, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (**Winegrad v N.Y.U. Medical Center**, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (**Winegrad v N.Y.U. Medical Center**, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (**Joseph P. Day Realty Corp. v Aeroxon Prods.**, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (**Castro v Liberty Bus Co.**, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (**Friends of Animals v Associated Fur Mfrs.**, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, a plaintiff must show that the defendant's negligence was a substantial factor in bringing about the injury. If the defendant's negligence was a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (**Spiegel v Fine Paint Co.** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]).

Here the adduced testimony by Alysondra, Michael O'Carroll, and John Kenny establishes that members of the public came onto St. George's premises for many years for the purpose of sleigh riding. At this deposition, Michael O'Carroll testified that he has been sleigh riding there since he was eight or nine years old and he was forty three on the date he testified. He never remembered seeing a ball washing pipe prior to this incident. On January 28, 2000 when the incident occurred wherein Alysondra sustained injury, there were about seven to nine cars parked on Lower Sheep Pasture Road by St. George's. He stated there were people sleigh riding all over the place. It was after nine o'clock at night, and he did not bring a flash light with him on the hill. He stated Alysondra's mother did not accompany them because she was tired and thought it was kind of late. When he arrived at the golf course, there was a post and rail fence with an opening for access to St. George's, about three fourths of the way up the hill with a little area where he could rest the sled. Michael O'Carroll testified he brought with him Alysondra, Alana (Alysondra's sister), Tiffany Dominer (hereinafter Tiffany) and Tiffany's sister, a neighbor's child, and his son Ryan. While the children were using the toboggan down the hill

on the golf course, he testified that he used the sleigh, was somewhere on the hill, or waiting at the middle of the hill or somewhere in the vicinity of the hill, and remained with the children until he brought Tiffany, the youngest of the children, to the car because she was freezing. They had been sleigh riding and tobogganing for at least an hour and a half prior to the incident. As he was leaving to put Tiffany in the car, Alysondra, Alana and Tiffany's sister were at the top of the hill on the toboggan and Ryan was holding the toboggan, getting ready to push it. He further testified that he told them not to go down the hill until he got back. It took him several minutes to get down the hill with Tiffany, and as he was putting her in the car, he heard a metallic sound and then heard Alysondra scream. When he turned, he saw her lying in the snow off the toboggan. He stated he told to his son not to push the sleigh and Ryan told him, "I pushed them, but then I tried to catch them and they went down the hill." Michael O'Carroll testified he saw the ball washer pipe sticking out of the snow at least three feet, located about three quarters the way down the bottom of the hill near where Alysondra was lying. He stated he did not see the pipe before that and that they had gone down the hill five to ten times before the accident happened, but this last time she had gone down a little more to the right than the other times. He stated he did not see the accident happen. He further testified that he did not see anyone from St. George's that night, and did not pay to get into St. George's.

Alysondra Saccaro testified her date of birth is May 7, 1991 and she has a twin sister, Alana. On January 28, 2000, when the accident occurred, she was in third grade. Michael O'Carroll was living in her home with her mother, sisters and brother. Ryan is now her step-brother. She testified the accident occurred about 11 p.m. at St. George's and it was the first time she had gone sledding there and went with Michael O'Carroll, Ryan, Barbara Casey, Tiffany (Barbara's younger sister who was four years old at the time) and Alana. There were other people at the golf course when they arrived, but she testified they were not by them as they had their own little hill. There were no lights on the hill but there were street lights. She did not see anyone from the golf course there. It was on her fifth ride down the hill that the accident happened. She was on the back of the toboggan, Barbara was in the middle and Alana was the steerer. To get the toboggan going, someone had to push it. She stated Michael O'Carroll pushed them the first four times and Ryan pushed them the fifth time because they discussed who was going, and it was decided Ryan would push. She stated that when he pushed, the sled was turned and they weren't ready as Alana did not have the steerer (the rope), her legs (Alysondra's) kept falling off, and the sled did not go straight. She stated Ryan was eight years old at the time. She could not see the pole they hit from the top of the hill from where the toboggan started, but stated it was at the bottom of the hill, towards the right, but not in the middle of the hill. She did not know if the pole was covered with snow before she hit it. She further testified that Michael O'Carroll had gone down the hill to put Tiffany in the car because Tiffany was cold, and he told them to wait until he got back.

John Kenny testified that St. George's was opened to private membership. Other than golfing, there are no other activities that take place on the grounds. He also testified he was the secretary of St. George's. He stated there was a post and rail fence along the roadway by the golf course, and a "No Parking" sign on Sheep Pasture Road. He testified he has seen sleigh riders there with children on occasion since he joined the club as a member in 1992, but

that these were outsiders, not members. He stated that St. George's has 150 acres, some of the property was flat and some hilly. He stated there had been ball washers on the golf course since he has been a member, and described the ball washer as being a football sized device on the top of a metal pole that held water and soap; the metal pole or pipe which held the ball washer was about thirty six to forty two inches high and cemented into the ground. The ball washer was removed before the first freeze in November, but the pipe remained there year round. The hills and fields were not plowed when there was snow. He stated that there was no lighting on the golf course, only by the club house. He stated the maintenance staff did not work in January and the only personnel on the premises would be those who operated the restaurant. He testified he never received any complaints about the poles sticking up from the ground before January 2000. To his knowledge, no one from St. George's ever stopped the sleigh riding on the golf course, and there were warning signs on the trees on both sides of the road that said "No Trespassing," but there were no signs that specifically say "No Sleigh Riding." He was not aware of any rules about sleigh riding for people who did use the St. George's and stated St. George's had no organized winter sports. He stated the club had on several occasions called the police due to cars blocking its entrance and parking on the club property, but did not know when, and stated the police began ticketing cars. He was not aware of anyone calling the police about the sleigh riding.

GOL §9-103 (1)(a) provides, "an owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning as defined in section seventy-one-y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-county skiing, tobogganing, sledding, speleological activities ..., to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes. GOL §9-103 (2) does not limit the liability which would otherwise exist (a) for willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity.... Section 3 of GLO 9-103 further provides that "Nothing in this section creates a duty of care or ground of liability for injury to person or property."

"When interpreting the statutory language, "the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principal. The premise underlying section 9-103 is simple enough: outdoor recreation is good; New Yorkers need suitable places to engage in outdoor recreation; more places will be made available if property owners do not have to worry about liability when recreationists come onto their land" (*Albright v Metz*, 88 NY2d 656, 649 NYS2d 359 [1996]; see also, *Bragg v Genovese County Agric. Socy.*, 84 NY2d 544, 620 NYS2d 322 [1994]).

The statute protects landowners against claims of ordinary negligence where there is not evidence of willful or malicious failure on the part of the landowner, therefore, the inquiry must focus on whether the property might be deemed suitable for the recreational use in which the infant plaintiff was participating when the accident occurred (*GLO 9-103 (2)(a)*).

In *Iannotti v Consolidated Rail Corp*, 72 NY2d 39, 544 NYS2d 308, the Court articulated the elements a court must consider to determine the suitability of property for the appreciation of GOL 9-103: whether the premises are the "type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation. A substantial indicator that property is "physically conducive to the particular activity: is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it (*Albright v Metz*, supra).

Application of §9-103 in a given instance requires only a showing that the injured party was pursuing one of the statutorily enumerated recreational activities at the time of the injury and that the property on which the injury occurred is of the character the legislature envisioned in enacting the statutory grant of immunity, namely, that it is physically conducive to the activity at issue, and of a type that is appropriate for public use in pursuing that activity as recreation. It is determined that St. George's, the owner of the golf course, did not encourage the public to come upon the property for sledding and the infant was not participating in an event scheduled by St. George's (See, *Gruber v Fairport Central School District et al*, 147 Misc2d 545, 556 NYD2d 965 [Sup. Ct. Monroe County 1990]), but the golf course had been used by non-members for many years for the purpose of sleigh riding and tobogganing without the express consent of the owners. A toboggan is a kind of long, flat-bottomed, light sled made of thin board or boards curved up at one end (See, *Gruber v Fairport Central School District et al*, supra), which the infant plaintiff was riding at the time of the within incident.

To qualify as willful or malicious, the proponent must show an intentional act of unreasonable character performed in disregard of a known or obvious risk so great as to make it highly probable that harm would result. The sine qua non of an action for public nuisance, however, is the interference by a defendant with a public right (*Reid v Kawasaki Motors Corporation, USA*, 189 AD2d 954, 592 NYS2d 496 [3rd Dept 1993]). "The statute removes any obligation on the landowner to 'keep the premises safe... [and] to give warning of any hazardous condition...to persons entering for [recreational] purposes' (General Obligations Law §9-103[1][a]). If this language is to have any force, suitability must be judged by viewing the property as it generally exists, not portions of it at some given time. Any other test, which requires the owner to inspect land, to correct temporary conditions or locate and warn of isolated hazards as they exist on a specific day, would vitiate the statute by reimposing on the owner the common-law duty of care to inspect and correct hazards on the land" (*Bragg v Genovese County Agric. Socy.*, supra). "Intentional acts of unreasonable character, performed in disregard of a known or obvious risk are so great as to make it highly probable that harm will result, are considered willful conduct in the realm of tort law (*Seminar v Highland Lake Bible Conference, Inc.*, 112 AD2d 630, 492 NYS2d 146 [3rd Dept 1985]). It is determined that the plaintiffs have not demonstrated any willful or malicious conduct on behalf of St. George's which would impose liability upon them.

It is further determined that the owners of the golf course had no duty to keep its land safe for tobogganning, which was the use plaintiffs made of the land (See, **Seminar v Highland Lake Bible Conference, Inc.**, supra). It is obvious from the facts presented in this case that the ball washer did not constitute a danger to those using the land for its usual and ordinary purpose that of a golf course used during the daytime hours. Here, however, the infant plaintiff was using the unlit golf course at night in the dark for the purpose of tobogganning, and it is very probable that there were other obstacles on this property which, during the hours of darkness, could have caused a child using a toboggan in the dark to have an accident and thus sustain injury.

Whether the premises are the type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation is considered. A substantial indicator that the property is "physically conducive to the particular activity" is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it, (**Albright v Metz**, supra). In **Dean v Glens Falls Country Club, Inc.**, 170 AD2d 798, 566 NYS2d 104 [3rd Dept 1991]), the infant plaintiff was tobogganning on the golf course for seasonal use of its private members. In the winter months, when the golf course is covered with snow and ice, it is regularly used by the public for cross-country skiing, sledding and tobogganing, and the defendant golf course neither encouraged nor discouraged this off-season use of the golf course and did not inspect or maintain the property, advertise its availability or receive any fees or other consideration in connection with these off-season activities. By all accounts, it was determined that the hilly areas of the golf course are well suited for sledding and tobogganning, attracting participants to come. There was no question that the infant plaintiff entered the property for the express purpose of tobogganning and sustained her injuries while engaged in that activity. It was determined by the Court that this pursuit (of tobogganning on the golf course) fit squarely within the legislative purpose of enacting General Obligations Law 9-103, "to induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come on their property to pursue specified activities." The appropriate inquiries, the Court determined, were whether the property is (1) physically conducive to the particular activity, here tobogganing, and (2) of a type which would be appropriate for public use in pursuing that activity as recreation. As recognized in **Iannotti**, supra, "an open hill in an urban or suburban setting ***could be an ideal place for sledding." (See, **Gruber v Fairport Cent. School Dist**, supra). In the instant action, both questions set forth by the Court in **Dean** (supra) are answered in the affirmative, that is, that St. George's was physically conducive to tobogganning and would be appropriate for public use in pursuing that activity as recreation.

Based upon the foregoing, it is determined that the plaintiffs have failed, as a matter of law, to demonstrate by the submission of evidence that the defendant St. George's willfully or maliciously failed to guard, or to warn pursuant to GLO 9-103(2).


It is further determined, as a matter of law, that the ball washer pipe was not an inherently dangerous object maintained on the golf course. An inherently dangerous article is "one fraught with danger lying in the character and content of the article, albeit the disastrous consequences are caused immediately by an external force (*Martinez v Kaufman-Kane Realty Co., Inc.*, 74 Misc2d 341, 343 NYS2d 383 [Sup. Ct. 1973]). The phrase "inherently dangerous" means more than ordinarily dangerous (*Tauraso v The Texas Company*, 300 NY 567, 89 NYS2d 146 [1949]). Here it is determined that the pole used for the ball washer is not an inherently dangerous article.

It is further determined, as a matter of law, that the facts of this case fall squarely within the legislative purpose of enacting General Obligations Law 9-103, "to induce property owners, who might otherwise be reluctant to do so for fear of liability, to permit persons to come on their property to pursue specified activities." Thus it is determined that this action is barred by GLO 9-103(2) as asserted against St. George's Golf & Country Club. Thus, it is also determined as a matter of law that St. George's owed no duty to the plaintiffs.

Accordingly, the complaint and any and all cross-claims asserted against St. George's Golf & Country Club, and the third-party complaint asserted by St. George's Golf and Country Club are dismissed with prejudice.

In cross-motion (004) the defendants/second third-party plaintiffs, Ryan O'Carroll and Windy O'Carroll seek leave pursuant to CPLR 3025(b) to serve an amended answer to assert the affirmative defense of assumption of the risk, but have failed to provide this Court with a copy of the proposed amended answer (See, *Olivetti Leasing Corporation v Mar-Mac Precision Corporation*, 117 Misc2d 865, 459 NYS2d 399 [Sup. Ct New York County 1983]). They further seek a determination pursuant to CPLR 3211 and 3212 for summary judgment dismissing the complaint and all cross-claims asserted against them, which is deemed premature in light of the application to serve an amended answer.

Accordingly, that part of cross-motion (004) which seeks permission to serve an amended answer is denied without prejudice with leave to renew upon submission of the pleadings and the proposed amended answer. That part of the application which seeks an order granting summary judgment dismissing the complaint and all cross-claims asserted them is denied without prejudice with leave to renew upon determination of the application to serve an amended answer.

Dated: June 30, 2008_____
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION