Hines v Town of Hempstead
2009 NY Slip Op 30766(U)
March 31, 2009
Supreme Court, Nassau County
Docket Number: 7562/05
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

ROBERT HINES, an infant by his mother, DENISE HINES, parent and natural guardian, and DENISE HINES, individually,

Plaintiffs,

- against -

THE TOWN OF HEMPSTEAD, THE TOWN OF HEMPSTEAD DEPARTMENT OF PARKS AND RECREATION and NASSAU COUNTY YOUTH ATHLETIC ASSOCIATION,

Defendants.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 7562/05

Motion Sequence No. 002/003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	1,2
Answering Affidavits	3,
Replying Affidavits	4,5
Briefs: Plaintiff's / Petitioner's	
Defendant's / Respondent's	

The defendant Nassau County Youth Athletic Association moves for summary judgment. The Nassau County Youth Athletic Association contends, in its moving papers, there is no genuine issue of material fact, and the plaintiffs cannot make a *prima facie* negligence case against it. The defendant Town of Hempstead cross moves for summary judgment, and incorporates by reference the recitation of facts, law and the exhibits of the Nassau County Youth

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Athletic Association. The plaintiffs oppose the motion and cross motion. The underlying personal injury action seeks to recover damages sustained by the infant plaintiff on August 2, 2004, when that child was allegedly caused to trip and fall on a pitcher's mound on the baseball field located at Rath Park in Franklin Square, County of Nassau, State of New York. This Court has carefully reviewed and considered all of the parties' papers submitted with respect to these motions.

"Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (***Ugarriza v. Schmieder***, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply***

Co., 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

The injured infant plaintiff testified, at a deposition on August 2, 2004, he was present for a Little League baseball game as a member of the Long Island League Lightning. The injured infant plaintiff testified, during the game, he walked from the dugout to the shortstop position as he had previously done in the game, and he attempted to cross over the portable pitcher's mound, but fell over it, and landed on the actual mound with his ankle hitting the surface. The injured infant plaintiff testified, although this circumstance was the first time he saw a portable mound used on an outdoor field, he was familiar with the mound as used in indoor facilities. There is nothing in the youth's testimony indicating the portable mound was defective on the day of the incident.

The Park Supervisor for the Town of Hempstead testified, at a deposition on October 12, 2007, being employed by that defendant on August 2, 2004. The Park Supervisor testified the Town of Hempstead is responsible for the maintenance of the baseball field, including the pitcher's mound which was used during a baseball season, but it was purchased and belonged to the Franklin Square Little League. The Park Supervisor testified the portable mound was used to promote the use of the field for children of all ages, but the Franklin Square Little League decided to discontinue its use. The Park Supervisor testified there were no complaints about the

mound prior to the incident, any reported accidents nor any accident report pertaining to this particular incident. The Park Supervisor testified she never observed the carpeting on the mound roll up nor move.

The President of the Nassau County Youth Athletic Association testified, at a deposition on October 12, 2007, he maintained that same position at the time of the incident; he was not present at the time of the accident, but he spoke to the coaches who were there that day. The President of the Nassau County Youth Athletic Association testified he learned the infant plaintiff tripped while running across the pitcher's mound heading to the shortstop position. The President of the Nassau County Youth Athletic Association testified only the pitcher is allowed to cross the mound, and the plaintiff's actions were done in a joking manner. The President of the Nassau County Youth Athletic Association testified the Franklin Square Little League, as owners of the portable mound, had no relationship with the Nassau County Youth Athletic Association.

The plaintiff's attorney states, in an opposing affirmation dated December 18, 2008, the motion and cross motion must be denied where the infant plaintiff failed to understand or appreciate the nature of the defect or potential for harm, and where the defect is not open and obvious. The plaintiff's attorney maintains the infant plaintiff testified he never played baseball at that particular baseball field before the accident, and despite crossing over the pitcher's mound, he had not encountered any problems nor noticed any defects until he fell. The plaintiff's attorney contends the doctrine of assumption of risk attributed to this plaintiff does not bar recovery but diminishes recovery in the proportion to which the infant plaintiff contributed to his injuries. The plaintiff's attorney opines the infant plaintiff fell over an improperly placed,

raised artificial pitcher's mound, and the defect was not open and obvious to people walking across the field. The plaintiff's attorney claims the pitcher's mound was too high for the playing surface, and caused the infant plaintiff to trip and fall which resulted in injury. The plaintiff's attorney states, while participants in sported related activities generally consent to those commonly appreciated risks which are inherent, arise from the nature of the sport and flow from such involvement, the participants do not consent to conduct which is so negligent as to create an unreasonably increased risk. The plaintiff's attorney asserts the infant plaintiff was not the pitcher, but played a field position, and was not engaged in play at the time of the accident. The plaintiff's attorney claims there are questions of fact regarding the standard of care to be applied, the inherent risks, the inherent nature of the defect, whether the defect was open and obvious, and whether the infant plaintiff appreciated and understood the danger posed by the defect. The plaintiff's attorney indicates, although the baseball game was organized by the defendants, they had no independent knowledge of the extent of the infant plaintiff's skill and experience in playing baseball, so the defendants could not know if the risks commonly arising from the nature of baseball were fully appreciated by the infant plaintiff. The plaintiff's attorney avers the infant plaintiff's injury resulted from the negligent maintenance of the baseball field, specifically the improperly installed pitcher's mound. The plaintiff's attorney states, the defendants owed a duty to the infant plaintiff to ensure the baseball field was free from defects, and the infant plaintiff played with a league relying on the judgment of persons who coordinated the league.

The Deputy Town Attorney states, in a reply affirmation dated December 30, 2008, the only duty of the Town of Hempstead was reasonable care to ensure a safe baseball field. The Deputy Town Attorney states the Town of Hempstead is not liable because the infant plaintiff

assumed the risk of injury due to the open and obvious field condition. The Deputy Town Attorney points out the infant plaintiff was familiar with portable mounds, saw such mounds in indoor facilities, and he ran across this mound on several occasions before he tripped.

The attorney for the Nassau County Youth Athletic Association states, in a reply affirmation dated December 31, 2008, the defense has made a *prima facie* showing of entitlement to summary judgment. The attorney for the Nassau County Youth Athletic Association states the plaintiffs have not shown, in opposition, the existence of a triable issue of fact. The attorney for the Nassau County Youth Athletic Association points out there is no evidence submitted by the plaintiffs which demonstrate the portable mound was defective on the day of the accident. The attorney for the Nassau County Youth Athletic Association notes the plaintiffs' assertion the mound was too high or improperly place is unsubstantiated by any admissible evidence. The attorney for the Nassau County Youth Athletic Association states the infant plaintiff testified the rolled up turf covering the mound caused the accident. The attorney for the Nassau County Youth Athletic Association adds the mound and the risks were open and obvious, and the infant plaintiff crossed over that mound to the shortstop position at least once without incident earlier in the baseball game. The attorney for the Nassau County Youth Athletic Association maintains the Nassau County Youth Athletic Association did not own, control, maintain, install, place nor design the portable pitcher's mound, but Franklin Square Little League, which does not have a relationship with the Nassau County Youth Athletic Association owned it. The attorney for the Nassau County Youth Athletic Association asserts the Town of Hempstead owned the park, and it was responsible for maintaining the baseball field, including the pitcher's mound.

"[B]y engaging in a sport or recreational activity, a participant consents to those

> commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (***Morgan v. State of New York***, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202). This encompasses risks associated with the construction of the playing surface (see ***Maddox v. City of New York***, 66 N.Y.2d 270, 277, 496 N.Y.S.2d 726, 487 N.E.2d 553; ***Peters v. City of New York***, 269 A.D.2d 581, 703 N.Y.S.2d 923)

Morlock v. Town of North Hempstead, 12 A.D.3d 652, 785 N.Y.S.2d 123 (2nd Dept., 2004)

> The infant plaintiff was injured when she tripped and fell on a crack in the surface of a basketball court while playing basketball. By engaging in a sport or recreational activity, a participant consents to those commonly-appreciated risks which are inherent in and arise out of the nature of the sport generally and which flow from such participation (***see, Morgan v. State of New York***, 90 N.Y.2d 471, 484-486, 662 N.Y.S.2d 421, 685 N.E.2d 202). Application of the doctrine of assumption of the risk requires not only knowledge of the injury-causing defect, but also, appreciation of the resultant risk. Awareness of risk, however, is not to be determined in a vacuum (***see, Maddox v. City of New York***, 66 N.Y.2d 270, 278, 496 N.Y.S.2d 726, 487 N.E.2d 553). Rather, it is to be assessed against the background of the skill and experience of the particular plaintiff (***see, Maddox v. City of New York, supra***, at 278, 496 N.Y.S.2d 726, 487 N.E.2d 553; ***Turcotte v. Fell***, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49, 502 N.E.2d 964; ***Morgan v. State of New York, supra***, at 486, 662 N.Y.S.2d 421, 685 N.E.2d 202; ***Pascucci v. Town of Oyster Bay***, 186 A.D.2d 725, 588 N.Y.S.2d 663). Furthermore, the doctrine encompasses risks associated with the construction of the playing field, and any open and obvious conditions thereon (***see, Maddox v. City of New York, supra***; ***Paone v. County of Suffolk***, 251 A.D.2d 563, 674 N.Y.S.2d 761).

Gamble v. Town of Hempstead, 281 A.D.2d 391, 721 N.Y.S.2d 385 (2nd Dept., 2001).

> There is no merit to the argument that the infant plaintiff's age raised an issue of fact as to whether he was able to appreciate the risks of playing roller hockey on a defective and dangerous skating surface. The infant plaintiff's testimony at a hearing pursuant to General Municipal Law § 50-h indicated that he was an experienced rollerblader and street hockey player who was very familiar with the rink conditions at issue. Under these circumstances, it could not be said that the infant plaintiff failed to appreciate the risk presented by the cracked surface of the rink (***see Goldberg v. Town of Hempstead***, 289 A.D.2d 198, 733 N.Y.S.2d 691; ***Lamphier v. Rome City School Dist.***, 284 A.D.2d 989, 990, 726 N.Y.S.2d 884; ***Peters v. City of New York, supra; Hernandez v. City of New York, supra; Matter of Moore v. State of New York, supra***)

Morlock v. Town of North Hempstead, 12 A.D.3d 652, 653, 785 N.Y.S.2d 123 (2 Dept., 2004).

Here, the pitcher's mound was open, obvious, clearly visible, and known to the infant plaintiff.

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Also, contrary to the plaintiffs' opposition, the infant plaintiff had the necessary skill and experience to appreciate the risk presented by the crack (***see Gamble v. Town of Hempstead, supra***, at 391-392).

The court finds there are no triable issues of fact. Accordingly, the motion and cross-motion are both granted.

So ordered.

Dated: **March 31, 2009**

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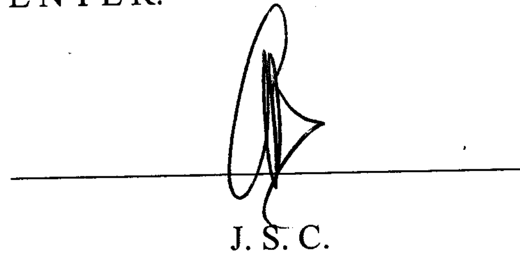

J. S. C.

FINAL DISPOSITION XXX NON-FINAL DISPOSITION

ENTERED
APR 03 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE