Shiu Gee Leung v General Growth Prop., Inc.
2009 NY Slip Op 32821(U)
November 30, 2009
Supreme Court, New York County
Docket Number: 101453/07
Judge: Doris Ling-Cohan
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SCANNED ON 12/3/2009

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number: 101453/2007

LEUNG, SHIU GEE
vs.
GENERAL GROWTH PROPERTIES

INDEX NO. 101453/07
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

SEQUENCE NUMBER: 001
SUMMARY JUDGMENT

... were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5
Replying Affidavits	6, 7
	3, 4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided to the extent ~~set~~ forth in the attached memorandum.

FILED
DEC 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/30/09

DORIS LING-COHAN J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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SHIU GEE LEUNG,

Plaintiff,

-against-

GENERAL GROWTH PROPERTIES, INC., THE CITY OF NEW YORK and JOHN ZHONG,

Defendants.

----------X

Index No. 101453/07

Motion Seq. No. 001

FILED
DEC 03 2009
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.:

Defendants General Growth Properties, Inc. (GGP) and The City of New York (the City) jointly move for an order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing the complaint against them. Defendant John Zhong (Zhong) cross-moves for an order, pursuant to CPLR 3212, dismissing the complaint against him.[1] Plaintiff Shiu Gee Leung (Leung) opposes both motions.

This is a personal injury action in which plaintiff claims that on June 17, 2006, at approximately 6:47 P.M., she sustained serious injuries, when she was struck and knocked to the ground by a bicycle being operated by a seven-and-a-half year old girl, the daughter of defendant Zhong. The accident occurred on the South Street Seaport promenade, by Pier 17 and Fulton Street (the Promenade). It is undisputed that a sign is posted by the pier adjacent to Fulton Street specifically prohibiting bicycle-riding, roller-blading, skate-boarding and the like. It is also undisputed that Zhong was walking with his daughter and five year old son, from their apartment

[1] The Court notes that a cross motion is an improper vehicle for seeking affirmative relief from a non-moving party (*Mango v Long Island Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [2d Dept 1986]; Weinstein-Korn-Miller, NY Civ Prac ¶ 2215.01). However, because defendant Zhong seeks the same relief as defendants GGP and the City, and plaintiff has had an opportunity to respond, the cross motion will be considered.

on Water Street to a bike path which runs alongside Pier 17, when Zhong's son suddenly darted into the crowd on the Promenade. Zhong immediately directed his daughter not to move as he ran after his son. Zhong acknowledges that, despite his instruction, his daughter got on her bicycle and struck and injured Leung.

Plaintiff named the City and GGP as defendants, based on their respective roles as the owner and the property manager of South Street Seaport properties, including the Promenade. The claims against these defendants focus on their alleged failure to maintain the Promenade in a reasonably safe condition in that they did not safeguard plaintiff, as a member of the public, from the dangerous activity of bicycle-riding, of which they had knowledge. Plaintiff also named Zhong as a defendant, charging him with inadequate supervision of his daughter.

The proponents of a motion for summary judgment 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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a determination by the trier of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

The City and GGP jointly assert that, under the circumstances of this case, there is no theory of liability under which either of them could be held liable for plaintiff's injuries. While acknowledging their obligation to maintain the Promenade in a reasonably safe condition, defendants assert that there is no evidence of their failure to do so. In addition, defendants

contend that plaintiff cannot show that either the City or GGP owed her a duty of care, that the duty was breached, and that the breach was the proximate cause of her injuries (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985].

It is well-settled that the City is not an insurer of the safety of individuals, like plaintiff, who use its facilities (*see Curcio v City of New York*, 275 NY 20, 23 [1937]). Rather, the City "owes the same duty of care as that of a private individual: the duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition" (*Mesick v State of New York*, 118 AD2d 214, 216-17 [3d Dept 1986]; *see Curcio*, 275 NY at 23). Movants assert that plaintiff did not offer any evidence challenging the condition of the Promenade, either at her hearing, pursuant to Section 50-h of the General Municipal Law, or at her deposition. In fact, Leung testified that there was nothing about the surface of the Promenade that caused her to fall, and that her injuries were the direct result of the sudden and unexpected impact with the child's bicycle (*see* Brian Brown Affirmation, Exhibit D, Leung Deposition, at 63-64). Leung also testified that she routinely took walks along the pier and the Promenade, that she was aware of the uniformed security personnel who monitor the South Street Seaport, and that when her accident occurred, security personnel, in addition to passersby, came over to assist (*id.*, at 74-76).

The City and GGP have met their burden of a *prima facie* showing of entitlement to summary judgment by demonstrating that the Promenade, which was in a reasonably safe condition at the time of plaintiff's accident, did not cause or contribute to Leung's injuries. Having made this showing, the burden now shifts to plaintiff to demonstrate that a genuine issue of material fact exists, requiring the denial of the motion. In her response, on the one hand, plaintiff recognizes the distinction between a private and a municipal duty of care, tacitly

conceding that the City did not owe a duty of care to her individually. On the other hand, plaintiff argues that the City, as well as GGP, breached their municipal duty of ordinary care by failing to provide adequate warning signage and security at the Promenade.

Plaintiff asserts that, based on the time of day, the number of people present on the Promenade, and the likelihood that someone might ride a bicycle on the Promenade, questions of fact exists as to whether: (1) defendants took reasonable care by posting only one sign notifying the public that bicycle-riding was prohibited; and (2) the number of security personnel hired and on duty at the time of plaintiff's accident was adequate to enforce the prohibition.

In the factually similar case of *Solomon v City of New York* (66 NY2d 1026 [1985]), in which an infant-plaintiff was struck and injured by a bicycle being operated on a city-owned promenade, despite posted signs prohibiting such activity, the Court of Appeals found that the City did not owe the plaintiff a duty of care and dismissed the complaint. The Court of Appeals noted that "[b]y promulgating and enforcing these regulations, intended for the protection of the general public, defendant did not assume a special relationship toward [plaintiff] carrying with it a special duty to protect the latter from the prohibited activity" (*Solomon*, 66 NY2d at 1028). The Court of Appeals specifically found that:

> In its proprietory capacity, a municipality is under a duty to maintain its park and playground facilities in a reasonably safe condition. This duty includes not only physical care of the property but also prevention of ultrahazardous and criminal activity of which it has knowledge. *Bicycle riding on a busy promenade does not rise to the level of ultrahazardous and criminal. Thus, as a matter of law, the city did not breach its duty to plaintiffs*

(*id.* at 1027-28 [internal quotations and citations omitted] [emphasis added]).

However, plaintiff instead stresses the similarities between her accident and the facts in

Mesick v State of New York (118 AD2d 214 [3rd Dept], *appeal denied* 68 NY2d 611 [1986]), and seeks a trial as to the reasonableness of the City's and GGP's actions and/or inactions.[2] In determining that a duty of care was owed, the court considered "the likelihood of injury to another from a dangerous condition or instrumentality on the property and the foreseeability of a potential plaintiff's presence on the property" (*Mesick*, 118 AD2d at 217). However, plaintiff's reliance on *Mesick* is misplaced. Unlike the act of swinging on a rope over jagged rocks in order to reach a swimming hole, the activity at issue in the instant action involves a child riding a child's bicycle on a promenade. The act at issue in *Mesick* was found to be a dangerous condition whereas, here, bicycle-riding, which has previously been found not to be a dangerous condition, is at issue (*see Solomon*, 66 NY2d at 1027-28). Leung, like the plaintiff in *Solomon*, has failed to demonstrate that the City owed her a special duty to protect her from the prohibited activity, and accordingly, the complaint against the City must be dismissed.

Plaintiff also fails to raise a question of material fact sufficient to preclude judgment in GGP's favor. Leung's opposition papers are insufficient in that they contain only speculation as to what steps GGP should have taken in order to prevent the type of accident in which plaintiff and Zhung's child were involved. Rather than providing competent evidence, such as an expert affidavit to refute GGP's showing, or to raise a material issue of fact, plaintiff offers conclusory

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[2] The *Mesick* action involved a young man who sustained severe injuries (quadriplegia) when he fell from a swinging rope onto sharp, jagged rocks at the edge of a water hole located on state property. Despite warning signs to the contrary, the water hole was frequently used for swimming. The Appellate Court determined that, under the circumstances, the State owed a duty of care to the plaintiff and that its actions of posting signage and cutting down the rope (from time to time), were not adequate to fulfill its duty where the precise activity engaged in by the plaintiff was not unforeseeable (*Mesick*, 118 AD2d at 218).

allegations and unsubstantiated speculation (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Furthermore, as indicated above, plaintiff has offered no evidence that the Promenade was not properly maintained. Thus, the complaint against GGP must also be dismissed.

As to the cross motion by defendant Zhong, Zhong contends that summary judgment must be granted in his favor as well because it is well-settled in New York that a cause of action does not lie against a parent based on lack of proper supervision over his or her child, except in instances involving negligent entrustment of a dangerous instrument or where the parent is aware of the dangerous propensities of his or her child (*Rios v Smith*, 95 NY2d 647, 651-53 [2001]; *LaTorre v Genesee Mgmt.*, 90 NY2d 576, 581-82 [1997]; *Nolechek v Gesuale*, 46 NY2d 332, 336 [1978]; *Holodook v Spencer*, 36 NY2d 35, 45 [1974]). Zhong argues that Leung's assertion that he failed to supervise his daughter is, under the circumstances, baseless. First, Zhong contends that there is no evidence that his daughter had a propensity to engage in dangerous conduct. Second, Zhong argues that the bicycle which was involved in the accident – a small-wheeled, child's folding bicycle – cannot be deemed a dangerous instrument.

In opposition, plaintiff contends that summary judgment is inappropriate because questions of fact exist as to whether the bike was a dangerous instrument, or became a dangerous instrument when it was used in an area that was unsuitable for bicycle-riding. Leung also argues that questions of fact exist as to whether the child possessed the ability to understand and obey her father's instruction, and whether her conduct deviated from the degree of care expected of a reasonably prudent child of her age, experience, intelligence and degree of development.

Plaintiff has not shown a sufficient basis for her claim of lack of proper supervision of Zhong's child to defeat Zhong's motion for summary judgment. A review of the evidence fails

to reveal competent evidence to support plaintiff's theory that the child's bicycle could be deemed a dangerous instrument when it is ridden on a crowded promenade in clear violation of posted signage. "While this is often a fact-based determination, items that are commonly used by children, of suitable age in a manner consistent with their intended use, may not, as a matter of law, be classified as dangerous instruments" (*Rios*, 95 NY2d at 653), and as stated above, "[b]icycle riding on a busy promenade does not rise to the level of 'ultrahazardous and criminal'" (*Solomon*, 66 NY2d at 1027 [citations omitted]). The submitted evidence indicates that the small bicycle was being used in a typical manner by the child and there is no evidence to the contrary that would show that the bicycle rose to the level of being a dangerous instrument. Moreover, no evidence has been produced that Zhong's daughter had dangerous propensities or tendencies, merely because she did not follow her father's instruction not to move. Plaintiff's speculative and conclusory assertions with respect to the ability of Zhong's daughter to understand and follow her father's instructions, are not sufficient to defeat the motion for summary judgement (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974]). Thus, the complaint is dismissed as to Zhong as well.

Accordingly, it is

ORDERED that defendants The City and GGP's motion and defendant Zhong's cross motion for summary judgment are granted, and the complaint is dismissed as against General Growth Properties, Inc, The City of New York, and John Zhong; and it is further

ORDERED that the portion of Zhong's motion, which seeks attorneys' fees, is denied as there has been no showing that this is a frivolous action as defined by 22 NYCRR § 130-1.1; and it is further

[* 9]

ORDERED that the Clerk is directed to enter judgment in favor or these defendants with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry of this order, defendants The City and GGP shall serve a copy of this order upon all parties, with notice of entry.

Dated: 11/30/09

DORIS LING-COHAN
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Leung.GGP, city property, child supervision, granted.wpd

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