

**Gill v Town of N. Hempstead**

2009 NY Slip Op 33152(U)

December 10, 2009

Supreme Court, Nassau County

Docket Number: 1184/08

Judge: Daniel Martin

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN  
Acting Supreme Court Justice

TRIAL/IAS PART 30  
NASSAU COUNTY

TIMOTHY GILL,

Plaintiff,

Index No.: 1184/08

Motion Seq. Nos.: 2 - 5

- against -

TOWN OF NORTH HEMPSTEAD, NASSAU  
COUNTY PARKS, RECREATION & MUSEUMS,  
THE INCORPORATED VILLAGE OF EAST  
WILLISTON, THE COUNTY OF NASSAU,  
VILLAGE OF MINEOLA, and EAST WILLISTON  
LITTLE LEAGUE,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
(#2) Notice of Motion for Summary Judgment	1
Defendant's Reply Affirmation	2
(#3) Notice of Cross-Motion for Summary Judgment Dismissing the Complaint	3
(#4) Notice of Cross-Motion for Summary Judgment Dismissing the Complaint	4
(#5) Notice of Motion for Summary Judgment Dismissing the Complaint	5
Defendant's Reply Affirmation	6
Defendant's Affirmation in Reply	7
Defendant's Affirmation in Opposition	8

In a personal injury action, the Defendant, TOWN OF NORTH HEMPSTEAD, moves (Motion #2) for summary judgment dismissing the Plaintiff's complaint and all cross-claims interposed against it. The Defendants, COUNTY OF NASSAU, and NASSAU COUNTY PARKS, RECREATION AND MUSEUMS, hereinafter referred to as "NASSAU" cross-moves (Motion #3) for summary judgment dismissing the complaint and all cross-claims interposed against them. The Defendant, EAST WILLISTON LITTLE LEAGUE, cross-moves (Motion #4) for summary judgment dismissing the complaint and all claims interposed against it. The Defendants, VILLAGES OF

EAST WILLISTON and MINEOLA, cross-move (Motion #5) for summary judgment dismissing the complaint and all cross-claims interposed against them. Since the initiation of the various motions, the Plaintiff has discontinued his actions against the Defendants, NASSAU, VILLAGE OF EAST WILLISTON, and the VILLAGE OF MINEOLA. In response to that circumstance, the Defendant NASSAU has withdrawn that portion of Motion #3 which sought dismissal of the claim in chief, while pursuing the remainder of the relief sought therein, and the Village Defendants withdrew Motion #5 in toto. The Plaintiff opposed Motions #2 and #4. No opposition to the remainder of Motion #3 was interposed.

The underlying complaint alleges that the Plaintiff was injured on May 14, 2007 at 7:15 p.m. when he tripped and/or fell on an allegedly defective water meter manhole cover located at Sagamore Avenue ballfield. Several alternative theories as to causation were asserted including, inter alia, that the improper maintenance of the area concealed the manhole cover creating a hazzard resulting in the Plaintiff's injuries. The answer of the Defendant, EAST WILLISTON LITTLE LEAGUE, consists of a general denial, three (3) affirmative defenses (none of which is pertinent to the determination of these applications), and a cross-complaint against all other named Defendants. The Defendant, TOWN OF NORTH HEMPSTEAD, submitted an answer consisting of general denials, and asserting nine (9) affirmative defenses (none of which is pertinent to these applications), and a cross-complaint against the other named Defendants.

In support of its motion for summary judgment, the Defendant, TOWN OF NORTH HEMPSTEAD, endeavors to submit proof which it claims would establish that said Defendant did not own or maintain the park, and did not receive actual or constructive notice of any defect claiming that the Town merely performed "grooming function" for the ballfields. Included in the proof submitted is the Plaintiff's municipal hearing testimony. The Plaintiff testified that he had watched his son play baseball and when moving backwards, he stepped into the unattended manhole. Other testimony by municipal employees indicates that the ballfield and its environs are owned by NASSAU and maintained by the TOWN OF NORTH HEMPSTEAD. During the time in question, the Town did no work to the manhole cover. The property in question was utilized by the Town pursuant to a permit which expired on May 1, 2007 (prior to the date of the accident). Thereafter, the County agreed to transfer the property to the Town, which transfer did not occur until May 29, 2007 (subsequent to the date of the incident in question). Within three (3) days of the incident, the Town workers were on site and no record of any unsafe condition was noted. The Town also claims that no one provided the Town with actual notice of the condition. Based on the foregoing proof, the Town claims that it has established that it did not create the condition and that it did not have actual or constructive notice of an unsafe condition on the site.

The proof of the County is similar to that of the Town, but the County emphasizes that control of the property was reposed by informal agreement solely with the Town. The County maintains that since it was not in control of the property, the County did not create the condition and did not have constructive or actual notice of a dangerous condition on the site. Based on that proof, the County requests that all cross-claims against it be dismissed (the Plaintiff having already discontinued against the County).

The moving papers of the Defendant, EAST WILLISTON LITTLE LEAGUE, rely on the same proof previously submitted. Based on that proof, the LITTLE LEAGUE indicates that the proof shows that it did not create the condition and it had no actual or constructive notice that a dangerous condition existed at the site in question. The LITTLE LEAGUE also asserts that it did not own or maintain the premises and did not have exclusive use of the ballfield. In any event, the LITTLE LEAGUE maintains that it committed no act of negligence with respect to its utilization of the ballfield.

In opposition, the Plaintiff essentially states that the proof of the Town as to constructive notice is inadequate. The Plaintiff also questions the credibility of the Town's maintenance workers as to the work performed and suggest that the "grooming" of the site including mowing the grass near the displaced cap to the water main. With respect to the movant LITTLE LEAGUE, the Plaintiff maintains a question of fact exists as to whether the LITTLE LEAGUE had exclusive control of the premises. The Plaintiff also argues that the LITTLE LEAGUE official who testified stated that the field is inspected before each game, but in this instance only the infield was inspected. The Plaintiff alleges that the LITTLE LEAGUE knew spectators would be in the area where the water main cap was, and performed no inspection of that area. The Plaintiff also claims contradictions exist as to whether the sprinkler system was operational at the time of the incident - a circumstance not relevant to these applications. Based on the foregoing, the Plaintiff claims that an issue of fact exists as to whether the Defendant LITTLE LEAGUE created the condition or had constructive notice of the defective condition.

On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. "Sheppard-Mobley vs. King, 10 A.D.3d 70, 74 (2d Dept. 2004), *aff'd*. As mod., 4 N.Y.3d 627 (2005), *citing Alvarez vs. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); Winegrad vs. New York Uni. Med. Ctr., 64 N.Y.2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley vs. King, *supra*, at p. 74; Alvarez vs. Prospect Hosp., *supra*; Winegrad vs. New York Univ. Med. Ctr., *supra*.

Based on the submissions before it, the Court concludes that the Defendant TOWN OF NORTH HEMPSTEAD has failed to meet its *prima facie* burden. In order to prevail, the Town must prove that it did not create the condition, and that it had neither actual or constructive notice of the defect. The Town's proof as to its proprietary interest in the property in question on the date of the accident is confusing at best. The Court, for the purpose of this motion, has deemed the Town as a permittee or a licensee of the County's property. The Town had assumed full responsibility for the maintenance and the safety to the public of the property. The Court will accept, as it must, that the Town received no actual notice of the defect. However, while the Town endeavored to establish a lack of constructive notice, the proof submitted was inadequate for such purpose. Viewed in its best light, the Town's proof, containing no corroborative documentation or records only tried to establish that at least three (3) days prior to incident no defects were noted at the field. That proof is lacking in two important respects. First, the proof does not conclusively show that in the time period in

question there was a specific examination of the site of the accident and no defect noted. Secondly, given the daily use of the ballfield and the need for regular maintenance or "grooming," proof that the defect did not exist three (3) days prior to the accident is inadequate to negate the potential of constructive notice (See Gerbi vs. Tri-Mac Enterprises of Stony Brook, 34 AD3d 732, 826 NYS2d 101, Britto vs. Great Atlantic & Pacific Tea Co. 21 AD3d 436, 799 NYS2d 828. Where, as here, the moving affidavits fail to establish as a matter of law that the Defendant was without actual or constructive notice, the motion for summary judgment is deficient and must be denied (See Kraus vs. Great Atlantic & Pacific Tea Co., 262 AD2d 35, 690 NYS2d 590). Where a proponent of summary judgment has not satisfied its *prima facie* burden the sufficiency of the opponent's papers are irrelevant (See Winegrad vs. New York Uni. Med. Ctr., 64 N.Y.2d 851, Joachim vs. 1824 Church Ave., Inc., 12 AD3d 409, 784 NYS2d 157. Accordingly, the Town's motion for summary judgment is denied.

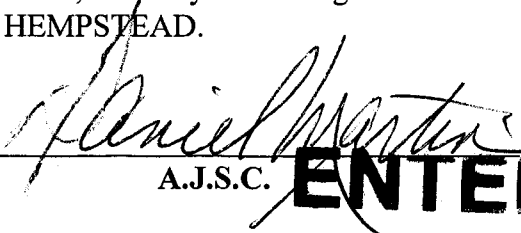
Turning to the motion of the Defendant LITTLE LEAGUE, the Court concludes that unlike the Town, the LITTLE LEAGUE has proven that it has no proprietary interest in the ballfield. The proof also shows that the LITTLE LEAGUE has no legal obligation to maintain the property, and has not assumed any maintenance obligation either authorized or unauthorized. Thus the LITTLE LEAGUE has initially demonstrated that it has no responsibility whatsoever to the property. The LITTLE LEAGUE's proof also shows that it was not the exclusive user of the property and performed no function which would have created the dangerous condition. Having met its *prima facie* burden, the burden then shifts to the Plaintiff to demonstrate that a bona fide issue of fact exists.

The primary argument advanced against the LITTLE LEAGUE is that the LITTLE LEAGUE conceded that it inspected the playing areas of the ballfield to insure that it was safe for use by its players and as a consequence it was negligent in not expanding the scope of its inspection to include the adjacent areas where the water cap was located and if it had, it would have noted the defective condition and eliminated the unsafe condition. Such argument is based solely on conjecture and surmise and is wholly inadequate to defeat a motion for summary judgment (See McDonald vs. Mauss, 38 AD3d 728 833 NYS2d 35, Rendon vs. Castle Real Estate, 28 AD3d 532, 813 NYS2d 479. The Court has considered other arguments advanced by the Plaintiff as to the existence of potential issues of fact including the issue of exclusive control and finds them either without merit or not relevant to the determination made herein. Accordingly, the Defendant LITTLE LEAGUE's motion for summary judgment is in all respects granted.

By way of summary, Motion #5 is withdrawn. Motion #4 and the remainders of Motion #3 are granted and all claims and cross-claims are dismissed against said movants. Motion #2 by the TOWN OF NORTH HEMPSTEAD is denied. Thus, the only remaining triable claim is the Plaintiff's action against the TOWN OF NORTH HEMPSTEAD.

SO ORDERED.

Dated: December 10, 2009

  
A.J.S.C. **ENTERED**

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NASSAU COUNTY  
COUNTY CLERK'S OFFICE