| **Oxman v Mountain Lake Camp Resort, Inc.** |
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| 2010 NY Slip Op 30306(U) |
| February 8, 2010 |
| Supreme Court, New York County |
| Docket Number: 106110/07 |
| Judge: Martin Shulman |
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SCANNED ON 2/16/2010
[* 1]

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

PRESENT: MARTIN SHULMAN J.S.C. Justice

PART 1

Index Number : 106110/2007

OXMAN, TATYANNA

vs.

MOUNTAIN LAKE CAMP RESORT

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 106110/07

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

this motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-H | 1, 2 |
| Answering Affidavits — Exhibits | 3, 4, 5 |
| Replying Affidavits | 6 |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
FEB 16 2010
NEW YORK COUNTY CLERK'S OFFICE

Dated: FEB 8 2010 MARTIN SHULMAN J.S.C.

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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TATYANA OXMAN,

Plaintiff,

Index No. 106110/07

-against-

MOUNTAIN LAKE CAMP RESORT, INC. and
RICHARD PARZOCH,

Defendants.

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FILED
FEB 16 2010
COUNTY CLERK'S OFFICE

MARTIN SHULMAN, J. :

Defendants move for summary judgment dismissing the complaint in this personal injury action. The complaint alleges that defendants owned the thoroughfare and beach area portions within the premises at 29 Camp Road in Ellenville, New York. Plaintiff, who was 76 years old on the date of the accident, July 24, 2004, alleges that her daughter rented a bungalow on the premises. There was a beach on a lake, reachable by boat, on the opposite side of the shore from where the bungalow was located. Plaintiff, her daughter and son-in-law and her grandchildren took a boat to the beach. After a swim in the lake, plaintiff started to walk to her grandchildren and fell.

Plaintiff brings this action against defendants for their alleged negligence in creating and allowing a hazardous condition to exist, in failing to remedy the condition and in failing to warn of a dangerous condition. Plaintiff's bill of particulars describes the condition as a pit or hole created in the beach area.

In their motion for summary judgment, defendants raise the following arguments: (1) defendants did not own, control or possess the beach area where the accident occurred; (2) plaintiff does not know what caused her to fall; (3) defendants did not

have actual or constructive notice of the condition at bar; and (4) the condition complained of was natural, open and obvious.

Defendants submit an affidavit from defendant Richard Parzoch, who states that he is the owner of defendant Mountain Lake Camp Resort, Inc. ("Mountain Lake") and was responsible for the rental of plaintiff's bungalow on July 24, 2004. He asserts that the area where plaintiff was injured was on the opposite side of the Mountain Lake property. He claims that this beach area was not owned or operated by defendants at any time. He also claims that defendants did not conduct activities at the beach area.

Defendants argue that, in her deposition testimony, plaintiff, when asked what caused her to fall, answered that she did not know. Defendants claim that since plaintiff was allegedly ignorant as to the cause of her accident, they are entitled to summary judgment.

Defendants further argue that plaintiff is unable to determine how long the condition was present at the time of the accident. They state that she is unable to show that they had either actual or constructive notice of the condition. In his affidavit, Parzoch states that he had no record of a complaint being made about a hole on the beach area prior to the accident. According to defendants, in the absence of notice, there can be no liability. Defendants contend that even if it is found that they owned the beach property, they would not be liable because a property owner is not required to enclose natural geographic features which present open and obvious, rather than latent dangers.

In opposition to the motion, plaintiff argues that defendants' claims are meritless and questions of fact exist. Plaintiff's deposition testimony and affidavits from her

daughter and son-in-law, allegedly provide sufficient proof. The evidence allegedly shows that: (1) defendants accepted responsibility for the beach area by making a special use of the area, advertising it, providing transportation to it, accepting complaints about the conditions on the beach, collecting money from tenants for the maintenance of the beach, promising to maintain and actually performing some maintenance on the beach; (2) plaintiff explicitly described the condition that caused the accident and described its location and origin; (3) defendants received actual complaints of recurrent dangerous conditions and were on constructive notice of the specific condition; and (4) the condition was neither open nor obvious.

The affidavits from plaintiff's daughter and son-in-law indicate that Parzoch and his predecessor had been doing business with plaintiff's family for a number of years. Parzoch purchased Mountain Lake recently before plaintiff's accident. The affidavits state that Parzoch had a less dedicated attitude towards the maintenance of the premises, and that he had assumed responsibility for the beach area. Both plaintiff's daughter and son-in-law complained that the conditions of the beach had deteriorated since Parzoch's purchase. They contend that he allowed individuals to use the beach area for setting off fireworks and building bonfires in the sand. The activities allegedly resulted in the presence of holes in the sand and charred wood remaining from the fires. Plaintiff's daughter and son-in-law claim to have complained of the conditions to Parzoch and to have received a response from him that he would do something about them. His failure to act allegedly resulted in plaintiff's fall.

According to plaintiff, her deposition testimony clearly identified the cause of her fall. She stated that she fell in a hole in the sand, described the dimensions of the hole

and claimed that the edges of the hole were around her knee. She described withdrawing her leg and noticing the soot on the bottom of her sandal from a recent bonfire. The affidavits from her relatives confirm seeing the hole and the soot on her foot.

Plaintiff asserts that the hole was one of many in the area. The existence of holes allegedly was a recurrent condition, as holes were dug in the sand for the purpose of building bonfires or setting off fireworks. She claims that Parzoch had been aware of the recurrent condition and was under constructive notice of the condition which caused her accident.

Plaintiff denies that the hole was an open and obvious condition and such an assertion is at least an issue of fact. She avers that although the hole in the sand might have been discernable to someone looking out for it, it was not necessarily visible to someone coming out of the water.

In reply, defendants state that plaintiff has failed to show proof of their ownership of the beach area. They claim there is no record of plaintiff's relatives complaining of conditions on the beach. Plaintiff allegedly failed to show a recurrent condition at the location of the accident that would warrant constructive notice. Defendants contend that despite the evidence submitted, she failed to refute the statement that she did not know the cause of her fall.

It is well settled that proponents of summary judgment motions must establish the cause of action or defense sufficiently to warrant the court as a matter of law to direct judgment in their favor, and by evidentiary proof in admissible form. *See Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 (1993). Defendants argue that they did not own or

control the beach area. Plaintiff contends that defendants nevertheless assumed responsibility for that area. The issue of control may be established by proof of defendants' promise, either written or otherwise, to keep certain areas in repair, or by a course of conduct demonstrating that they assumed responsibility to maintain a particular portion of the area. *See Gelardo v ASTHMA Realty Corp.*, 137 AD2d 787, 788 (1st Dept 1988).

Through their affidavits, plaintiff's daughter and son-in-law claim that Parzoch made an effort to maintain the beach area and to fill up the holes prior to the accident. Such an effort is claimed to have been inadequate, as holes were left unfilled. Summary judgment is a drastic remedy that should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits. *Talansky v Schulman*, 2 AD3d 355, 357 (1st Dept 2003). It is obvious the aforesaid affidavits contradict Parzoch's affidavit and that an issue exists as to whether defendants assumed responsibility for the maintenance of the beach area. If defendants voluntarily made repairs on the beach area, which they claim they had no duty to make, they could be liable for injuries resulting from their negligence.

Turning to plaintiff's inability to identify the cause of her accident, her deposition testimony can be interpreted as identifying the hole that she fell into. Even in defendants' papers, they state that plaintiff fell into a hole that was 25 to 31 inches in width and that if she stood in it, the hole would be above her knee. The evidence is clear as to the nature of the condition at bar. There is no question as to the cause of plaintiff's fall.

With respect to the issue of notice, plaintiff testified that she did not know how long the hole had been present and she was not aware of the existence of holes on the previous day. Defendants argue that they did not have sufficient time to notice the condition and remedy the situation, and thus cannot be held liable. Here, plaintiff can establish constructive notice through evidence that defendants were aware of an ongoing and recurring unsafe condition which regularly went unaddressed. *See Talavera v New York City Transit Auth.*, 41 AD3d 135, 136 (1st Dept 2007).

The evidence submitted by plaintiff indicates that Parzoch may have been aware of the continual condition of holes in the beach area and that these holes constituted a hazard. Whether this condition was a recurring one in need of remedy is a question of fact.

The last argument concerns the nature of the condition. Defendants assert that the hole in question was an open rather than a latent danger and that plaintiff should have been aware of it. Defendants claim that they cannot be held liable for such an obvious condition. The fact that a defect may be open and obvious does not negate defendants' duty to maintain their premises in a reasonably safe condition, but may raise an issue of fact as to plaintiff's comparative negligence. *See Ruiz v Hart Elm Corp.*, 44 AD3d 842, 843 (2d Dept 2007). The issue of whether a dangerous condition is open and obvious is fact specific and thus usually a question for the jury. *Id.*

The motion for summary judgment is denied as issues of fact exist as to whether defendants assumed responsibility for the maintenance of the beach area, whether they

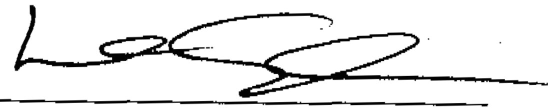
had constructive notice of a recurrent condition and whether the hole in the sand constituted an open and obvious condition.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

The foregoing constitutes this court's decision and order.

Dated: February 8, 2010



Martin Shulman, J.S.C.

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