

Riff v Staten Is. Univ. Hosp.

2010 NY Slip Op 33139(U)

November 5, 2010

Supreme Court, Richmond County

Docket Number: 101915/07

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.:101915/07
Motion No.:001

MAUREEN RIFF,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

STATEN ISLAND UNIVERSITY HOSPITAL,

Defendant

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant seeks an order granting it summary judgment dismissing the plaintiff's complaint. The defendant's motion is denied in its entirety.

Facts

The facts of this case are virtually uncontested. It is alleged that the plaintiff tripped and fell over an exposed root or stump from a shrub or hedge as she attempted to cut through an opening in the hedges in front of the Heart Tower on the defendant's property. The plaintiff testified that there was ongoing construction on the hospital premises. And that while a "bridge" existed to allow sidewalk access she observed several individuals walking along the dirt opening between two bushes to access the Heart Tower on the campus of Staten Island University Hospital. The plaintiff's husband also testified that there was construction going on in the vicinity of the Heart Tower at the time his wife fell.

In stark contrast the Frank Cracchiolo, the witness for Staten Island University Hospital testified that there was no work being done in the area where the plaintiff fell. Furthermore, the defendants annex the report taken on the day of the incident that states that the walk way was "free of . . . obstructions or damage . . ."

Discussion

Summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.¹ It is well established that summary judgment should be granted only if there are no material and triable issues of fact. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the affidavit should be scrutinized in the light most favorable to the party opposing the motion.²

¹ *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

² *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact.³ If on any branch of a summary judgment motion, the movant fails to meet the initial burden, the burden never shifts to the opponent, and the movant's motion should be denied without regard to the sufficiency of the opposition papers.

“It is well established that landowners who hold their property open to the public have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries . . . Encompassed within this duty is the duty to warn of potential dangerous conditions existing thereon, whether they are natural or artificial . . . The duty extends only to those conditions not readily observable, and there is no duty to warn of conditions that are in plain view and easily discoverable by those employing the reasonable use of their senses . . .”⁴

In this case the defendant has come forward with evidence that meets its burden to demonstrate an entitlement to judgment as a matter of law. According to the deposition testimony of Frank Cracchiolo, there was no construction on the premises on the date when the plaintiff sustained her injuries. Furthermore, the defendant has come forward with numerous appellate decisions that uphold a finding of summary judgment where the landowner provided reasonable alternative paths of ingress and egress.⁵ The burden therefore shifts to the plaintiff to raise a triable issue of fact.

Here the plaintiff comes forward with her own deposition testimony wherein she states that there was ongoing construction on the defendant's grounds that blocked her entry into the Heart Tower. Furthermore, investigations conducted by the plaintiff's attorney yielded a

³ *Dempster v. Overview Equities, Inc.*, 4 AD3d 495, [2d Dept 2004].

⁴ *DeLaurentis v. Marx Realty & Improvement*, 300 AD2d 343, [2d Dept 2002](internal citations omitted).

⁵ *See. Rosenbloom v. City of New York*, 254 AD2d 474 [2d Dept 1998]; *Hilf v. Massapequa Union Free School Dist.*, 245 AD2d 261 [2d Dept 1997].

multitude of photographs of the area where the plaintiff was injured. These photographs show a well worn path between the hedges that was utilized by many people as a means of entry and exit from the Heart Tower. The plaintiff relies on the Appellate Division, Second Department's decision in *Witherspoon v. Columbia University*⁶, to support her contention that summary judgment should be denied.

In *Witherspoon*, the Appellate Division, Second Department reviewed a jury verdict that granted judgment in favor the defendant. *Witherspoon* was an action to recover for injuries sustain from a slip and fall on ice as she attempted to walk along an open court yard. During the trial the plaintiff testified that she could have taken an alternate path, rather than the one she actually took. After instructing the jury with regard to comparative negligence and duty of care the trial court “. . . informed the jury that if the defendant provided ‘a safe and direct path for prospective pedestrians, it cannot be held liable if a plaintiff chooses to take . . . an indirect and treacherous path over property it controlled.’”⁷

In reversing the trial court, the Appellate Division, Second Department reasoned that “. . . the presence of an alternate route under the overhang did not relieve the defendant of the duty to maintain the courtyard in a reasonably safe condition as a matter of law. In addition, the plaintiff's knowledge of the icy condition in the courtyard and the presence of an alternate route under the overhang were circumstances from which the jury might or might not have found her contributorily negligent.”⁸

While the defendant argues that the opening between the hedges was not intended to be a walkway, the plaintiff presents evidence that contradict this assertion. Furthermore, the two

⁶ 7 AD3d 702 [2dDept 2004].

⁷ Id.

⁸ Id. At 703.

cases relied upon by the defendant, *Rosenbloom v. City of New York*⁹ and *Hilf v. Massapequa Union Free School District*¹⁰, speak of the removal of snow and icy from unpaved areas of the respective defendants' property.

The defendant's further argument that the wooden nub or stump was inherent to the nature of the topography is likewise unavailing. While the existence of slippery conditions around moss covered portion of a concrete groin or around a boat ramp have been held to find summary judgment in favor of landowners, the wooden nub or stump in this case should not be treated similarly.¹¹ The defendant submits one case that concerns a tree stump.¹² In *Torres v. State*, the Appellate Division, Second Department reviewed a decision of the trial court dismissing the plaintiff's claim at the close of trial on issue of liability. That decision does not elaborate as to the condition of the stump in question, only to say ". . . based on the testimony and photographs adduced at trial, the tree stump encountered by the claimant in or around a picnic area in Franklin D. Roosevelt State Park was such a condition [as to be inherent or incidental to the nature of the property]."

Here, the photographs of the wooden nub or stump show an obstruction on the path of only a few inches that blends in with the dirt path. It appears to this court that the wooden nub or stump is not a naturally occurring root, or other form of vegetation that would be inherent with the topography of the path. As such, the court cannot conclude that the wooden nub or stump was incidental to the nature of the property that should have been reasonably anticipated by the plaintiff, thereby absolving the defendant from any liability.¹³

⁹ 254 AD2d 474 [2d Dept 1998].

¹⁰ 245 AD2d 261 [2d Dept 1997].

¹¹ *Groom v. Village of Sea Cliff*, 50 AD3d 1094 [2d Dept 2008]; *Progressive Northeastern Ins. Co. v. Town of Oyster Bay*, 40 AD3d 612 [2d Dept 2007].

¹² *Torres v. State*, 18 AD3d 739 [2d Dept 2005].

¹³ *Id.*

Conclusion

On a motion for summary judgment, the function of the court is issue finding, and not issue determination.¹⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.¹⁵ As such, the motion must be denied as there are issues of material fact concerning the existence of construction work on the day of the accident, as well as the nature of the wooden nub or stump that existed on the path in question. The defendant's arguments concerning the untimeliness of plaintiff's opposition is without merit, as the defendant was permitted an extension to file its reply papers. As such, the defendant was not prejudiced by plaintiff's failure to comply with the terms of the stipulation. It is the position of this court that matters should be decided on the merits whenever prejudice does not exist.

Accordingly, it is hereby:

ORDERED, that Staten Island University Hospital's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the parties shall return to DCM Part 3 on Monday, December 6, 2010 at 9:30 a.m. for a Pretrial conference.

ENTER,

DATED: November 5, 2010

Joseph J. Maltese
Justice of the Supreme Court

¹⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

¹⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].