Desmond v Northport-East Northport Union Free School Dist.
2011 NY Slip Op 33199(U)
November 29, 2011
Sup Ct, Suffolk County
Docket Number: 06-33394
Judge: Jeffrey Arlen Spinner

[* 1]

SHORT FORM ORDER

INDEX No. 06-33394
CAL. NO. 09-01765OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 7-13-11
ADJ. DATE 9-21-11
Mot. Seq. # 004 MotD

RAYMOND DESMOND and LIDIA DESMOND,

Plaintiff,

- against -

NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT,

Defendant.

STEVEN F. GOLDSTEIN, LLP
Attorneys for Defendant
One Old Country, Suite 318
Carle Place, New York 11514

MORICI & MORICI, LLP
Attorneys for Plaintiff
1399 Franklin Avenue, Suite 202
Garden City, New York 11530

Upon the following papers numbered 1 to 13 read on this motion RRRR; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-13 ; Notice of Cross Motion and supporting papers_; Answering Affidavits and supporting papers_; Replying Affidavits and supporting papers _; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by the defendant, Northport-East Northport Union Free School District, pursuant to CPLR 2221 (d) and (e) for an order granting renewal and reargument of motion (003) which was brought pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's action, and which was denied, is granted as to renewal, and upon renewal, summary judgment dismissing the complaint is denied.

In this action, the plaintiffs seek damages personally and derivatively for injuries allegedly sustained by Raymond Desmond on September 17, 2005 when he tripped and fell in a trench-like condition at the entry/exit to the soccer field at Northport Middle School. It is claimed that the premises was maintained in a dangerous condition, that the defendant had actual and constructive knowledge of that dangerous condition, and that it failed to prevent or otherwise correct the condition.

In motion (003), the defendant sought summary judgment dismissing the complaint on the basis that there were no prior complaints about the area where the plaintiff fell and that it had no notice that such a condition existed prior to the date of the incident and that had it known, it would have corrected the condition. The defendant further contends that the condition was open and obvious and was not inherently dangerous.

In support of the prior motion, the defendant submitted an attorney's affirmation; a copy of the summons and complaint and answer; various photographs; and the partial and unsigned excerpts of the transcripts of the examinations before trial of Raymond Desmond dated August 22, 2008 and 50-h hearing dated December 15, 2005, and William Bryde dated October 1, 2008. The unsigned copies of the transcripts were deemed not to be in admissible form as required by CPLR 3212 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), were not accompanied by an affidavit

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pursuant to CPLR 3116, and were not considered on the motion. Additionally, the defendant did not provide this court with a copy of plaintiffs' bill of particulars as required pursuant to CPLR 3212. Therefore, it was determined that the defendant's motion failed to comport with the requirements of CPLR 3212 and was deemed insufficient as a matter of law.

It is additionally noted that the defendant also submitted affidavits with the reply in support of the prior application, however, and such affidavits are to be given no consideration by the court entertaining the motion for summary judgment, when received in a reply (***Canter v East Nassau Medical Group***, 270 AD2d 381, 704 NYS2d 624 [2d Dept 2000]; ***Sherrer v. Time Equities, Inc. and Emilia Grocery, Inc. v. Time Equities, Inc.,*** 218 A.D.2d 116, 634 N.Y.S.2d 680 [1st Dept 1995]). The function of a reply paper is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (***In the Matter of the Application of Veronica Montgomery-Costa v The City of New York***, 2009 NY Slip Op 29461, 2009 Misc Lexis 3116 [Sup Ct New York County 2009]). Nor does it avail defendant to shift to the plaintiff, by way of a reply affidavit, the burden to demonstrate a material issue of fact at a time when the plaintiff has neither the obligation nor opportunity to respond absent express leave of court (***Winegrad v City of New York***, supra; ***Azzopardi v Amrican Blower Corporation***, 192 AD2d 453, 596 NYS2d 404 [1st Dept 1992])

Pursuant to CPLR 2221(e)(2) a motion for leave to renew shall be based upon new facts not offered on the prior motion that would have changed the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. Pursuant to CPLR 2221 (e) (3) a motion for leave to renew shall contain reasonable justification for the failure to present such facts on the prior motion. "A motion for renewal is properly made to the motion court...to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court. Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation," (***Beiny v Trustees of the Trust Created by Elizabeth N.F. Weinberg, as Grantor,*** 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987]). Renewal is granted as to motion (003) on the basis that counsel has now submitted the bill of particulars and its supporting papers in admissible form to be considered by this court on a motion for summary judgment pursuant to CPLR 3212.

The proponent of a summary judgment motion 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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

The within incident occurred on Saturday, September 17, 2005 at approximately 2:40 p.m. at the entrance/exit to the soccer fields at Northport Middle School located at 11 Middleville Road, Northport, New York. It was clear, sunny, warm day. Raymond Desmond testified that he was attending his son's soccer game at the soccer field located at Northport Middle School. His son was on the town league which was playing at that soccer field. He testified that he had not been to the middle school to watch his children play soccer for about six years. Just prior to the incident, he was walking with his son from the parking lot located to the right of the adjacent soccer field through the opening which was less than four feet wide and was the entrance/exit for the soccer field. The opening had a chain link fence through which to pass and which changed direction, requiring him to make a left, followed by another left before he could enter onto the soccer field. Once he reached the soccer field, he walked straight ahead to the bleachers. The field was then to his left as he walked. He walked past a manhole cover to his left before he reached the bleachers and sat down for about twenty minutes before going to the area where the parents and team stay across the field.

Desmond continued that after about fifteen minutes, he saw that his wife had pulled into the parking lot, and left to walk to her car. He testified that his view towards the parking area was not obstructed. He came to the manhole cover he previously passed. He further testified that there was a track which went around the soccer field, and that he was walking about a foot or two along side that track, looking ahead, talking to his wife as she had just seen their son score a goal. As he stepped forward, his right ankle rolled to the side, and his body lunged forward. His left shoulder hit the fence, but he did not fall to the ground. He felt pain in his ankle, and felt dizzy and nauseous. As he turned around, he saw where he fell to the right of the entrance (facing the bleachers). He described it as a "trench type thing," "like a rain rut," on the field side of the fence which he did not see before he fell. He hopped out of the area into the parking lot over to his wife's car. He was wearing sunglasses and sneakers, and did not wear corrective lenses. Desmond's testimony at his 50-h examination was essentially the same wherein he indicated that he was walking toward the fence to talk to his wife and landed in the hole and twisted his ankle. He described the hole as a rain rut or trench, not necessarily manmade.

Anthony Resca testified to the extent that he ha been employed by the Northport Union Free School District as superintendent of buildings and grounds for about sixteen years and oversees the operations of the custodial grounds, maintenance and staff. He is involved in budgeting and planning, and oversees the warehouse operations and mail operations throughout the district. He is responsible for ten buildings and has four supervisors for whom he is responsible. His duties do not require him to conduct inspections of the buildings and grounds. The PE department cuts and maintains the grounds and fields, and lines the fields for the sporting events. PE communicates with him through the building principal who lets him know if there is any problem or if there is something of which he should be aware. No one else is responsible for the grounds maintenance. Head custodians provide him with periodic reports concerning maintenance and look at the field and parking lot. John Bach was the head custodian for the Middle School, and he believed that Bach submitted reports to him.

Resca testified that in 2005, he visited the Northport Middle School on an occasional basis, approximately twelve times. He has walked the athletic field but did not know if he did in 2005. There were two soccer fields at that school, but the lower field was used by outside groups, such as the Northport Youth Center Soccer League. Mr. Bryde, the president of the soccer club came to his office, he believes in 2005, and advised him that Raymond Desmond had been injured while attending a game on the field. Resca stated that the day after Bryde came to him, he went to the field and checked the area at the entrance to the field, but did not make a report of the accident or incident, of any conversation with Bryde, or his findings upon visiting the site. Resca testified that at some time, someone had driven over the soccer field and created ruts, and Bryde told him about it. They went there and tried to fill in the ruts to take care of the problem. He could not recall any reports

about the condition in the field at the Middle School prior to the accident. With regard to the condition of the entry and grass into the fields from the parking lot, he stated that they did quite a bit of work with asphalt in the parking lot as there had been some damage in the winter. After September 17, 2005, there were complaints about the condition of the playing field from PE, but not about the entrance to the field.

Resca described the area stating that after going through the entrance, there is a dirt pathway to the field in an S-shape or switchback. He did not know if there was a curb along the pathway in 2005, why there was an elevated portion, and if there had been any type of drainage problem there. When shown a picture of the entrance area from the parking lot onto the field through the switchback, he stated that he believed he saw the soil on the lower half of the picture, characterized as a depression or rut or gully, but he did not recall when. He continued that he knew that there is a depressed area, and after Bryde told him about the accident, he went to the site. Although he remembered checking the area and looking for a pothole, but did not see anything out of the ordinary. He continued that he did not pay too much attention to that area, and did not recall looking at that specific area. Resca further testified that the picture looked the same as he remembered it, and did not think that it looked out of the ordinary. He did not know why the entrance had a raised portion and a lower portion on the way to the field. He did not know who installed the circular drainage grate at the site, but indicated that he is responsible for the drainage of the field if there is a problem, such as the grate being covered, blocked off or water was accumulating in the area.

William Bryde testified to the effect that he has been the president of the Northport Youth Center Soccer League for the past ten years. He stated that League is an in-house recreational soccer league for boys and girls, pre-k though high school, and is open to everyone, even those who do not reside in Northport. They played at thirty different fields in 2005, including the field at Northport Middle School. After being advised by Raymond Desmond that he sustained an injury at the school, he notified Anthony Resca at the school district headquarters, but did not fill out any paper work. He was also advised about the accident by one of the parents or coaches. He continued that the Northport Youth Center Soccer League does not perform maintenance of the field at Northport Middle School. Prior to the incident, he thought he made a comment to Mr. Resca about the congested entrance and exit area at the field. He stated that the League had nothing to do with the design of the switchback which is designed to keep motorcycles and ATV's off the field. When shown a picture of the entrance which depicted what was characterized as a gut or depression, Bryde testified that "[t]hat's the way the field is." He continued that it has been that way since he was president of the soccer league for the past ten years, and that the League never performed any work on the soil area adjacent to the switchback. He had no idea what the drainage plate and drain was for "other than the obvious."

In view of the foregoing, the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the bases that it was not negligent, that it reasonably maintained the pathway from the parking lot to the soccer field in a relatively safe condition, that the condition was open and obvious, and that it was not inherently dangerous. There are further factual issues concerning whether the defendant had actual and/or constructive notice of the condition.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (***Spiegel v Fine Paint Co.***, 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). To recover in a negligence action plaintiff must establish that defendant owed him/her a duty to use reasonable care, and that the

defendant breached that duty (***Atkins v Glens Falls City School District***, 53 NY2d 325, 441 NYS2d 644 [1981]).

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. To meet its burden on the of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (***Mei Ziao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 916 NYS2d [2d Dept 2011]). "A property owner has a duty to maintain his or her property in a reasonably safe condition" (***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1978]). "However, a property owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous" (***Katz v Westchester County Healthcare Corporation***, 2011 NY Slip Op 1620, 917 NYS2d 896 [2d Dept 2011]). Where an allegedly dangerous condition might have been open and obvious, it does not negate the defendant's duty to maintain the premises in a reasonably safe condition (***Bradley v DiPaterio Mangement Corp.***, 78 AD3d 1096, 913 NYS2d 244 [2d Dept 2010]). As a general rule, liability for a dangerous or defective condition on property is predicated upon ownership, occupancy, control or special use of the property (***Arev v Feigenbaum***, 2011 NY Slip Op 31069U [Sup Ct, Queens County]).

In the instant action, the defendant has failed to demonstrate prima facie that it used reasonable care in inspecting the grounds and entry/exit from the parking lot to the soccer field. There was a drainage cover in close proximity to the "rain rut" or trench on the pathway leading from the lot to the field. There are factual issues concerning whether the defendant caused or allowed the rut or depressed gully area to develop from the water running into the grate. Bryde testified that the drain and condition was there for the ten years that he was president of the League. The defendant school district offered no testimony or evidentiary submissions concerning its maintenance and repair or inspection of the walkway, although Resca did testify that there had been work in the parking lot area and by the entryway prior to the accident. Thus, the defendant has not established that it did not breach its duty to the plaintiff to maintain the pathway in a reasonably safe condition.

Anthony Resca did not testify as to the last time the accident site was inspected and what the findings were. In fact, when Resca inspected the site after the accident, he stated he did not pay attention to that area as he was looking for a pot hole. He did not know the specific location of the accident at the time. Resca failed to establish that the gully or rain rut in the pedestrian pathway from the field to the parking lot did not exist for a sufficient period of time for it to have been discovered and remedied by the defendant in the exercise of reasonable care (*see*, ***Bloomfield v Jericho Union Free School District***., 80 AD3d 637, 915 NYS2d 294 [2d Dept 2011]). Thus there are factual issues concerning actual or constructive notice of the condition.

The defendant also seeks dismissal of the complaint on the basis that the condition of the pathway was open and obvious and that it was not inherently dangerous. Although the question of whether a condition is hidden, or open and obvious, is fact specific and generally for the finder of fact to determine, the court may determine that the risk is open and obvious as a matter of law where clear and undisputed evidence compels such a conclusion (***Capasso v Village of Goshen,***, 2011 NY Slip Op 4188, 2011 N.Y. App. Div. Lexis 4102 [2d Dept, May 17, 2011]; ***Shah v Mercy medical Center***, 71 AD3d 1120, 898 NYS2d 589 [2d Dept 2010]). A condition that is generally apparent "to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Clark v AMF Bowling Centers, Inc.***, 2011 NY Slip Op 3016, 2011 N.Y. App. Div. Lexis 2944 [2d Dept April 12, 2011]; ***Beck v Bethpage Union Free School District***, 2011 NY Slip Op 2339, 919 NYS2d 192 [2d Dept, March 22, 2011]). Additionally, whether the alleged defect in the sidewalk was open and obvious is significant only as to the injured person's

comparative fault and does not relieve the landowners of liability altogether so as to entitle them to summary judgment (***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]). In the instant action, the defendant merely asserts in a conclusory manner, unsupported by any evidentiary submissions, that the condition of the pathway leading to the soccer field was open and obvious and was not inherently dangerous. Desmond testified that although his view to the parking lot was not obstructed, as he was walking on the pathway toward the parking lot, he did not see the area where he twisted and fractured his ankle until after it happened. Whether the condition was open and obvious is a factual issue to be resolved by the trier of fact as the defendant has not established as a matter of law that it was open and obvious.

The defendant also seeks dismissal of the complaint on the basis that the condition of the pathway was not inherently dangerous. Again, the defendant's argument is conclusory and unsupported by admissible evidence. The burden is on the defendant to demonstrate, as a matter of law, that the condition of the pathway was not inherently dangerous because the condition which caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses (***Cooper v Costello, Inc.***, 2009 NY Slip op 32040U [Sup. Ct., New York County 2009]; *see*, ***Martinez v Kaufman-Kane Realty Co., Inc.***, 74 Misc2d 341, 343 NYS2d 383 [Sup. Ct., Bronx County 1973]). Here, the defendant has not demonstrated with evidentiary submissions that the condition was open and obvious to enable this court to determine that the pathway was not inherently dangerous as a matter of law. While this court finds that, ordinarily, a pathway is not dangerous in and of itself, there are factual issues concerning whether the school district's neglect or failure to maintain the pathway free of guts or gullies rendered it unsafe, thus causing injury to the plaintiff (*see generally*, ***Menaker v Aramark American Food Services, Inc.***, 2008 NY Slip Op 31539U [Sup Ct, Nassau County 2008]). "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (***Clark v AMF Bowling Centers, Inc.***, supra). Thus, whether the condition of the pathway was inherently dangerous is to be determined by the trier of fact.

Accordingly, upon renewal, it is determined the defendant has not established it's prima facie entitlement to summary judgment dismissing the complaint and the motion for an order granting summary judgment is denied.

Dated: NOV 29 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION