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Index No: 5336/09

SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

COPY

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: #001-**MG**

_____ x
GLENN SERMOS AND FILIPPA GRUPPUSO,

Plaintiff(s),

-against-

VINCENZA GRUPPUSO AND PIETRO GRUPPUSO,

Defendant(s),
_____x

ATTYS FOR PLAINTIFF(S):
DERGARABEDIAN, DILLON, GRIZOPOULOS & NATHAN, PLLC
11 CLINTON AVE.
ROCKVILLE CENTRE, NY 11570

ATTYS FOR DEFENDANT(S):
KELLY, RODE & KELLY, PLLC
330 OLD COUNTRY RD., STE. 305
MINEOLA, NY 11501

Pages Numbered
Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1
Opposing Affidavits (Affirmations) V
Reply Affidavits (Affirmations)_____
_____Affidavit (Affirmation)_____
Other Papers_____

Upon the foregoing papers, the plaintiffs move for an order granting summary judgment on the issue of liability to plaintiffs.

This is an action for personal injuries sustained by the plaintiff, Glenn Sermos, in connection with an alleged slip and fall on June 25, 2008 on a deck at the rear of the premises located at 107 Hobson Avenue, St. James, New York.

In support of the application, the plaintiff has submitted the following: an attorney affirmation; a copy of the summons and complaint; defendants answer; and copies of the transcripts of the examinations before trial of Glenn Sermos dated July 22, 2009, Filippa Gruppuso dated July 22, 2009, Vincenza Gruppuso dated July 22, 2009, and Pietro Gruppuso dated July 22, 2009.

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 (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [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 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and 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 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]).

The plaintiff Glenn Sermos testified at his examination before trial that when he arrived at his in-laws' home on the night of June 25, 2008 he went to the rear of the subject premises to smoke a cigarette stepping onto the rear pool deck consisting of wood boards, whereby after taking several steps on the deck he felt his right foot go through the deck causing him to lose his balance and fall into the pool. Mr. Sermos testified that when he arrived at his in-laws' house that everyone was sleeping except his wife. Mr. Sermos sustained a displaced right distal tibia and fibula fracture requiring open reduction internal fixation.

The defendant Vincenza Gruppuso, the plaintiff Glenn Sermos's mother-in- law, testified that she resides at 107 Hobson Avenue, St. James, New York. She testified that no one is allowed to smoke in the house and that everyone usually smokes on the back deck. She testified that on the morning of the incident, her husband, Pietro Gruppuso, attempted to fix a pool light that was not functioning correctly, but was unable to fix it. She testified that in the process of attempting to fix the light he removed two boards from the deck and failed to properly put them back in place after attempting to fix the light. She testified that she did not tell her son-in-law to stay away from the deck despite the boards being loose. Mrs. Gruppuso testified she was asleep when Glenn Sermos arrived and that she did not witness the incident.

The defendant Pietro Gruppuso, the plaintiff's father- in-law, testified that on June 25, 2008 he removed two wooden boards on his pool deck in an attempt to repair a light that was located in the pool. He further testified that he removed the nails from the boards and that upon inspection realized that he could not fix the light and that he placed the boards back without nailing or screwing them back in place figuring that he would call an electrician to come fix the light. He further testified that he did not inform anyone except his wife of the unsecured boards on the pool deck and that he did not rope off the area nor post any warnings by placing cones or chairs around the unsecured boards. He testified that he did not witness the incident because he went to bed.

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. "Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises.... The existence of one or more of these elements is sufficient to give rise to a duty of care" (***Bruhns et al v Antonelli et al,*** 255 AD2d 478 [2nd Dept 1998]; ***Franks v G & H Real Estate Holding Corp.***, 16 AD3d 619 [2005]). Here it is determined that the defendant owners owed a duty to plaintiff Sermos who entered onto the property. It has been established that plaintiff Sermos sustained injury. Therefore, it must be determined if the defendants breached their duty, proximately causing the plaintiff Sermos' injury.

A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (***Singh v United Cerebral Palsy of New York City, Inc. et al,*** 72 AD3d 272 [1st Dept 2010]). Liability is predicated only on a failure of defendant to remedy the danger presented after actual or

constructive notice of the condition (*see*, ***Placquadio v Recine Realty Corp.***, 84 NY2d 967 [1994]; ***Murphy v Conner***, 84 NY2d 969 [1994]). To constitute constructive notice, a condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it (***Granillo v Toys "R" us, Inc et al,*** 72 AD3d 1024 [2nd Dept 2010]; ***Pelow v Tri-Main Development et al,*** 303 AD2d 940 [4th Dept 2002]). Moreover, a general awareness that a dangerous condition might exist is legally insufficient to constitute notice of the specific condition which caused the injury (***Baumgartner v Prudential Ins. Co. of Am.***, 251 AD2d 358 [2nd Dept 1998]).

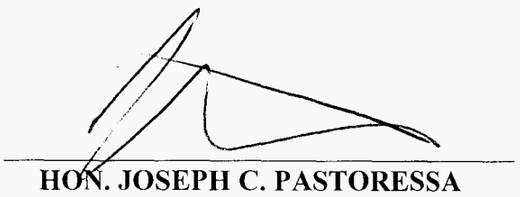
"The issue whether a condition was readily observable impacts on a plaintiff's comparative negligence and does not negate a defendant's duty to keep the premises reasonably safe. An open and obvious condition merely negates the duty to warn. Likewise, the issue of whether the hazard was 'trivial" is also one of fact, dependent on the peculiar facts and circumstances of the case" (***Pelow v Tria-Main Development et al,*** supra). 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 (*see*, ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005 [3rd Dept 2005]).

"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. This duty extends, however, only to those conditions not readily observable. The landowners owe no duty to warn of conditions that are in plain view and easily discoverable by those employing the reasonable use of their senses" (***Meyer et al v Tyner et al,*** 272 AD2d 364 [2nd Dept 2000]).

Here, plaintiffs demonstrated a prima facie showing of entitlement to summary judgment on the issue of liability. The defendant Pietro Grupposo testified he removed two boards from the pool deck and that he thereafter put them back in place, but that he failed to secure them after removal thereby creating an unsafe condition. The plaintiff Sermos testified that upon walking on the pool deck that his right foot went into the deck where the two loose boards were located causing his right foot to go through the deck causing his injury. The plaintiffs showed that it was foreseeable that a person such as the plaintiff Sermos would be on the pool deck and that the defendants failed to warn anyone including the plaintiff Sermos or provide safeguards or safely secure the area to warn of the loose boards.

In opposition to the plaintiffs prima facie showing of entitlement to judgment as a matter of law, defendants failed to raise a triable issue of fact as to the manner in which the accident occurred. The defendants submitted uncertified copies of the plaintiff Sermos' medical records which constitutes hearsay and are not in admissible form and are therefore not considered on this motion for summary judgment (cf. Kamolov v BIA Group, LLC, 79 AD3d 1101). Specifically, the defendants submitted eight pages of uncertified medical records of Glenn Sermos provided by Stony Brook Medical Department of Orthopaedics History and Physical, whereby the notes contained on page 1 of the "Senior Resident History form" state: "29 year old male; Status Post jumping into pool." In addition, the defendants submitted two progress note pages provided by Stony Brook Medical's Emergency Department Encounter and Treatment section, which state in part: "29 year old male arrives with complaints of right foot pain from jumping in pool." In the absence of admissible evidence, the defendants failed to raise a triable issue of fact. Accordingly, motion (001) by plaintiffs for summary judgment on the issue of liability is granted.

Dated: May 11, 2011



HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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