

Gevorgyan v City of New York

2012 NY Slip Op 30050(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 108259/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

GEORGE GEVORGYAN,
Plaintiff,

Index No.: 108259/09

Motion Date: 09/27/11

Motion Seq. No.: 01

Motion Cal. No.: _____

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,
EASTERN NEW YORK STATE AMATEUR SOCCER
ASSOCIATION, UNITED STATES ADULT SOCCER
ASSOCIATION and COSMOPOLITAN SOCCER
LEAGUE,

Defendants.

FILED

JAN 12 2012

NEW YORK

COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers,

In this action personal injury/negligence action, defendants move for summary judgment to dismiss the complaint, and plaintiff cross moves for summary judgment to dismiss one of defendants' affirmative defenses. For the following reasons, both motions are denied.

On November 2, 2008, plaintiff George Gevorgyan (Gevorgyan) was injured while playing in an amateur soccer league game on

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

Field 85, a public playing facility which is located on Randall's Island. The defendant City of New York (the City) owns Field 85, and co-defendant New York City Department of Parks and Recreation (Parks Dept.) oversees and manages Field 85. Co-defendants Eastern New York State Amateur Soccer Association (ENYSASA) and United States Adult Soccer Association (USASA) are the licensing bodies that govern co-defendant Cosmopolitan Soccer League (Cosmopolitan), the soccer league in which Gevorgyan's team plays, and which the Parks Dept. has granted a permit to use Field 85.

Prior to his accident, on October 24, 2008, Gevorgyan had submitted an amateur soccer player's registration form (the registration form) to ENYSASA that includes the following clause:

I acknowledge that I assume the risk for any personal injury I sustain before, during or after the game and/or practice and I will not hold liable my Team, Club, League, State Association, ENYSASA, USASA or U.S. Soccer Federation.

[emphasis in original]

At his July 23, 2010 deposition, Gevorgyan testified that, at approximately 10:20 am on the day of his accident, he was in the process of running toward an "unmarked" (i.e., open or undefended) player during the soccer game when he caught his left foot on a penalty kick marker that was partially hidden by torn and rolled up artificial turf on Field 85, and he tripped, fell and was injured. Gevorgyan also testified that he had been a

professional soccer player in Armenia (where he was born), and that he had previously played on Field 85 "one or two" times, with the most recent occasion being about one week before his accident. Gevorgyan specifically described the condition that he tripped on as a "piece of turf on the penalty kick mark [that] was actually raised and rolled." He also stated that one of his teammates, whom he identified as "Emil," told him that he had observed this condition while playing on Field 85 during the summer before Gevorgyan's accident, and that he (i.e., Emil) had complained about it to the "manager of the field."

At his August 16, 2010 deposition, Parks Dept. supervisor Philip McAuliffe (McAuliffe) confirmed that Field 85 is an artificial turf field, and testified that the City has hired a contractor - non-party Sprint Turf (Sprint) - to perform twice daily cleaning and maintenance of the field (i.e., during the morning and afternoon). McAuliffe also testified that the procedure followed in the event that any dangerous conditions were discovered on Field 85, was for the Parks Dept. to notify the "contract manager," who would, in turn, order Sprint to repair the condition. McAuliffe stated that he had observed contractors laying down new rolls of artificial turf on Field 85 at some point just prior to September 2008. However, McAuliffe denied that the Parks Dept. had received any complaints about a defective condition on Field 85, and that Sprint had performed

any repair work there, between September and November of 2008. McAuliffe also stated that he performed daily inspections of Field 85, and denied ever having observed any problems with the turf during the time in question. He admitted, however, that he did not specifically inspect the turf near the penalty kick markers at the time that he inspected and signed off on the turf installation job in September 2008.

Gevorgyan commenced this action on May 22, 2009, after having duly served a timely notice of claim on the City, by filing a summons and complaint that sets forth one cause of action for negligence. On August 20, 2009, ENYSASA, USASA and Cosmopolitan served a joint answer that set forth the affirmative defenses of: 1) statute of limitations; 2) contributory negligence; 3) the collateral source doctrine; 4) failure to state a claim; and 5) assumption of risk. The City and the Parks Dept. initially filed a separate joint answer that included affirmative defenses and a cross claim against ENYSASA, USASA and Cosmopolitan for contribution and/or indemnification. However, on March 9, 2010, the City and the Parks Dept. filed a notice of substitution by which they agreed to joint representation with ENYSASA, USASA and Cosmopolitan.

Now before the court are defendants' joint motion for summary judgment dismissing the complaint, and Gevorgyan's cross-

motion for summary judgment dismissing defendants' fifth affirmative defense of assumption of risk.

The complaint asserts a claim of negligence. "[T]he traditional common-law elements of negligence [are] duty, breach, damages, causation and foreseeability." Hyatt v Metro-North Commuter R.R., 16 AD3d 218 (1st Dept 2005). Here, defendants argue that they did not breach any duty of care to Gevorgyan and that they did not create, or have actual or constructive notice of, the condition that allegedly caused Gevorgyan's injuries.

Defendants also argue that "plaintiff assumed the risks inherent in his participation in the activity of soccer." They cite the decision of the Appellate Division, Second Department, in Brown v City of New York (69 AD3d 893 [2d Dept 2010]) that summarized the law governing the doctrine of assumption of risk as follows

A voluntary participant in a sporting or recreational activity is deemed to consent to "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." This principle extends to those risks associated with the construction of the playing field and any open and obvious condition thereon. If the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be [internal citations omitted].

Defendants then note Gevorgyan's background as a former professional soccer player in Armenia and his familiarity with Field 85, as well as the release that he signed on the

[* 6]
registration form. From the foregoing, defendants assert that Gevorgyan assumed the risk of potentially suffering an injury while playing soccer on Field 85.

In his cross-motion, Gevorgyan responds that the doctrine of assumption of risk does not apply where the dangerous/defective condition on a playing field is not "open and obvious," but hidden. Gevorgyan cites precedent from the Appellate Division, Second Department that holds that granting summary judgment is improper where there is an issue of fact as to whether or not a dangerous/defective condition on a playing field was hidden. See e.g. Guardino v Kings Park School Dist., 300 AD2d 355 (2d Dept 2002); Cronson v Town of North Hempstead, 245 AD2d 331 (2d Dept 1997); Henig v Hofstra University, 160 AD2d 761 (2d Dept 1990). Gevorgyan concludes that there is such a question of fact presented based upon his deposition testimony describing the condition. Gevorgyan specifically reasons that "the defect was hidden due to the fact that [I] only saw the strip of turf when it was in the 'down' position," that he "never saw the strip in the 'up' position," and that "when the strip is in the 'down' position, it is completely hidden." Defendants reply that Gevorgyan "admitted that he observed the penalty kick marker prior to his fall," and that "it is irrelevant whether the penalty kick marker was in the up or down position since it was readily apparent, noticeable and obvious."

The court finds that there is an issue of contested fact as to the liability of the City and the Parks Dept. with respect to the installation and maintenance of Field 85. Defendants' testimony sets forth that the field was installed a few months before plaintiff's accident under contract to the City and Parks Dept. Plaintiff's testimony and accompanying photographs of the penalty kick mark viewed in the light most favorable to the plaintiff would allow a factfinder to reasonably infer that the penalty kick mark was improperly glued down constituting a dangerous condition that is not an inherent risk of playing on the field. As the Court has stated a "torn or allegedly damaged or dangerous net--or other safety feature--is by its nature not automatically an inherent risk of a sport as a matter of law for summary judgment purposes. Rather, it may qualify as and constitute an allegedly negligent condition occurring in the ordinary course of any property's maintenance and may implicate typical comparative negligence principles." Morgan v State, 90 NY2d 471, 488 (1997). Defendants reliance upon Brown v City of New York is misplaced because in that case the concrete curb was conceded to be an open and obvious feature of the playing surface. Brown v City of New York, 69 AD3d 893, 894 (2010) ("plaintiff assumed the risk of injury . . . open and obvious cement strip in the out-of-bounds area of the field").

Plaintiff's deposition testimony that his friend had complained of the condition months prior to plaintiff's accident in addition to the other evidence submitted is sufficient , for purposes of summary judgment, to raise an issue of fact as to defendants' awareness of the condition. See Guzman v L.M.P. Realty Corp., 262 AD2d 99, 100 (1st Dept 1999) ("in opposing a motion for summary judgment, hearsay evidence may be utilized as long as it is not the only evidence submitted").

Therefore, the court concludes that, at this juncture, defendants have not borne their burden of proving that Gevorgyan's complaint should be dismissed pursuant to the doctrine of assumption of risk. Accordingly, the court finds that defendants' motion should be denied as to the City and Parks Dept.

However, there has been no showing that defendants ENYSASA, USASA or Cosmopolitan had any responsibility for the condition of the playing field and therefore defendants' motion to dismiss shall be granted solely as to ENYSASA, USASA and Cosmopolitan as no liability to plaintiff has been established as to them.

Gevorgyan's cross-motion seeks summary judgment dismissing defendants' fifth affirmative defense of assumption of risk. However, as previously discussed, the court has determined that there is a triable issue of fact as to whether Gevorgyan was injured as a result of a hidden condition on Field 85, and this

factual issue will decide the viability - or not - of defendants' assumption of risk argument. Because that factual issue awaits resolution at trial, there are no grounds to grant Gevorgyan's summary judgment request at this juncture. Accordingly, the court finds that Gevorgyan's cross-motion should also be denied.

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment dismissing the complaint pursuant to CPLR 3212 is GRANTED only as to defendants Eastern New York State Amateur Soccer Association, United States Adult Soccer Association and Cosmopolitan Soccer League and the complaint is hereby DISMISSED as against those defendants; and it is further

ORDERED that the defendants' motion for summary judgment is otherwise DENIED; and it is further

ORDERED that the cross-motion, pursuant to CPLR 3212, of plaintiff George Gevorgyan is DENIED; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a status conference on February 7, 2012 at 11:00 A.M.

This is the decision and order of the court.

FILED

Dated: January 9, 2012

ENTER: **JAN 12 2012**

NEW YORK
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DEBRA A. JAMES J.S.C.