Hope v Holiday Mtn. Corp.
2013 NY Slip Op 33959(U)
November 12, 2013
Supreme Court, Sullivan County
Docket Number: 2359-2011
Judge: Stephan Schick

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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ANDREA J. HOPE

Plaintiff,

-against-

DECISION & ORDER

HOLIDAY MOUNTAIN CORP. and
HOLIDAY MOUNTAIN FUN PARK, INC.,

Defendants.

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Motion Return Date: 10-16-13
RJI No.: 52-32850 2012
Index No.: 2359-2011

Appearances:

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Schick, J.:

This matter comes on by defendant's motion for summary judgment. A complaint was filed on/about August 17, 2011 in which it alleges that on August 26, 2008, plaintiff was employed as a Teacher's Assistant working with developmentally challenged persons at the Center for Discovery and was on her first field trip with a female adolescent client to defendant's Holiday Mountain facility where she was injured in a collision with another patron at the bottom of the "Fun Slide" tube slides. The complaint is not specific as to how the accident occurred however, in her Affirmation in Opposition, dated October 2, 2013, plaintiff states that she and her client climbed to the top of a multi-lane slide; that there were no employees of defendant at the top to provide instruction or safety warnings; that she was in "the left lane and the resident/client was in the middle lane" and they "placed the [burlap] bags on the slide and sat on them and went down the slide

together." She then alleges that at the bottom she stepped over to the middle lane to assist her client and "[w]hile we both stood at the bottom of the middle lane, another patron had gone down the [middle lane of the] slide and struck both my legs." Plaintiff also claims she moved to the adjacent lane to carry out the duties of her employment which included attending to the disabled client in that lane and, therefore, her injuries are the result of defendant's negligent failure "maintain a safe distance between patrons using the tube slides in order to avoid collisions between patrons at the conclusion of the tube slides."

Defendant's version of events, based upon the affidavit of an employee stationed at the bottom of the slides, is different. Defendant alleges plaintiff and her client were in parallel slides separated by a middle slide and that when plaintiff and her client arrived at the bottom plaintiff walked from her slide to the client's slide past the middle slide in violation of the posted warning and with a person descending the middle slide in plain view and was struck by that person coming down the middle slide. Defendant, therefore, argues that plaintiff assumed the reasonable risks of using the tube slides; that the absence of an employee of defendant at the top is not relevant; that plaintiff disregarded the visible warning signs not to cross lanes at the bottom; that plaintiff's argument that she was carrying out work duties is unavailing because, even after discovery, plaintiff's client remains unidentified and, even if unnamed, was considered a "higher" functioning client who showed no sign of requiring assistance at that time or place. In sum, defendant argues plaintiff's injuries were the result of her negligence and not that of defendant.

Plaintiff concludes there are substantial facts in dispute and the motion must be denied. Defendant argues there are no facts in dispute and this Court should decide the matter as a matter of law.

It is clear that were plaintiff's injuries sustained during the ordinary course of using the tube slides in conformity with the posted regulations defendant's liability may be negated by the defense that plaintiff "assumed the risks" of using the slides [Morgan v State of New York, 90 NY2d 471 (1997); Morgan v. Ski Roundtop Inc., 290 AD2d 618 (3d Dept 2002); Shivers v Elmwood Union Free School District, (2d Dept, 2013)]. Additionally, if plaintiff's injury was a result of her disregard for ordinary practices associated with using the slides and/or was a result of her violating clearly posted warnings, plaintiff's behavior may be the cause of her injuries. If, on the other hand, plaintiff was injured through a series of events which were different from, or beyond, or unrelated to the risk which an ordinary person engaged in using the slide could appreciate, then liability may well be laid at defendant's doorstep [Kaufman v Hunter Mountain Ski Bowl, 240 AD2d 371 (2d Dept 1997); Anand v. Kapoor, 15NY3d 946 (2010)].

Further, where plaintiff argues she was injured during the course of fulfilling a duty of care to her client and defendant was aware of the circumstances surrounding, in this case, the Center for Discovery field trip to the "Fun Park," a separate analysis must be performed before assessing liability.

The purpose of a motion for summary judgment is to expedite the disposition of a case to avoid calendar congestion where no material issue of fact is challenged and a decision as a matter of law may be rendered by the court [DiSabato v. Soffes, 193 NYS 2d 184 (1959)]. In deciding a motion for summary judgment after discovery, the Court scours the available record, not to resolve issues of fact but to determine whether there are material questions of fact in dispute [Garolfalo Elec. Co. v NYU, 754 NYS 2d 227 (1st Dept 2002); see Dyckman v Barret, 187 AD2d 553). If there are triable issues of fact, the motion must be denied [Vanmattam v. Thomas, 205 AD2d 615 (2d Dept 1994); Winegrad v New York University Medical Center, 64NY2d 851(1985)] and the matter submitted to a jury [Shaw v. Binghamton Lodge No. 852, BPO Elks Home, Inc., 155 AD2d 805 (1989)]. The question for the Court is whether the proponent of the motion has set forth a *prima facie* case in support of its claims. Failure of the proponent to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers [Smalls v. AJI Industries 10 NY 3d 733 (2008); Winegrad v New York University Medical Center, 64NY2d 851]. Where the proponent has made a *prima facie* showing the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any "genuine,"[Melhado v. Catsimatidis, 182 AD 2d 576 (1st. Dept 1992)] "bona fide," [Gilbert Frank Corp. V. Federal Ins. Co. 70 NY 2d 966 (1988)] material issue of fact requiring a trial of the action [Zuckerman v. City of NY, 49 NY 2d 557 (1980); Reynolds Metal Co., v. EM's Supply Co., Inc, 62 AD 2d 882 (3d Dept 1983); Vermetta v. Kenworth Truck Co., 68 NY 2d 714 (1986); Francheschi v. Consolidated Rail Corp., 142 AD2d 915 (3d Dept 1988); Bush v. St. Claires' Hospital, 82 NY2d 738, 739 (1993)].

In reviewing the record, the pleadings are to be liberally construed (CPLR 104) and will be deemed to allege whatever may be reasonably implied from the statements [Foley v. D'Agostino, 21 AD 2d 60 (2d Dept 1964); Boyce v Vazquez, 249 AD 2d 724 (3d Dept 1998)] and construed in a manner favorable to the non-moving party [Martin v Briggs, 103 AD2d 996; Russell v A.Barton Hepburn Hospital, 154 AD2d 796]. The motion will be granted where a thorough examination of all the papers and proof submitted clearly demonstrates the absence of any triable issues of fact and the cause of action or defense shall be established sufficiently to warrant a Court as a matter of law in directing judgment in favor of a party even in the

absence of a cross-motion [CPLR R 3212(b); MBNA America Bank, N.A. v. Paradise, 285 AD2d 586 (2d Dept 2001)]. If it appears that facts essential to justify opposition may exist but cannot then be stated, court may deny the motion or may order a continuance for disclosure and such orders as may be just [CPLR 3212(f); Allen v. Crowell-Collier Publishing Co., 21 NY2d 403,406 (1968); Santiago v. Pyramid Crossgates Co., 243 AD 2d 955, 956 (3d Dept 1997].

Here the moving defendant argues the record supports his description of plaintiff's actions while the responding plaintiff's affidavit puts forth a conflicting chain of events. Any legal analysis must rest upon an uncontested factual record: here, the facts are in dispute as to whether plaintiff crossed over a lane which had a patron descending to reach her client, in violation of warning signs, when her client was experiencing no difficulty and was in no danger or whether plaintiff moved over to her client, without crossing an intervening lane, to assist the client who was at the bottom of a slide while another patron was descending upon the client and was injured in the course of assisting her client. In this situation the Court must deny defendant's motion for summary judgement and the matter must be submitted to a fact finder to resolve.

Therefore, it is

ORDERED that the Motion by the Plaintiff for Summary Judgment is hereby denied.

This shall constitute the Decision of the Court. The original Decision and Order and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

SO ORDERED.

Dated: Monticello, NY
November 12, 2013

ENTER

HON. STEPHAN G. SCHICK, JSC