SHORT FORM ORDER

INDEX No. 10-21473
CAL No. 13-01299OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-6-13
ADJ. DATE 12-17-13
Mot. Seq. # 001 - MD

MICHAEL J. LACKOWSKI,

Plaintiff,

- against -

MICHAEL GIORDANO and DIANE GIORDANO,

Defendants.

WILLIAM WEXLER, ESQ.
Attorney for Plaintiff
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North Babylon, New York 11703

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated November 5, 2013, and supporting papers (1-9); (2) Affirmation in Opposition by the plaintiff, dated November 27, 2013, and supporting papers 10-11; (3) Reply Affirmation by the defendant, dated December 16, 2013, and supporting papers 12-13; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

ORDERED that motion (001) by the defendants, Michael Giordano and Diane Giordano, pursuant to CPLR 3212 for summary judgment on the issue of liability dismissing the complaint is denied.

This negligence action arises out of an incident which occurred on July 13, 2007, when the plaintiff, Michael J. Lackowski, was an invitee at the premises located at 10 Sarah Court, in Ronkonkoma, New York, owned by the defendants, Michael Giordano and Diane Giordano, and a hot dog cart tipped, causing the plaintiff to sustain burns to parts of his body. The plaintiff alleges that the defendants breached their duty of reasonable care to the plaintiff to prevent a dangerous condition on the premises, and by causing and permitting a dangerous condition to exist on the premises, causing him to sustain injury.

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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, 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]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; and copies of the plaintiff's and defendants' transcripts of their respective examinations before trial.

The plaintiff, Michael Lackowski, testified to the extent that on July 3, 2007, at about 6:30 p.m., he was at the Giordano residence for a 4th of July gathering with his girlfriend, Melanie Rodriguez, who worked with defendant Diane Giordano. He walked into the back yard of the premises and noted about 20 to 50 guests, children and adults, present. He had been at the house for about five to ten minutes when the incident occurred. Melanie introduced him to Diane Giordano, then went over to the bar area and told the bartender to make him a Vodka Coke or Jack Daniels and Coke, which plaintiff placed on the shelf next to the hot dog cart in the back yard, near the stairs to the deck. He described the hot dog cart as a regular hot dog cart with two big wheels at the front, and an umbrella, something like a hot dog cart which would be seen in Manhattan. There was a fixed bar on the rear of the cart. There were two posts sticking down in front of the cart from either corner. The cart was on the grass. The shelf where one could prepare the hot dog was next to the hot dog cart. He did not know if the cart was being manned by a caterer or if it was a self-service cart. As he was standing next to the cart, he felt it begin to move back towards him. He placed his hand where his drink was and felt something move underneath his hand. The plaintiff testified that he did not push down on the shelf when he placed his hand on the cart. He did not see anyone come in contact with the front end of the cart. When the cart began to move, he turned his hand to stop it, but the handle started to fall down. It bumped his forearm so he turned his right arm around because the cart started to move and come down at the same time. The cart just toppled onto the back end so that the handle went down to the ground. It stayed in that position and did not roll over. Hot dogs and boiling water bounced off his right leg below the knee, the calf and the foot, and splashed all over him on the other leg and "everything." He remained at the premises until about midnight or one a.m. He took some Aspirin or Tylenol that someone gave him, and he stood in the pool for a few minutes after it happened. He continued to walk around, sat down, drank, ate, and socialized, trying to numb the pain.

Diane Giordano testified to the extent that on July 3, 2007, she had a party, a get-together for close friends, family, neighbors, and business associates, about 50 people. The weather was very nice out. The event was catered by Better Way to Party. The hot dog cart was delivered by a rental company, not the catering company. The rental company delivered the hot dog cart to her backyard. The cart was on wheels. She set it up by putting hot dogs, buns, water, and sternos in it. She had previously rented a hot dog cart and knew what to do, and placed it so that people could grab a hot dog. She did not know Michael

Lackowski prior to the party. She testified that he attended the party with her bookkeeper, Melanie Rodriguez, whom she invited, including her significant other. She was introduced to the plaintiff, then learned of the accident. She saw the hot dog cart tipped over, and saw the plaintiff standing there next to the cart and hot dogs on the ground. She did not see the cart tip and did not observe anyone else in the immediate area. She asked if he was okay or if he needed anything, and she then started cleaning up. She saw him throughout the evening. He put his foot in the pool and had a drink, and told her "[t]his is all I need, a cold drink and cold water." She made no observation of his leg. She later learned from a couple of friends that the plaintiff was leaning on the cart and it tipped over. She described the cart as having two big wheels and a wheel in the front. The whole thing was on wheels, and she did not remember any pegs. Before the party, her husband put cinder blocks behind the wheels so the cart would not move. It was placed on concrete between the deck stairs and the garden. Diane Giordano stated that Melanie Rodriguez did not see the incident. She also told her for days that everything was fine, then everything changed and that the plaintiff was seeking medical and legal advice.

Michael Giordano testified to the extent that he is also an owner of the subject property and has lived there sixteen years. The party was on July 3, 2007, and was attended by Melanie Rodriguez, who works for his wife. He did not know the plaintiff other than being introduced at the party, and never met him again after the party. He was not in the backyard when the incident occurred, and his wife told him that the cart tipped over, and to check it to make sure it was stable. When he saw the cart after the incident, someone had already placed it back up and the area was cleaned up. He had no conversation with anyone who observed how the incident occurred.

The plaintiff asserts that the defendants breached their duty of reasonable care by creating and permitting a dangerous condition at the premises by placing the hot dog cart at the premises causing injury to the plaintiff. The plaintiff further asserts that because the hot dog cart contains scalding hot water, that it is inherently hazardous. The defendants argue that they were not on notice of any problems with the hot dog cart, that they did not create a hazard or dangerous condition, and that they maintained the premises in a reasonably safe condition.

The plaintiff pleaded that he was an invitee at the defendants' home, however, the common law rules for premises liability based on the status of the entrant as licensee, invitee, trespasser, or other category had been replaced in New York by the single standard of reasonable care by the occupant of the premises, abandoning the common law classifications as the conclusive determinant of a land occupier's duty (***Quinlan v Cecchini***, 41 NY2d 686, 394 NYS2d 872 [1977]). Thus, the single standard of reasonable care rule no longer confines courts to traditional systems of classifications, and permits the court to shift from the status of the plaintiff to the conduct of the defendant under the totality of all the prevailing circumstances.

Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property and to warn of a latent, dangerous condition on the property as a natural counterpart to the duty to maintain the property in a reasonably safe condition (***Martino v Stolzman,*** 18 NY3d 905, 941 NYS2d 28 [2012]). While a landowner has a duty to maintain premises in a reasonably safe manner, it has no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous (***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2003]). The fact that a defect may be open and obvious does not negate a landowner's duty to maintain premises in a reasonably safe condition, but may

raise an issue of fact as to the plaintiff's comparative negligence (***Ruiz v Hart Elm Corp.***, 44 AD3d 842, 844 NYS2d 80 [2d Dept 2007]). Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the circumstances of each case and is generally a question of fact for the jury. A condition that is ordinarily apparent to a person making reasonable use of [his or her] senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (*see* ***Chen v City of New York***, 106 AD3d 1081, 966 NYS2d 177 [2d Dept 2013]). While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion and may do so on the basis of clear and undisputed evidence (***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]).

While, to prove a prima facie case of negligence in a premises liability case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [1995]), the defendant, as the movant in this case, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see* ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). Moreover, the issue of actual or constructive notice is irrelevant where defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see* ***Weller v Colleges of the Senecas***, 217 AD2d 280, 635 NYS2d 990 [1995]; ***Watson v New York***, 184 AD2d 690, 585 NYS2d 100 [1992]).

Based upon the foregoing, it is determined that the defendants have established prima facie entitlement to summary judgment dismissing the complaint on the bases that they maintained the premises in a reasonably safe manner; that they used reasonable care in setting up the hot dog truck; that they did not cause or create the alleged defect; and that they had no actual or constructive notice of any alleged defect. The defendants established that they had previously rented a hot dog cart from a rental company and experienced no difficulties or problems with it, and were familiar with its set up and use. When the subject hot dog truck was delivered to their premises before the party, it was placed on either a grassy or cement surface between the deck stairs and the garden. Michael Giordano put cinder blocks behind the wheels so the cart would not move. The defendants established that they had no actual or constructive notice of any defect concerning this hot dog cart, or the prior hot dog cart, which would cause the cart to tip forward. They further established that there was nothing that they did or did not do which created the alleged defect or proximately caused the hot dog cart to tip.

The plaintiff counters with the arguments that the defendants were aware of the danger of scalding hot water and should have taken every precaution to insure against this type of accident occurring. While scalding hot water may be said to be inherently dangerous, whether scalding hot water in a hot dog cart renders the cart inherently dangerous is a factual issue to be determined by the trier of fact. The plaintiff argues that the cart tipped, thus causing the scalding water and hot dogs to spill out of the cart. The plaintiff does not identify what caused the cart to tip and asserts that the defendants should have known that the cart would tip or move, and that by defendants placing the blocks at the wheels of the cart, they were aware of the danger associated with the lack of stability of the cart. Thus, whether or not the defendants used reasonable care in stabilizing the cart by placing the blocks at the wheels of the hot dog truck is a factual issue to be determined by the trier of fact. The plaintiff also testified that there were two posts

sticking down in front of the cart from either corner, thus, whether the defendants had actual or constructive notice that the cart could tip is a factual issue for jury determination. While the plaintiff asserts that the cart was placed on grass, the defendants testified that the cart was placed on cement, raising further factual issue concerning whether or not reasonable care was employed in placing the hot dog cart on a firm and level base to avoid the cart tipping or moving. It is determined that the plaintiff has raised factual issues concerning whether the defendants had actual or constructive notice that the cart could tip or move by placing the cinder blocks at the wheels of the cart, or sticks at the front of the cart, and whether the defendants employed reasonable care in the placement of the cart and in trying to stabilize it, thus precluding summary judgment.

The plaintiff further contends that he has established a cause of the accident: that either the hot dog cart itself was defective, or that defendants created the unsafe condition in the placement and set up of the cart. The plaintiff argues that if the cart were defective, then the defendants are responsible for the negligence of the rental company under a theory of respondeat superior. The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment (***RJC Realty Holding Corp. v Rupublic Franklin Insurance Company***, 2 NY3d 158, 777 NYS2d 4 [2004]). The uncontroverted evidentiary proof establishes that the hot dog cart was rented from a rental company and that the defendants were not employees of the rental company, thus, the defendants cannot be vicariously liable for any alleged defect.

Accordingly, motion (001) is denied.

Dated: 3/7/14

PETER H. MAYER, J.S.C.