Lynch v City of New York
2014 NY Slip Op 30721(U)
March 21, 2014
Sup Ct, New York County
Docket Number: 113034/2009
Judge: Kathryn E. Freed

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 6

Lynch, Daniel
-v-
City of New York

INDEX NO. 113034/09

MOTION DATE

MOTION SEQ. NO. 001

Cal. #43

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

RECEIVED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

FOR THE FOLLOWING REASON(S):

Dated: ____ J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ☐ MOTION IS GRANTED ☐ MOTION IS DENIED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

DANIEL F. LYNCH, as guardian of BONNIE LYNCH, a minor,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------X

DECISION/ORDER
Index No. 113034/2009
Seq. No. 001

KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED	1-2 (Exs. A-I)
ORDER TO SHOW CAUSE	
ANSWERING AFFIDAVITS	3
REPLYING AFFIDAVITS	4
EXHIBITS	
OTHER	

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Defendant The City of New York ("the City") moves for an Order, pursuant to CPLR 3211(a)(7), dismissing the complaint against it or, in the alternative, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint. Plaintiff opposes the motion. After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and Procedural Background:

Plaintiff Daniel F. Lynch seeks monetary damages for personal injuries allegedly sustained by his then eight year old daughter, Bonnie Lynch ("the infant"), on June 19, 2008. He alleges that

the infant broke her wrist when she fell off of a statue of an elephant at Murphy's Brother's Playground ("the park"), a public playground in Manhattan owned and operated by the City.

Plaintiff's notice of claim alleged that the infant was injured when she slipped off a statue of an elephant inside of Murphy's Brother's Park, located at Avenue C and the FDR Drive. Further alleged in the notice of claim is that the infant was injured due to the City's negligent failure to maintain and supervise the park.

The instant action was commenced on or about September 14, 2009. In the complaint, plaintiff alleged that the City was negligent in its construction and maintenance of the park. Plaintiff further alleged that the City knew or should have known that the "slippery elephant statue posed a danger to children" who climbed on it. In its answer dated October 9, 2009, the City denied all substantive allegations of wrongdoing and asserted as affirmative defenses, inter alia, plaintiff's culpable conduct, assumption of risk, and failure to state a cause of action. In his bill of particulars dated January 18, 2011, plaintiff alleged that:

> The acts and omissions [of the City] constituting negligence consist of the placement of a large ceramic slippery elephant in the center of [a] children's city playground, inviting children to climb onto and fall off of the elephant, due to the size of the elephant, the lack of any handles or mechanisms to hold, the lack of any steps or location to place feet, and the extremely slippery nature of the surface of the elephant.

Ex. D, at par. 18.[1]

At her General Municipal Law §50-h hearing on February 26, 2009, the infant testified that, while her mother and sister went to the ladies' room, she decided to climb the elephant, which she had done many times before. Ex. E., at 12-14. As she sat on the elephant's head and inched forward in an effort to slide down its trunk, she fell to the ground. Ex. E., at 14-16.

---

[1] All references are to the exhibits annexed to the City's motion.

The deposition of the City's witness, Steven DiGiovanni, was conducted on May 22, 2012. DiGiovanni was the Principal Park Supervisor for the City's Department of Parks and Recreation ("DOPR"), Districts 6, 8 and 15, at the time of the subject accident. Ex. G, at 5-6, 8. The park where the alleged incident occurred was located in District 6. Ex. G, at 7.

DiGiovanni testified that there was a stationary elephant statue in the park. Ex. G, at 17. He did not know how long the elephant had been in the park and was not aware of any records reflecting when and how it was placed there. Ex. G, at 21-22. Nor was he certain what the dimensions of the elephant were, what it was made of, or who designed it. Ex. G, at 16, 17-18, 21, 26, 35. Although he said that the DOPR's design department would have records regarding the design and layout of the park, he did not testify about those records. Ex. G, at 23.

Although DiGiovanni initially said that children climbed on the elephant (Ex. G, at 16), he later said that he never saw any children climb on it and that "[a]s far as he kn[e]w, it was decorative." Ex. G, at 28. Later in his deposition, however, he stated that he was uncertain "whether it was intended as a climbing apparatus or decorative." Ex. G, at 29. He did not know whether the statue had any handles or ridges which would facilitate climbing on it. Ex. G, at 18. He was not aware of any child who fell off of the elephant prior to the alleged incident. Ex. G, at 21.

DiGiovanni further testified that rubber matting was placed all around the elephant for safety purposes. Ex. G, at 22. He did not know whether the elephant itself was maintained in any particular way. Ex. G, at 25. He testified that, if any repair had been made to the elephant, the individual performing the repair would have generated a work order. Ex. G, at 30-31. However, he was not aware of any such repairs. Ex. G, at 31.

At her deposition, the infant testified that, prior to her accident, she climbed on the elephant 10-20 times without incident. Ex. H, at 12. Although she said that the elephant was slippery (Ex.

H, at 36), she said that she "was not sure exactly what caused [the incident]." Ex. H, at 15.

Plaintiff testified at his deposition that he did not see the alleged incident occur. Ex. I, at 12. Prior to the alleged incident, he never saw anyone fall off of the elephant. Ex. I, at 11. Nor was he aware of any prior complaints made regarding the elephant. Ex. I, at 11.

The City now moves to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action or, in the alternative, for summary judgment dismissing the complaint pursuant to CPLR 3212. In support of its motion, the City submits the notice of claim, pleadings, bill of particulars, 50-h and deposition testimony of the infant, and the deposition testimony of plaintiff and DiGiovanni. Exs. A-E, G-I. The City also submits "work orders, complaints, daily field inspections, and parks photos inspections" for the period of June 19, 2006 to June 19, 2008, the two years leading up to, and including, the date of the incident, accompanied by a cover letter from the DOPR to the City's Law Department. Ex. F.

The Parties' Positions:

The City argues that it is entitled to summary judgment because plaintiff has failed to prove that defendant possessed any actual or constructive notice of any allegedly defective condition regarding the elephant. Specifically, the City asserts that the DOPR records annexed to its motion as Ex. F, including work orders, complaints and daily field inspections for the park for two years prior to and including the date of the instant accident, prove that City employees observed nothing hazardous, dangerous, or defective regarding the elephant, thereby establishing the City's prima facie entitlement to summary judgment. In fact, urges the City, the said records do not mention any complaint or defect relating to the subject elephant.

In opposition to the motion, plaintiff argues that the City failed to establish its prima facie

entitlement to summary judgment dismissing the complaint. Specifically, he asserts that the City had a duty to maintain the playground in a reasonably safe condition and the question of whether the elephant was dangerous is an issue of fact for the jury. Plaintiff further claims that the City "knew or should have known that placing an adorable decorative item in the middle of [the park] would attract children to play with the slippery elephant and [that the city's] failure to provide any warning or safety mechanism proximately caused [the infant's] injuries."

In its reply affirmation in further support of the motion, the City argues that it established its prima facie entitlement to summary judgment by demonstrating that it did not breach any duty to plaintiff because no such duty existed and that it had no actual or constructive notice of the allegedly dangerous condition. Further, asserts the City, plaintiff failed to raise a triable issue of fact sufficient to defeat its motion. The City also claims that plaintiff failed to provide any support for his argument that the City created the allegedly dangerous condition. Last, the City argues that the elephant was not an attractive nuisance and that plaintiff's argument that the elephant was inherently dangerous is merely speculative and thus does not defeat its entitlement to summary judgment.

Conclusions of Law:

The City's Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts as alleged in the complaint are accepted as true, the plaintiff is given the benefit of every possible favorable inference, and the court must determine simply whether the facts alleged fit within any cognizable legal theory. *See Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013). Here, plaintiff alleges that the City was negligent in creating a hazardous condition or, in the alternative, in failing to properly maintain the park in a safe condition despite having actual

or constructive notice of the alleged danger posed by the elephant. Since, in order to establish a prima facie case against the City arising from a dangerous condition in the park, plaintiff must "demonstrate either that the [City] created the alleged hazardous condition or that [the City] had actual or constructive notice of the defective condition and failed to correct it" (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006] [*citation omitted*]), plaintiff has clearly set forth a cognizable claim and the City's motion pursuant to CPLR 3211(a)(7) is denied.

The City's Motion for Summary Judgment

"Where a defendant moves for summary judgment, it has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition." *Mitchell, supra* at 374 (*citation omitted*). "It is well settled that the 'drastic remedy' of summary judgment can be 'granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact' (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). When, as here, the movant fails to make this prima facie showing, the motion must be denied, 'regardless of the sufficiency of the opposing papers.' (*id.*, italics omitted)". *Kebbeh v City of New York*, 113 AD3d 512 (1st Dept 2014).

As noted above, plaintiff alleges that the City was negligent in creating a hazardous condition or, in the alternative, in failing to properly maintain the park in a safe condition despite having actual or constructive notice of the alleged danger posed by the elephant. However, the City failed to establish its prima facie entitlement to summary judgment as a matter of law because it did not present evidence that it maintained the elephant in a reasonably safe condition. *See Angelone v City of New York*, 45 AD3d 513 (2d Dept 2007); *Swan v Town of Brookhaven*, 32 AD3d 1012, 1013 (2d

Dept 2006). DiGiovanni was unable to state whether the elephant was maintained in any particular manner, if at all. Ex. G, at 25. He testified that, if any repair had been made to the elephant, the individual performing the repair would have generated a work order. Ex. G, at 30-31. However, he was not aware of any such repairs. Ex. G, at 31.

In steadfastly maintaining that it lacked any actual or constructive notice of any danger relating to the elephant, the City relies principally on the work orders, complaints, daily field inspections, and photographs relating to the park for the two year period leading up to, and including, the date of the alleged accident, which it submits as Ex. F to its motion. Whether these documents would have set forth evidence sufficient to meet the City's burden or not, it has failed to lay any foundation for their admissibility. Therefore, the City fails to fulfill its burden of establishing, by proof in admissible form, its prima facie entitlement to judgment as a matter of law since it did not demonstrate the admissibility of these documents under the business record exception, or any other exception, to the hearsay rule. *See* CPLR 4518; *JP Morgan Chase Bank, N.A. v RADS* Group, Inc., 88 AD3d 766 (2d Dept 2011). As noted above, the records annexed to the City's motion are accompanied merely by a cover letter from the DOPR to the City's attorney. Ex. F. The City did not submit an affidavit of one with personal knowledge of how the records were generated and maintained and thus failed to lay a proper foundation for the records. *Id.*, at 767.

Even assuming, arguendo, that the City had no actual or constructive notice of the allegedly dangerous condition, it utterly fails to address whether it created the condition which caused the incident, which is an alternative basis for its liability. *See Santana v City of New York*, 56 AD3d 295 (1st Dept 2008). As discussed previously, DiGiovanni was not aware of any records reflecting when and how the elephant was placed in the park. Ex. G, at 21-22. Nor was he certain what the dimensions of the elephant were, what it was made of, or who designed it. Ex. G, at 16, 17-18, 21,

26, 35. In fact, his testimony was woefully short on details and personal knowledge. Thus, a question of fact exists as to whether the City, through its design or installation of the elephant, created the allegedly dangerous condition. It is also telling that the City did not submit the affidavit of an engineer attesting to the fact that the elephant was safely constructed and that the City thus did not create the alleged condition. *See Lorenzo v Ortiz Funeral Home Corp.*, 113 AD3d 528 (1st Dept 2014). Therefore, the City has failed to establish as a matter of law that it did not create the alleged hazard.

Since the City failed to meet its prima facie burden, this Court need not consider the sufficiency of plaintiff's opposition papers. *See Alvarez v Prospect Hosp., supra*, at 324; *Kebbeh v City of New York, supra* at 512.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant The City of New York is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: March 21, 2014

ENTER:

MAR 21 2014

FILED

MAR 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Kathryn E. Freed,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT