Ortolani v Brentwood Water Dist.
2014 NY Slip Op 30820(U)
March 28, 2014
Supreme Court, Suffolk County
Docket Number: 11-327
Judge: Arthur G. Pitts

SHORT FORM ORDER

INDEX No. 11-327
CAL. No. 10-01191OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-22-13
ADJ. DATE 1-2-14
Mot. Seq. # 003 - MG
004 - XMG

FRANK ORTOLANI,	:	STEVEN D. DOLLINGER & ASSOCIATES
	:	Attorney for Plaintiff
Plaintiff,	:	P.O. Box 369
	:	Huntington Station, New York 11746
	:	
	:	ROBERT J. PASSARELLI, ESQ.
- against -	:	Attorney for Defendant SCWA
	:	One John Street
	:	Babylon, New York 11702
BRENTWOOD WATER DISTRICT, TOWN OF ISLIP and SUFFOLK COUNTY WATER AUTHORITY,	:	JAKUBOWSKI, ROBERTSON, MAFFEI, et al.
	:	Attorney for Defendant Town of Islip
	:	969 Jericho Turnpike
Defendants.	:	Saint James, New York 11780

Upon the following papers numbered 1 to 36 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 21; Answering Affidavits and supporting papers 23 - 31; Replying Affidavits and supporting papers 32 - 33; 34 - 36; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Suffolk County Water Authority for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion by defendant Town of Islip for summary judgment dismissing the complaint and all cross claims against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on November 14, 2009 when he tripped and fell while walking across wooden bleachers in Modern Times Park located at 51 Third Avenue in Brentwood, New York, which is allegedly owned and operated by defendant Town of Islip. The gravamen of the complaint is that the defendants were negligent in failing to properly maintain, manage, and control the premises, creating a hazardous condition. The plaintiff alleges in the bill

of particulars that there was a foreign substance on the bleachers, "rain water," and that the bleachers were slippery "due to rain."

Defendant Town of Islip ("Town") cross-moves for summary judgment dismissing the complaint against it on the ground that the plaintiff failed to identify the cause of his alleged accident. The Town alleges that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition, and that it was raining at the time of the accident.

At his examination before trial, the plaintiff testified to the effect that, on the day of the accident at 4:00 p.m., he arrived at a football field in the subject park and was on the bleachers to watch a football game. When he first saw the bleachers, they were wet. The bleachers consisted of six or seven levels. He and his wife were sitting on the second or third level. His wife was on one side, and he was on the other side. One or two minutes prior to the end of the game, as he walked across the bleachers towards his wife, his right foot slipped off the slat, causing him to fall. It was raining from the time when he arrived at the field until the subject accident occurred. In addition, when he was asked a question, "Can you tell me where with respect to those knotholes [on the wood bleachers] your fall occurred?," he answered, "No." When he was asked a question, "Would it be fair to say you slipped because it was raining out?," he answered, "Well, it is a possibility, yeah. It had something to do with it, I'm sure." He also testified that there was artificial illumination at the site of the accident, and that "[he] thought it should be lit a lot better than it was."

At the General Municipal Law § 50-h hearing, the plaintiff testified to the effect that on the day of the accident, he was sitting on the third or fourth step of the bleachers, approximately 20 feet long. There was a hard drizzle or rain at the time of the accident, and the bleachers were wet. When he was asked a question, "Do you believe there was a defect with the bleachers?," he answered, "No defect."

At his deposition, Santo Novelli testified to the effect that, at the time of the subject accident, he was employed as a groundskeeper 3 for the Parks Department of the Town of Islip. His duty was to oversee crews that maintain the parks including the subject park. It is also his responsibility to maintain the bleachers at the subject park. He had no recollection of the subject incident. He testified that there are lights "directly in front of the bleachers" illuminating the football field at the park. He had no recollection as to whether there was any problem with the lights within a month of the subject incident.
During four years prior to the incident, no repairs were made to the wooden part of the bleachers, and he had not heard any complaints with regard to the bleachers. On a weekly basis, "the bleachers, the lighting, the building, [and] everything in the park" are inspected. If anything needed to be done, the maintenance department would be notified. Within a year of the incident, there were no work orders prepared for maintenance on the bleachers at the park. He indicated that the Town had not been notified of the existence of a defect or hazard at the park prior to the accident. He testified that at the time of the incident, the Suffolk County Water Authority had no involvement in the maintenance, repair or ownership of the bleachers at the park.

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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64

NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see* ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*see* ***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

While to prove a prima facie case of negligence in a case involving a fall, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition (*see* ***Williams v SNS Realty of Long Is.***, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]), the defendants, as the movants in this case, are 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 [2d Dept 2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.*** 84 NY2d 967, 622 NYS2d 493 [1994]).

Here, the plaintiff, at his deposition, testified that his accident occurred possibly due to the fact that it was raining at the time of the accident. At the General Municipal Law § 50-h hearing, the plaintiff testified that there was "no defect" with the bleachers. Subsequently, on or about June 30, 2010, the plaintiff sent an "Errata Sheet" with regard to the transcript of the § 50-h hearing which indicated, *inter alia*, that the "no" answer with regard to the question as to whether there was a defect with the bleachers should be changed to "yes"; and no reason for the error at § 50-h hearing was provided. The Court declines to consider the plaintiff's correction sheet to his § 50-h hearing testimony since the correction sheet lacked a statement of the reasons for making the corrections (*see* CPLR 3116 [a]; ***Shell v Kone El. Co.***, 90 AD3d 890, 935 NYS2d 132 [2d Dept 2011]; ***Dima v Morrow St. Assoc., LLC***, 31 AD3d 697, 818 NYS2d 474 [2d Dept 2006]; ***Riley v ISS Intl. Serv. Sys.***, 284 AD2d 320, 725 NYS2d 567 [2d Dept 2001]). Moreover, although the plaintiff testified that "it should be lit a lot better than it was," he did not testify or indicate that the alleged insufficient lighting condition caused or contributed to his accident. Santo Novelli, the Town's employee, at his deposition, testified that on a weekly basis, "the bleachers, the lighting, the building, [and] everything in the park" are inspected, and that if something needed to be done, the Town would be notified. The Town has established its entitlement to judgment as a matter of law by showing that it did not create the dangerous condition which caused the accident, and did not have actual notice thereof. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Keene v The Marketplace and Wilmorite Mgt. Group, LLC***, 2014 NY Slip Op 1094, 2014 NY App Div Lexis 1080 [4th Dept 2014]; ***Chemont v Pathmark Supermarkets, Inc.***, 279 AD2d 545, 720 NYS2d 148 [2d Dept 2001]).

In opposition, the plaintiff failed to present any evidence sufficient to raise a triable issue of fact that the rain water had accumulated on the bleachers for a sufficient length of time before the plaintiff's fall so as to permit the Town to discover and remedy the condition (*see* ***Perlongo v Park City 3 & 4 Apartments,***

Inc., 31 AD3d 409, 818 NYS2d 158 [2d Dept 2006]; ***Chemont v Pathmark Supermarkets, Inc.***, *supra*). Although the plaintiff contends that it was difficult for him to see the hazardous condition due to insufficient lighting, he failed to present any evidence sufficient to raise an issue of fact as to whether the alleged insufficient lighting condition was the proximate cause of his accident.

Accordingly, the Town's cross motion for summary judgment is granted, and the complaint as asserted against it is dismissed.

Defendant Suffolk County Water Authority ("SCWA") moves for summary judgment dismissing the complaint against it on the ground that since the SCWA did not own the park where the plaintiff fell, SCWA is not liable for the plaintiff's accident. The SCWA contends that it is not responsible for maintaining the area of the accident, and that it did not create the alleged dangerous condition.

Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*see* ***Seaman v Three Vil. Garden Club***, 67 AD3d 889, 889 NYS2d 231 [2d Dept 2009]; ***Breland v Bayridge Air Rights, Inc.***, 65 AD3d 559, 884 NYS2d 143 [2d Dept 2009]; ***Ruffino v New York City Tr. Auth.***, 55 AD3d 819, 865 NYS2d 674 [2d Dept 2008]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that he or she did not create the defective condition (*see* ***Noia v Maselli***, *supra*; ***Franks v G & H Real Estate Holding Corp.***, 16 AD3d 619, 793 NYS2d 61 [2d Dept 2005]).

Here, Santo Novelli testified that at the time of the incident, the Suffolk County Water Authority had no involvement in the maintenance, repair or ownership of the bleachers at the park. SCWA has established its prima facie entitlement to judgment as a matter of law by demonstrating that SCWA did not own, occupy, possess, or put to a special use the subject bleachers where the plaintiff fell, and that SCWA had no obligation to maintain this area (*see* ***Casale v Brookdale Med. Assoc.***, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]; ***Franks v G & H Real Estate Holding Corp.***, *supra*). Moreover, there is no evidence that SCWA created the alleged dangerous condition that caused the plaintiff's accident (*see* ***Italia DePompo v Waldbaums Supermarket, Inc.***, 291 AD2d 528, 737 NYS2d 646 [2d Dept 2002]).

In opposition, the plaintiff contends that the SCWA failed to prove that it was not the lessee of the subject property. The plaintiff submits, *inter alia*, a copy of the management lease agreement dated January 27, 2000 ("lease agreement") for operation of Brentwood Water District between the SCWA and the Town Board of Islip. According to the lease agreement, the Town Board of Islip leases to the SCWA "all of the right, title or interest in the entire operation plant, hydrants, water storage and distribution system, real property and office facilities of the District." The plaintiff contends that pursuant to the lease agreement, the SCWA is responsible for all improvements on the property including the subject bleachers, and has a duty of care to make sure that the bleachers are safe.

Here, the Court finds that the plaintiff failed to raise a triable issue of fact, proffering only speculative assertions, unsupported by the record, that the SCWA is responsible for the maintenance and repair of the subject bleachers. When interpreting a contract, the court should arrive at a construction that will give fair

meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized (*see* ***Pellot v Pellot***, 305 AD2d 478, 759 NYS2d 494 [2d Dept 2003]; ***Gonzalez v Norrito***, 256 AD2d 440, 682 NYS2d 100 [2d Dept 1998]; ***Joseph v Creek & Pines***, 217 AD2d 534, 629 NYS2d 75 [2d Dept 1995]). The second "Whereas" paragraph of the agreement provides that "the parties desire to provide for the retail sale of water by the [SCWA] to all water customers located within the Brentwood Water District." Paragraph 1.2 of the lease agreement provides, in relevant part that the SCWA "agrees to operate, maintain and repair, at its own cost and expenses, the entire operating plant, hydrants, storage and distribution system of the District." Paragraph 3.2 of the lease agreement provides, in relevant part that the SCWA may "make replacements, additions, betterments and improvements or abandon any portion of the water supply and distribution system ... in order to provide adequate supply of water at proper pressure to the District." The Court finds that a fair and reasonable interpretation of the agreement is that the scope of the agreement is limited to the retail sale of water of the SCWA, and that the SCWA is not responsible for the maintenance and repair of the subject bleachers.

Accordingly, the SCWA's motion for summary judgment is granted, and the complaint as asserted against it is dismissed.

Dated: March 28, 2014

J.S.C.

_____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**