

**Creutzberger v County of Suffolk**

2014 NY Slip Op 30823(U)

March 23, 2014

Supreme Court, Suffolk County

Docket Number: 39984/08

Judge: Paul J. Baisley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

Copy

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X  
JOHN CREUTZBERGER,

Plaintiffs,

-against-

COUNTY OF SUFFOLK, LONG ISLAND  
MARITIME MUSEUM, SHELLFISH, INC. and  
CIRCLE OF CHIEFS, INC. d/b/a FRIENDS OF  
BRADSTOCK,

Defendants.

-----X

INDEX NO.: 39984/08  
CALENDAR NO.: 2013010700T  
MOTION DATE: 2/14/14  
MOTION SEQ. NO.: 003 MG; 004 MD

**PLAINTIFF'S ATTORNEY:**  
JOHN L. JULIANO, P.C.  
39 Doyle Court  
East Northport, New York 11731

**DEFENDANTS' ATTORNEYS:**  
MIRANDA SAMBURSKY SLONE  
SKLARIN VERVENIOTIS LLP  
570 Taxter Road  
Elmsford, New York 10523

DENNIS M. BROWN, ESQ.  
Suffolk County Attorney  
100 Veterans Memorial Highway  
Hauppauge, New York 11788

Upon the following papers numbered 1 to 85 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-31; 32-45 ; Notice of Cross Motion and supporting papers        ; Answering Affidavits and supporting papers 46-59; 60-78; 79-81 ; Replying Affidavits and supporting papers 82-83; 84-85 ; Other        ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendant Circle of Chiefs, Inc. d/b/a Friends of Bradstock (FOB) seeking an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against it is granted. The complaint and all cross claims asserted against FOB are hereby dismissed; and it is further

**ORDERED** that the motion by defendants County of Suffolk (County) and Long Island Maritime Museum (LIMM) seeking an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff John Creutzberger's (Creutzberger) complaint is denied; and it is further

**ORDERED** that the action is otherwise severed and continued against defendants County of Suffolk and Long Island Maritime Museum.

On September 2, 2007 plaintiff Creutzberger claims to have sustained injuries when, while riding his bicycle at approximately 8:30 p.m. on a dirt and tall grass pathway toward a boat marina located within the Long Island Maritime Museum grounds, the bicycle struck the marina's wood dock jettisoning Creutzberger over the handle bars face first onto the dock. Plaintiff claims that the tall grass camouflaged the 5 and 1/2 inch height differential between the pathway and the elevated dock. Plaintiff had previously been attending a music festival for 6 and 1/2 hours sponsored by defendant FOB. The Suffolk County Legislature had passed a resolution dated July 12, 2007 granting the defendant FOB permission to conduct the festival at the Long Island Maritime Museum grounds. Defendant County owns the premises where the LIMM is located.

NE

Plaintiff's complaint alleges that the defendants "jointly and severally" negligently failed to maintain the dock and grass area in a reasonably safe condition and negligently failed to supervise the park and festival area where the incident occurred. Plaintiff claims that the fact that the dock was approximately 5 ½ inches higher than the ground where Creutzberger fell off his bicycle, constituted a dangerous condition, which proximately caused the severe injuries he sustained when his bicycle struck the dock.

Defendants' motions each seek an order granting summary judgment dismissing plaintiff's complaint claiming that there is no evidence in the record to prove that the defendants were liable for the injuries sustained by Creutzberger. Defendant FOB claims that it had no legal duty to maintain the dock where plaintiff sustained his injuries and therefore FOB is not liable to the plaintiff. Defendant FOB asserts that the area where the plaintiff fell was maintained and controlled by the County and that a snow fence was erected by the County surrounding the perimeter of the area where the festival concert was conducted. Defendant FOB also argues that the claimed dangerous condition was open, obvious and not inherently dangerous and was, in fact, a trivial defect as a matter of law. Defendant also claims that plaintiff assumed the risk of injury and that his reckless behavior was the sole proximate cause of the accident.

Defendants County of Suffolk and the Long Island Maritime Museum claim that they are not responsible for plaintiff's injuries since the relevant, admissible, and credible evidence submitted proves that plaintiff Creutzberger's intoxication was the sole cause of his injury. Defendants assert that after being transported to the hospital approximately one hour after the accident, blood test results revealed that Creutzberger's blood alcohol level was .17. The County and LImm maintain that plaintiff's intoxicated condition coupled with his incautious and foolhardy operation of a bicycle, without a helmet in the dark near the waterway, constituted such reckless conduct to attenuate any causal connection between the crash and any claimed negligence on the part of the defendants. The County and LImm also claim that the difference in height between the dock and the ground was not a dangerous and defective condition and that plaintiff conceded during his pre-trial testimony that the lighting in the area was sufficient to enable him to see the canal. Defendants maintain that the complained of condition was open and obvious, and argue that even if a defective condition existed, the municipal defendants had no prior written notice (citing the Suffolk County Charter, Article 8, Section 2) of any alleged dangerous condition, and therefore the defendants cannot be found responsible for Creutzberger's injuries.

In opposition to both motions, plaintiff submits an affidavit, together with an affidavit from a licensed engineer and an affirmation of counsel and claims that substantial issues of fact exist concerning defendants' negligent failure to maintain and to control the wooden dock area where plaintiff fell in a reasonably safe condition, sufficient to require a plenary trial. Plaintiff claims that factual issues exist concerning the defendants failure to prevent individuals from gaining access to the dock area either by cordoning it off, or by barricading the dock area, with some form of fencing to prevent the type of incident which occurred during the nighttime hours of September 2, 2007. Plaintiff also claims that the defendants had a duty to provide adequate lighting in the dock area in view of the fact that nearly 2000 patrons attended the nearby music festival. Plaintiff claims that the combination of poor lighting conditions, together with the optical illusion created by the presence of high grass obscuring plaintiff's vision preventing him from observing the heightened wooden dock, provides sufficient evidence of the defendants' negligence. Plaintiff also claims that intoxication is not a bar to his recovery, since a plaintiff's condition remains a question of fact for the jury to determine when considering degrees of comparative negligence. It is the plaintiff's position that

whether the area where his bicycle struck the dock was open and obvious, or was under the circumstances dangerous, is an issue of fact to be determined by the jury, particularly since the lighting conditions in the area were deficient. Plaintiff also argues that the condition of the area was not trivial as a matter of law and that Creutzberger did not assume the risk of injury as a result of the dangerous condition which presented itself during the night. Finally plaintiff contends that the written notice provision of the Suffolk County Charter (C8-2A) does not apply, since the County, in leasing the premises to the co-defendant FOB, was acting in a proprietary capacity and not in a governmental capacity (citing *Maccерello v. County of Suffolk*, 100 AD3d 972, 954 NYS2d 609 (2<sup>nd</sup> Dept., 2012)).

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 action. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v. 20<sup>th</sup> Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 (1957)). The moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU 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. NYU Medical Center, supra.*; *Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065, 416 NYS2d 790 (1979)). Once such proof has been offered the burden 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 Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980)). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v. Aeroxon Products*, 148 AD2d 499, 538 NYS2d 843 (2<sup>nd</sup> Dept., 1979)) and 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 (2<sup>nd</sup> Dept., 1981)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (*Palka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR*, 248 NY 339 (1928); Prosser, “Torts”, 4<sup>th</sup> Edition Sections 30, 41-42 & 53)). He must further demonstrate that defendants’ acts or omissions which constituted such breach were a proximate cause of plaintiff’s injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (*Basso v. Miller*, 40 NY2d 233, 241, 386 NYS2d 564 (1976); *Smith v. Taylor*, 279 AD2d 566, 719 NYS2d 686 (2<sup>nd</sup> Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (*Martinez v. Santoro*, 273 AD2d 448, 710 NYS2d 374 (2<sup>nd</sup> Dept., 2000); *Sadler v. Town of Hurley*, 288 AD2d 805, 720 NYS2d 613 (3<sup>rd</sup> Dept., 2001)).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present a party cannot be held liable for injury

caused by the defective or dangerous condition on the property (*Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 296-297, 532 NYS2d 105 (1<sup>st</sup> Dept., 1988); leave to appeal denied 78 NY2d 783 (1989); *Pappalardo v. NY Health & Racket Club*, 279 AD2d 134, 718 NYS2d 287 (1<sup>st</sup> Dept., 2000)).

A plaintiff may only recover when he is able to show that the defendants either created the condition which caused the accident or had actual or constructive notice of the condition (*Anderson v. Klein Foods*, 139 AD2d 904, 527 NYS2d 897 (4<sup>th</sup> Dept., 1988); affirmed 73 NY2d 835 (1989); *Moss v. JNK Capital*, 211 AD2d 769, 621 NYS2d 679 (2<sup>nd</sup> Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (*Fasolino v. Fashion Bug*, 77 NY2d 847, 567 NYS2d 640 (1991)). Suffolk County Charter, Article 8, Section 2 provides that prior written notice of an alleged defective condition must be served upon the Clerk of the County Legislature by certified or registered mail as a condition precedent to maintaining a civil action against the County. The Appellate Division, Second Department has ruled (*Maccerello v. County of Suffolk*, 100 AD3d 972, 954 NYS2d 609 (2<sup>nd</sup> Dept., 2012) that when a governmental entity is acting in a proprietary capacity (as a landowner), it cannot require prior written notice of a dangerous condition as a condition precedent to sue, but must be held to the same notice standards as a private landowner.

The underlying facts are not in dispute. Between 1:30 p.m. and 2:00 p.m on Sunday, September 2, 2007, the then 46 year old plaintiff Creutzberger rode his bicycle from his Bayport home to the Long Island Maritime Museum for the purpose of attending a music festival sponsored by defendant FOB. The L IMM grounds, where the festival took place, are owned and maintained by the defendant County. The County Legislature passed a resolution granting FOB permission to lease the grounds and the County constructed a temporary snow fence in the area where the festival was conducted. The fence did not close off the entire park grounds so that visitors not attending the festival were still permitted access to the entire park including the dock and marina area. Sometime around 8:30 p.m. Creutzberger left the festival by riding his bicycle toward the marina bulkhead to meet a friend whose boat was docked there. Creutzberger was injured when the front wheel of his bicycle struck the dock throwing him over the bike's handlebars, face first, onto the wood dock. He was thereafter transported to Brookhaven Memorial Hospital where tests revealed a blood alcohol level of 0.17. As a result of his fall, Creutzberger remains paralyzed and confined to a wheel chair.

With respect to defendant FOB's motion, the relevant, admissible evidence shows that plaintiff left the premises where the festival was held and was riding his bicycle towards the marina in an area well beyond the fenced-in music festival when he sustained his injuries. The record is clear that the defective condition that Creutzberger claims caused the incident was "a gap between the dock and grass area" located near the L IMM marina. There is no issue but that FOB had no legal duty to maintain that County owned premises and had no responsibility to control the dock area where plaintiff's bicycle wheel collided with the wood planked deck. Absent any duty to maintain and control the area where the incident occurred, no legal basis exists to find the defendant FOB responsible for plaintiff's injuries and therefore defendant FOB's motion seeking an order granting summary judgment dismissing the complaint and all cross claims asserted against it must be granted.

With respect to defendants County of Suffolk and LIRR, the evidence indicates that prior written notice was not required since the municipality was acting in its proprietary capacity when it leased the premises to the co-defendant FOB for the purpose of granting FOB permission to lease the premises for a one day concert. Moreover, substantial issues of fact exist concerning these

defendants alleged negligent failure to maintain the dock area where plaintiff fell in a reasonably safe condition sufficient to require a plenary trial. Accordingly defendants County of Suffolk and LIRR's motion seeking an order granting summary judgment must be denied, and the action is hereby severed and continued against the remaining defendants.

Dated: March 23, 2014

**HON. PAUL I. BAISLEY, JR.**  
J.S.C.