

**Mawhinney v Long Is. Ducks Professional Baseball Club, Inc.**

2014 NY Slip Op 32384(U)

September 4, 2014

Supreme Court, Suffolk County

Docket Number: 10-28456

Judge: Peter H. Mayer

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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 11-4-13 (#002)  
MOTION DATE 4-8-14 (#003)  
ADJ. DATE 2-11-14 (#002)  
ADJ. DATE 4-15-14 (#003)  
Mot. Seq. # 002 - MG; CASEDISP  
# 003 - MD

-----X		
EDNA MAWHINNEY,		BONGIORNO LAW FIRM, PLLC
	Plaintiff,	Attorney for Plaintiff
		250 Mineola Blvd
		Mineola, New York 11501
- against -		
LONG ISLAND DUCKS PROFESSIONAL		HAVKINS ROSENFELD RITZERT &
BASEBALL CLUB, LLC,		VARRIALE, LLP
	Defendant.	Attorney for Defendant
		1065 Avenue of the Americas, Suite 800
		New York, New York 10018
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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 October 10, 2013, and supporting papers (including Memorandum of Law dated October 10, 2013); (2) Affirmation in Opposition by the plaintiff, dated December 13, 2013 and supporting papers; (3) Reply Affirmation by the defendant, dated February 10, 2014, and supporting papers; and now

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

**ORDERED** that these motions are consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by defendant Long Island Ducks Professional Baseball Club, LLC (“Ducks”) for an order pursuant to the CPLR 3212 granting summary judgment in its favor dismissing the complaint is granted; and it is further

**ORDERED** that the motion by defendant Long Island Ducks Professional Baseball Club, LLC (“Ducks”) for an order compelling the plaintiff to appear for a further orthopedic independent medical examination and staying the trial of this matter is denied as moot in light of the dismissal of the complaint herein.

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This personal injury action arises from the plaintiff's alleged accident on June 30, 2009 which occurred at the stadium where the defendant Duck's team plays baseball, located at 3 Courthouse Drive, Town of Central Islip, County of Suffolk ("the stadium"). Plaintiff's complaint alleges that she tripped and fell on a turnstile located at an entrance to the stadium as a result of the negligence of the defendant.

Defendant now moves (#002) for summary judgment dismissing the complaint. In support of the motion defendant submits, *inter alia*, its attorney's affirmation, the pleadings, the deposition of the plaintiff, the deposition of Michael Pfaff, as a witness for defendant, the depositions of Suzanne Richon, Diane Richon, Ruth Dunn Widmann, and Anthony Barberio, all as non-party witnesses, a copy of plaintiff's thirteenth verified bill of particulars, 38 photographs and the affidavit of its expert Jacques P. Wolfner, P.E., sworn to October 10, 2013. In opposition, the plaintiff submits its attorney's affirmation, one photograph and the affidavit of its expert Robert L. Schwartzberg, P.E., sworn to on December 13, 2013.

Defendant also moves (#003) for an order compelling the plaintiff to appear for a further orthopedic independent medical examination, and staying the trial of this matter pending said examination and the resolution of the motion. In support of the motion defendant submits, *inter alia*, its attorney's affirmation and memorandum of law, the pleadings, and a transcript of proceedings before the Honorable Duane A. Hart, J.S.C, in the matter of Bermejo v Amsterdam & 76 th Associates and Ibex Construction, LLC/Ibex Construction, LLC, Queens County Supreme Court, Index No 23985-09. In opposition, the plaintiff submits, its attorney's affirmation, an article from the New York Times, dated April 1, 2009 and copies of decisions in Moran V EMR Mechanical et al, Kings County Supreme Court Index No. 23212-10 and Tandia v Moya et al, Queens County Supreme Court Index No. 27413-11.

Plaintiff testified that on the day of the accident, she was 81 years old. That day she volunteered at her church's soup kitchen. Her accident occurred at 5:30 or 5:45 pm. at the Ducks stadium. She went to the game with her minister, Ruth Widmann, who picked her up directly from the soup kitchen along with Diane and Sue Richon and Denise Darling. Plaintiff had been to the stadium twice previously and both times entered through a turnstile at the same gate where she had her accident. She did not have any difficulty entering the stadium on those occasions. Plaintiff never observed any accidents at the stadium prior to the date of her accident, nor had she ever complained about the stadium prior to June 30, 2009. She was not aware of anyone else making any complaints. On the day of the accident, there was only one turnstile to enter the stadium and one person taking tickets. There was a rubber mat on the grating of the turnstile with a half inch to one-quarter inch crinkle in it across the entire mat. Plaintiff did not request assistance as she entered the stadium. She believed that Suzanne and Diane Richon entered the turnstile ahead of her and Ruth Widmann was behind her. The ticket taker was to her left as she approached the turnstile. She was holding her ticket in her right hand and entered the turnstile leading with the right side of her body after handing her ticket to the ticket taker. Her pocketbook was draped over her right shoulder. She was holding her cane in her right hand at chest level and above the turnstile bar, although she could not remember whether or not she was using the cane that day. One bar of the turnstile pushed her and another held her back and she just tripped over the mat. She further stated that as she pushed the turnstile forward it spun around and made contact with her left side. She was not sure, but believed that it was her left foot which tripped. She fell forward through the turnstile onto her right side and her right hip was the first part of her body which contacted the ground. She was caused to fall

because the turnstile was too narrow, she tripped on the mat and the turnstile hit her left side. She first noticed the crinkle when she stepped with her right foot. She looked down to see where she was walking and decided not to step over the crinkle but to put her foot down and continue walking. She made no complaints about the mat before or after her fall, but testified that she heard a member of her group say there was a crinkle in it after she fell. Plaintiff never asked anyone if they could open the gate so that she would not have to go through the turnstile. Plaintiff testified that she had fallen on a number of occasions prior to her accident. Plaintiff also suffers from post polio syndrome, which causes a weakness of the muscles.

Diane Richon testified that she and the plaintiff have been friends for approximately 20 years. She further testified that plaintiff has weakness in her feet due to post-polio syndrome. She was aware of one of the plaintiff's previous falls. When they picked plaintiff up at approximately 5:30 p.m., plaintiff told them she was tired, and the group asked her if she still wanted to go to the game. She insisted that she wanted to go. Upon arrival at the stadium, plaintiff declined an offer to be dropped off closer to the entrance and said she could walk. After parking, the group walked toward the east gate of the stadium and walked up the stairs. Reverend Widmann offered to assist the plaintiff on the stairs, but she declined. The plaintiff was not walking with a cane at the time of the accident. As the group approached the turnstiles, Reverend Widmann did not notice any mats on the ground. She passed through the turnstile without any difficulty. She did not observe any obstruction or tripping hazard. She felt that plaintiff's fatigue and her gait and balance issues caused the accident. The witness had been to the stadium on two previous occasions, had never made any complaints and she was unaware of anyone else making any complaints. In her two prior visits, she never observed anyone having any difficulty entering through the turnstile. She never observed an accident at the stadium. On the day of the accident, the group entered through the east gate. She also noted that the west gate was the handicapped entrance.

Suzanne Richon testified that on the date of the accident she traveled to the Duck's game with her sister Diane, Reverend Widmann, Denise Darling and the plaintiff. Plaintiff appeared to be tired when she was picked up. She walked slowly and shuffled her feet. The group asked her if she was sure she wanted to attend the game, but she insisted she was fine. Plaintiff did not walk with a cane on the date of the accident. Upon arrival at the stadium, plaintiff declined an offer from Rev. Widmann to be dropped off closer to the entrance. Reverend Widmann also offered to help plaintiff up the stairs to the east gate of the stadium and plaintiff asked her to hold her arm. She, also, was aware of one of the plaintiff's previous falls. She had been to the stadium on two prior occasions. She was not aware of any accidents that occurred while she was there and she never had any difficulty entering through the turnstiles. She did not observe any mats on the ground near the turnstiles. She noted that the base of the turnstile was a piece of metal not even a quarter of an inch thick, which could be stepped over with ease. There was no obstruction or tripping hazard as she walked through the turnstile prior to the plaintiff.

Ruth Widmann had also been to the Duck's stadium prior to the date of the accident and had not witnessed anyone having any difficulties entering the stadium. Reverend Widmann drove the group to the stadium. She noticed that the plaintiff was tired. She offered to drop off the plaintiff in front of the stadium, but she declined. Plaintiff also refused help ascending the stairs to the stadium entrance. She did not have any problem entering through the turnstile and did not observe any tripping hazards. She

observed the plaintiff prepare herself to go through the turnstile by placing her ticket in her purse so that it was ready to hand to the ticket taker. Plaintiff did not ask for any help from the ticket taker or anyone else as she entered the turnstile. Plaintiff stepped into the turnstile, gave her ticket to the ticket taker, who ripped it, and then entered through the bar to the other side. Although she did not see the plaintiff fall, she did witness the aftermath of the fall. She felt that plaintiff fell because she was tired and the more tired she gets, the more unstable she is.

Michael Pfaff testified as a witness for the defendant. He has worked for the Duck's organization since 2002, and he is currently the president and general manager of the Ducks. At the time of the accident he was serving as general manager; his duties included day to day oversight of the Duck's business operations. He conducted orientation for the ticket takers who were instructed that the gates of the stadium should be opened if there were any wheelchair attendees or anyone else who did not want to, or could not, go through the turnstile. All of the turnstiles in the stadium are identical. Each of the turnstiles is a traditional rotary turnstile. The base of each turnstile is a raised platform made of steel. Each base has a slight incline and decline. There are no mats at any of the standard admission gates to the stadium. There is a red carpet at the VIP entrance. Handicap facilities are located throughout the stadium, including handicapped ramps and seating. It is possible for a guest to use the handicapped ramp near the west gate and enter the stadium through the east gate. Prior to the date of the accident, he was not aware of any complaints with regard to the turnstiles at the stadium.

Anthony Barbiero, a former employee of the Ducks testified as a non-party witness. From 2006 through 2012, he was the merchandise and operations manager. As such, he supervised the ticket takers at the stadium. He also took care of their orientation. As part of the training, the ticket takers were verbally trained as to how to deal with customers needing assistance. There was no handicap ramp at the east gate, but there was at the west gate. At each gate, there were turnstiles and a gate to be opened for the handicapped and baby strollers. If any guests entering the stadium and advised the ticket takers that they needed help entering, they would open the gate to permit entry. He never witnessed any guests having difficulty entering through the turnstiles, aside from small children who have a height disadvantage. The bottom of each turnstile had a metal base made from steel and painted black to differentiate it from the grey concrete. The bottom of each turnstile was flatted to create the effect of a ramp. He had never observed anyone entering the turnstile being struck from behind by the following bar while passing through a stadium turnstile. He was not aware of any complaints or accidents at the turnstiles prior to the date of the accident.

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 (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 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. Med. Ctr.*, *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]). As the court's function on such a motion is to determine whether

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issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see 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]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. “Proof of negligence in the air, so to speak, will not do.” A property owner has a duty to maintain its premises in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Van Dina v St. Francis Hosp., Roslyn, N.Y.*, 45 AD3d 673, 845 NYS2d 430 [2d Dept 2007]). The owner’s duty is to maintain the premises in a reasonably safe condition in view of the circumstances, including the likelihood of injury to others (*Comeau v Wray*, 241 AD2d 602, 659 NYS2d 347 [3d Dept 1997]). A property owner also has nondelegable duty to provide the public with reasonably safe premises and a safe means of ingress and egress (*see Smith v Harri Associates, Inc.*, 109 AD3d 897, 971 NYS2d 451 [2d Dept 2013]; *Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]). When a property owner moves for summary judgment in a premises liability action, it bears the burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective condition that caused the accident (*see Sheehan v J.J. Stevens & Co., Inc.*, 39 AD3d 622, 833 NYS2d 237 [2d Dept 2007]; *Solomon v Loszynski*, 21 AD3d 366, 800 NYS2d 46 [2d Dept 2005]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *McMahon v Gold*, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]).

Defendant Ducks has established its entitlement to summary judgment, showing through testimony and documentary evidence, as well as the affidavit of its expert, that it did not create and had neither actual or constructive notice of any alleged defect in the turnstile in question. Defendant further argues that the court should not consider the merits of a new theory of recovery that was not pleaded in the complaint, as it was raised by the plaintiff for the first time in opposition to a motion for summary judgment. (*Mezger v Wyndham Homes, Inc.*, 81 AD3d 795, 916 NYS2d 641 [2d Dept 2011]; *Pinn v Baker's Variety*, 32 AD3d 463, 820 NYS2d 129 [2d Dept 2006]). Here, based upon the plaintiff’s expert’s conclusion that the turnstile at the Duck’s stadium is too narrow, it is now alleged that the turnstile is defective and in violation of the Building Code of New York State and the Americans With Disabilities Act (ADA). However, even if properly pleaded, these causes of action would be unavailing, because they are based on a flawed expert’s affidavit which must be rejected by the Court. The affidavit of plaintiff’s expert, Robert L. Schwartzberg, P.E., sets forth incorrect measurements of two dimensions of the turnstile. It is alleged that the width of the open area of the turnstile is available for pedestrians to walk through is 15-1/2 inches. However, the design schematic for the turnstile submitted by the defendant shows that the actual measurement of the area is actually 17-7/8 inches, almost 2-1/2 inches wider. It is also claimed that the turnstile is 24 inches wide, when, in fact, it is 27 inches wide. Mr. Schwartzberg then opines, based upon the mistaken width, that this width is “narrow enough to require

most normally sized adults to turn sideways to pass through...” However, nowhere in plaintiff’s expert’s affidavit does he establish what constitutes a “normally sized adult”. He claims that in passing through the turnstile, the following horizontal bar which contacted his body did so with “considerable” force. However, this statement is conclusory and unsupported by any actual measurement of the alleged force. Plaintiff’s expert states that he is “not aware of any ASTM [American Society For Testing Materials] or ASME [American Society of Mechanical Engineers] standards that explicitly involve turnstiles.” However, the defendant’s expert, Jacques P. Wolfner, P.E., establishes in his affidavit that the defendant’s turnstile meets the ASTM Standard [F1637] for safe walking surfaces.

Plaintiff’s expert next opines that the turnstile fails to meet the American National Standard for Buildings and Facilities with regard to handicapped access., as Section 4, subparagraph 4.3.3 requires the minimum width of 36 inches and that the turnstile in question fails to meet the standard. However, he fails to note that none of the alternative turnstiles he discusses in his affidavit meet the standard. In fact, none of the alternative turnstiles come within a foot of compliance. They comply with this rule by having an access gate next to the turnstile. In reply to this, the defendant’s expert has established that the turnstile complies with the National Fire Protection Association (NFPA) code. Section 7.2.1.11.1.2 (3) of the code requires that turnstiles “...are not in excess of 39 inches (990mm) in height and a clear width of 16 ½ in. (420 mm).” (Emphasis added). Defendant’s turnstile easily meets this standard. This proof of compliance also refutes the claim that the turnstile is too narrow. Plaintiff’s expert next argues that the defendant fails to comply with New York State rules for handicapped access to facilities. This argument is undermined by the fact that it is in part based on the claim that the attendant who took plaintiff’s ticket failed to offer her another means of entry even though it was obvious that she was walking with a cane and having trouble passing through the turnstile. Plaintiff testified that she was unsure if she had the cane with her that day and all other witness testimony confirmed that she did was not walking with a cane. Thus, this argument is not based on facts in the record.

Finally, plaintiff’s expert alleges that defendant failed to comply with the requirements of the ADA. ADA Accessibility Guidelines of 1991 address the issue of turnstiles. Section 4.13.2 states:

Revolving doors and turnstiles shall not be the only means of passage at an accessible entrance or along an accessible route. An accessible gate or door shall be provided adjacent to the turnstile or the revolving door and shall be so designed as to facilitate the same use pattern.

Both photographs and testimony in the record establish the turnstile/gate configuration used by the defendant at the site of the accident complies with this rule. Furthermore, “[a] Title III claim ... requires that a plaintiff establish that (1) he or she is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA” (*Roberts v Royal Atlantic Corp.*, 542 F3d at 368; see *Camarillo v Carrols Corp.*, 518 F3d 153, 156; *Gordon v PL Long Beach, LLC*, 74 AD3d 880, 903 NYS2d 461 [2d Dept 2010]). The record herein lacks any facts which would support a claim by plaintiff under the ADA.

It is noted that documentary proof submitted (photographs) of the turnstile setup at Duck’s

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stadium establishes that there are no mats on the turnstile entrances. The testimony of Michael Pfaff, the president and general manager of the Ducks, confirmed that there are no mats at any of the standard admission gates to the stadium. There is only a red carpet at the VIP entrance.

It is further noted that plaintiff's expert also failed to address one other fact in the record. Based upon testimony in the record, approximately 30,000 attendees (including the plaintiff) had gone through this turnstile during the season prior to plaintiff's accident without incident. Furthermore, based on testimony in the record, there is no evidence that any accident has occurred at any turnstile since 2002. In light of these facts, the conclusion that this turnstile is hazardous and unsafe is, in fact, contradicted by facts in the record.

Thus, defendant has established that it did not create and had neither actual or constructive notice of any defect (assuming for the sake of argument that such defect exists) in the turnstile in question. As such it has established its entitlement to summary judgment (*see McGough v Cryan, Inc.*, 111 AD3d 900, 976 NYS2d 135 [2d Dept 2013]; *Sheehan v J.J. Stevens & Co., Inc.*, *supra*). In opposition, the plaintiff has not proffered evidence sufficient to raise a triable issue of fact.

Accordingly, defendant's motion for summary judgment is granted. In light of this dismissal, defendant's motion for an order compelling the plaintiff to appear for a further orthopedic independent medical examination and for other relief is denied as moot.

Dated: September 4, 2014

  
PETER H. MAYER, J.S.C.