Reitner v Hauser
2014 NY Slip Op 32475(U)
September 23, 2014
Supreme Court, New York County
Docket Number: 151241/13
Judge: Cynthia S. Kern

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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DAVID A. REITNER.

Plaintiff,

Index No.151241/13

-against-

DECISION/ORDER

SETH A. HAUSER, as the Administrator of the Estate of SELMA HOCHHAUSER AND EUGENE MIGLIORINI,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages stemming from personal injuries he allegedly sustained when he tripped and fell on a cattle guard on defendant's premises while he was visiting her home. The defendant's estate has brought the present motion for summary judgment dismissing plaintiff's complaint against the estate on the ground that the cattle guard was both open and obvious and not inherently dangerous. For the reasons set forth below, defendant's motion is denied.

The relevant facts are as follows. On October 1, 2011, plaintiff went to defendant's home for a dinner party and parked his car in the street. To get to the house, plaintiff walked across the driveway and the cattle guard which was located on the driveway. On his way back to his car after the party, he was walking across the cattle guard. The accident occurred when his foot

slipped on one of the pipes. The cattle guard in question was installed by defendant in the driveway in 2002 or 2003.

Defendants now move for summary judgment dismissing the complaint on the ground that the cattle guard was not inherently dangerous as a matter of law and was open and obvious. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

It is well settled that "[a] landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances including likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk." *Branham v. Loews Orpheum Cinemas,* 31 A.D.3d 319 (1st Dept 2006). Thus, "[t]o be entitled to summary judgment, defendant, as a property owner, [is] required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property." *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 71 (1st Dept 2003).

The issue of whether a condition is open and obvious is generally a question for the jury to decide. *Id.* at 72. Moreover, even if a condition is capable of being discerned by a careful

observer, it may still not be open and obvious as the "nature or location of some hazards, while they are technically visible, make them likely to be overlooked." *Id.* Moreover, it is a "well-established principle that a finding of 'open and obvious' as to a hazardous condition is never fatal to a plaintiff's negligence claim." *Saretsky v. 85 Kenmare Realty Corp.*, 85 A.D.3d 89 (1st Dept 2011). Rather, it is only relevant as to plaintiff's comparative fault. *Id.*

Finally, even if a hazard is open and obvious as a matter of law, thereby negating any duty to warn, the court must still consider whether defendant violated "the broader duty to maintain the premises in a reasonably safe condition." *Westbrook,* 51 A.D.3d at 72. This is because "the duty to maintain the premises in a reasonably safe condition is analytically distinct from the duty to warn, and ... liability may be premised on a breach of the duty to maintain reasonably safe conditions even where the obviousness of the risk negates any duty to warn." *Cohen v. Shopwell, Inc.*, 309 A.D.2d 560, 561(1st Dept 2003).

In the present case, defendant estate is not entitled to summary judgment as it has not made a prima facie showing that the cattle guard is open and obvious and it has not made a prima facie showing that the premises were maintained in a reasonably safe condition. Initially, the issue of whether the cattle guard was an open and obvious condition should be determined by the jury rather than the court. Although it is undisputed that the cattle guard is technically visible and was seen by the plaintiff, it is for the jury to determine whether the potential hazards involved in walking on the cattle guard were apparent to an observer. Moreover, even if the hazards of walking on the cattle guard were open and obvious, the First Department has made clear that this would not be a basis for dismissing the complaint but would only be relevant with respect to whether plaintiff was comparatively negligent.

Moreover, separate and apart from the issue of whether the hazards of the cattle guard were open and obvious, defendant has failed to establish that the premises were maintained in a reasonably safe condition as a matter of law. Again, it is for a jury to determine whether the cattle guard was safe for visitors to walk on. Since defendant cannot establish that the cattle guard was safe to walk on as a matter of law, it is not entitled to summary judgment dismissing plaintiff's negligence claim.

Based on the foregoing, defendant's motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 9/23/14

J.S.C.

CYNTHIA S. KERN
J.S.C.