

Lewis v Town of Huntington

2014 NY Slip Op 33176(U)

January 25, 2014

Supreme Court, Suffolk County

Docket Number: 10-42236

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 12-19-13
ADJ. DATE 8-12-14
Mot. Seq. # 003 - MD

-----X	:		:	
SUSAN LEWIS,	:		:	WINGATE, RUSSOTTI, SHAPIRO, et al.
	:		:	Attorney for Plaintiff
	:	Plaintiff,	:	420 Lexington Avenue, Suite 2750
	:		:	New York, New York 10170
	:		:	
-against-	:		:	BESEN & TROP, L.L.P.
	:		:	Attorney for Defendant
THE TOWN OF HUNTINGTON,	:		:	825 East Gate Boulevard, Suite 202
	:		:	Garden City, New York 11530
	:	Defendant.	:	
-----X	:		:	

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 15 - 21; Replying Affidavits and supporting papers 22 - 23; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Huntington for an order granting summary judgment in its favor is denied.

Plaintiff Susan Lewis allegedly was injured on February 16, 2010, when she tripped and fell when exiting from an indoor ice skating rink at the Dix Hills Park Ice Rink. Owned and operated by defendant Town of Huntington, the ice skating facility was open to the general public at the time of plaintiff's accident. Plaintiff testified at a hearing held pursuant to Municipal Law § 50-h and at an examination before trial that she fell after the tip of the ice skate she was wearing on her right foot got caught on the sill of the doorway that provides skaters access to the rink, causing her to fall backward and land on the ice. Subsequently, plaintiff commenced this action seeking damages for the personal injuries she allegedly sustained due to the fall. By her bill of particulars, plaintiff alleges that her accident was caused by a worn plastic strip on the doorsill, and that such plastic strip created a dangerous, trap-like condition on the premises. She further alleges that the Town was negligent, among other things, in failing to maintain the doorsill in a reasonably safe condition, and in failing to warn of the alleged dangerous condition.

The Town now moves for summary judgment in its favor, arguing that plaintiff voluntarily assumed the risk of tripping when she participated in the public ice skating session. The Town further asserts it lacked written notice of the alleged dangerous condition at the skating rink, and that such condition constituted a non-actionable trivial defect. In addition, the Town asserts it is entitled to judgment dismissing the complaint, because there is no evidence it had actual or constructive notice of the alleged dangerous condition of the doorsill. In support of its motion, the Town submits copies of the pleadings and the bill of particulars, transcripts of plaintiff's testimony at the General Municipal Law § 50-h hearing and at her deposition, the transcript of the Town's deposition testimony, and copies of photographs purporting to depict the doorsill at issue. The Town also submits affidavits of two of its employees, Stacy Colamussi, Deputy Town Clerk, and Michael Kaplan, Highway Project Assistant for the Superintendent of Highways.

Plaintiff opposes the motion, arguing the Town failed to make a prima facie case that it lacked constructive notice of the alleged dangerous condition created by the worn plastic on the sill of the doorway leading to the skating rink. She further contends that the prior written notice provision of Huntington Town Code § 174-3 is not applicable, as it does not apply to defects inside of Town buildings. Moreover, plaintiff argues the assumption of risk doctrine does not bar her claim, because her injury occurred after she stopped skating and was exiting the rink, and because the worn plastic covering on the doorsill unreasonably increased the danger to skaters exiting the ice rink. In opposition, plaintiff submits the transcripts of the General Municipal Law § 50-h hearing and of the parties' deposition testimony. She also submits copies of photographs and an affidavit of Nicholas Bellizzi, a professional engineer.

Plaintiff testified at the General Municipal Law § 50-h hearing conducted in May 2010 that she was an experienced skater, that she had ice skated at the Town's Dix Hills facility the previous year, and that she skated with her daughter for approximately two hours before the accident that is the subject of this action. As relevant to the instant motion, she testified that as she was stepping up with her right foot to pass through the doorway leading from the skating surface to the viewing area immediately outside the rink, the tip of the skate caught on a gap or slit in a plastic cover attached to the doorsill or saddle, and she fell backwards onto the ice. Subsequently, at a deposition conducted in June 2011, plaintiff testified that there was only one doorway at the ice skating facility that provided access to the ice skating rink, and that she repeatedly passed through the doorway to enter and exit the skating area on the day of her accident. She explained that to access the surface of the skating rink, a person had to step over a "lip or step," and that it was this "lip or step" that had the plastic cover on it. When questioned at her deposition how the accident occurred, plaintiff testified that she fell when her right skate got caught in the plastic cover as she was attempting to step off of the ice and onto the surface of the viewing area outside the rink.

Matt Naples, a Town employee assigned to the Parks Department who works as the manager of the Dix Hills ice skating facility, testified on behalf of the Town. Mr. Naples testified, in part, that the accident happened at the older of the two skating rinks existing at the facility. He testified that there are three doors leading onto the ice at that rink, and that plaintiff's accident happened by the south door, which is near the bleachers. He further testified that there was a "cosmetic" piece of plastic at the threshold of the south door after plaintiff's accident, but that at the time of the accident the threshold, or

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sill, was made of metal. In addition, Mr. Naples testified that he had not received any complaints about the south door of the skating rink prior to plaintiff's accident, and that plaintiff and her husband returned to the skating facility one or two months after the accident to take pictures of the south door.

A municipality acting in a proprietary capacity is subject to the same principles of tort law as a private landowner (see *Sebastian v State of New York*, 93 NY2d 790, 698 NYS2d 601 [1999]; *Balsam v Delma Eng'g Corp.*, 90 NY2d 966, 665 NYS2d 613 [1997]; *Miller v State of New York*, 62 NY2d 506, 478 NYS2d 829 [1984]; *Salone v Town of Hempstead*, 91 AD3d 746, 937 NYS2d 103 [2d Dept 2012]). In contrast to governmental functions, such as providing police and fire protection, the operation of a public park or recreational facility by a municipality is a proprietary activity (see *Caldwell v Village of Is. Park*, 304 NY 268, 107 NE2d 441 [1952]; *Vestal v County of Suffolk*, 7 AD3d 613, 776 NYS2d 491 [2d Dept 2004]; *Melby v Duffy*, 304 AD2d 33, 758 NYS2d 89 [2d Dept], *lv denied* 100 NY2d 507, 764 NYS2d 235 [2003]). In general, a landowner has a duty to maintain its property in a reasonable safe condition and to prevent the occurrence of foreseeable injuries (see *Gronski v County of Monroe*, 18 NY3d 374, 940 NYS2d 518 [2011]; *Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741 [2003]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Friedman v 1753 Realty Co.*, 117 AD3d 781, 986 NYS2d 175 [2d Dept 2014]). A municipality which extends an invitation to citizens to enter and use its facilities and recreational areas, therefore, owes those people accepting the invitation a duty to maintain the property in a reasonably safe condition and to warn and protect against latent hazards (see *Caldwell v Village of Is. Park*, 304 NY 268, 107 NE2d 441; *Vestal v County of Suffolk*, 7 AD3d 613, 776 NYS2d 491; *Melby v Duffy*, 304 AD2d 333, 758 NYS2d 89; see also *Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]). However, like a private landowner, a municipality has no duty to warn or protect against an open or obvious condition on its property which, as a matter of law, is not inherently dangerous (see *Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40; *Melby v Duffy*, 304 AD2d 33, 758 NYS2d 89; see also *Nelson v 40-01 Northern Blvd. Corp.*, 95 AD3d 851, 943 NYS2d 216 [2d Dept 2012]; *Weiss v Half Hollow Hills Cent. School Dist.*, 70 AD3d 932, 893 NYS2d 877 [2d Dept], *lv denied* 15 NY3d 706, 908 NYS2d 159 [2010]).

To impose liability based on a failure to keep premises in a reasonably safe condition, a plaintiff must show the existence of a dangerous or defective condition on the property, that such condition caused his or her injuries, and that the defendant created the condition or had actual or constructive notice of it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Winder v Executive Cleaning Servs., LLC*, 91 AD3d 865, 936 NYS2d 687 [2d Dept], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]; *Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]; *Barland v Cryder House*, 203 AD2d 405, 610 NYS2d 554 [2d Dept], *lv denied* 84 AD3d 947, 621 NYS2d 511 [1994]). The owner or possessor of real property, however, is not an insurer of the safety of people on its property (see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Donohue v Seaman's Furniture Corp.*, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]). Further, to establish constructive notice, the dangerous or defective condition must have been visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner or possessor to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646; *Schubert-Fanning v Stop & Shop Supermarket Co., LLC*, 118 AD3d 862, 988 NYS2d 245 [2d Dept 2014]; *Bravo v 564 Seneca Ave. Corp.*, 83 AD3d 633, 922 NYS2d 88 [2d Dept 2011]).

Moreover, it is well settled that by engaging in a sport or a recreational activity, a participant consents “to those commonly appreciated risks which are inherent in and arise out of the nature of the sport [or activity] and flow from such participation” (*Morgan v State of New York*, 90 NY2d 471, 484-486, 662 NYS2d 421 [1997]; see *Anand v Kapoor*, 15 NY3d 946, 917 NYS2d 86 [2010]; *DiBenedetto v Town Sports Intl., Inc.*, 118 AD3d 663, 987 NYS2d 102 [2d Dept 2014]; *Mussara v Mega Funworks, Inc.*, 100 AD3d 185, 952 NYS2d 568 [2d Dept 2012]; *Mendoza v Village of Greenport*, 52 AD3d 788, 861 NYS2d 738 [2d Dept 2008]; *Joseph v New York Racing Assn., Inc.*, 28 AD3d 105, 809 NYS2d 526 [2d Dept 2006]). The primary assumption of risk doctrine is not an absolute defense to liability, but a measure of the duty of care owed by the defendant (*Custodi v Town of Amherst*, 20 NY3d 83, 87, 957 NYS2d 268 [2012]; *Turcotte v Fell*, 68 NY2d 432, 439, 510 NYS2d 49 [1986]; *Taylor v Massapequa Intl. Little League*, 261 AD2d 396, 397, 689 NYS2d 523 [2d Dept 1999]; see *Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 901 NYS2d 127 [2010]). As explained by the Court of Appeals in the *Trupia* case, “by freely assuming a known risk, a plaintiff commensurately negates any duty [of care] on the part of the defendant to safeguard him or her from the risk” (*Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395, 901 NYS2d 127). Thus, under the primary assumption of risk doctrine, a person who engages in an athletic or recreational activity will be barred from recovering damages for injuries sustained during a such activity if it is established that the injury-causing conduct, event or condition was known, apparent or reasonably foreseeable (see *Morgan v State of New York*, 90 NY2d 471, 662 NYS2d 421; *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29 [1989]; *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49; *Maddox v City of New York*, 66 NY2d 270, 496 NYS2d 726 [1985]).

Nevertheless, a negligence claim will not be dismissed if the defendant’s negligent action or inaction “created a dangerous condition over and above the usual dangers” inherent in the sport or recreational activity (*Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 970, 582 NYS2d 998 [1992]; see *Custodi v Town of Amherst*, 20 NY3d 83, 957 NYS2d 268; *Morgan v State of New York*, 90 NY2d 471, 662 NYS2d 421; *Weinberger v Solomon Schechter School of Westchester*, 102 AD3d 675, 961 NYS2d 178 [2d Dept 2013]). In assessing the risks assumed by a plaintiff when he or she elected to participate in the sport or recreational activity, and the duty of care owed by the owner or operator of the property used for such activity, a court must consider the skill and experience of the particular plaintiff (*Morgan v State of New York*, 90 NY2d 471, 486, 662 NYS2d 421; *Maddox v City of New York*, 66 NY2d 270, 278, 496 NYS2d 726; *Toro v New York Racing Assn., Inc.*, 95 AD3d 999, 944 NYS2d 229 [2d Dept], *lv denied* 19 NY3d 810, 951 NYS2d 720 [2012]), as well as the nature of the defendant’s conduct (see e.g. *Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [plaintiff does not assume risk of reckless or intentional conduct]; *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 543 NYS2d 29 [plaintiff does not assume concealed or unreasonably increased risks]).

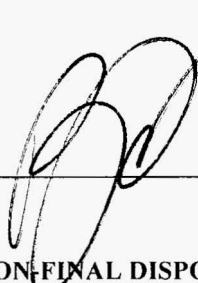
Here, while plaintiff assumed the risk of injury created by ice skating, the Town’s submissions in support of its motion, particularly the transcripts of the parties’ pretrial testimony, demonstrate a triable issue as to whether the risk of tripping was unreasonably increased by the presence of a worn plastic cover over the sill of the doorway providing skaters access to the ice (see *Morgan v State of New York*, 90 NY2d 471, 662 NYS2d 421; *Freeman v Village of Hempstead*, 120 AD3d 1393, 993 NYS2d 142 [2d Dept 2014]; *Philippou v Baldwin Union Free Sch. Dist.*, 105 AD3d 928, 963 NYS2d 701 [2d Dept 2013]; *Gallagher v County of Nassau*, 74 AD3d 877, 902 NYS2d 640 [2d Dept 2010]). While Mr.

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Naples testified that at the time of the accident the sill of the south door was made of metal, plaintiff testified at both the General Municipal § 50-h hearing and her deposition that the sill was covered with a split, worn piece of plastic in which the tip of the ice skate got caught. In view of the conflicting deposition testimony, the Court finds the Town also failed to demonstrate as a matter of law that the sill of the south doorway was in a reasonably safe condition or that it lacked constructive notice of the sill's condition. Finally, the Town failed to establish a prima facie case that the alleged hazardous condition on the doorsill was trivial and nonactionable as a matter of law (see *Lupa v Town of Oswego*, 117 AD3d 1418, 985 NYS2d 361 [4th Dept 2014]; *DeLaRosa v City of New York*, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]; *Boxer v Metropolitan Transp. Auth.*, 52 AD3d 447, 859 NYS2d 709 [2d Dept 2008]). The Court notes the black and white copies of the photographs purporting to depict the doorsill at issue included with the moving papers are not authenticated and, therefore, are not in admissible form (see *Young v Ai Gou Chen*, 294 AD2d 430, 742 NYS2d 341 [2d Dept 2002]; *Truesdell v Rite Aid of N.Y.*, 228 AD2d 922, 644 NYS2d 428 [3d Dept 1996]; see generally *Batton v Elghanayan*, 43 NY2d 898, 403 NYS2d 717 [1978]).

Accordingly, the Town's motion for summary judgment in its favor is denied.

Dated: 1/25/14



A.J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION