Porooshasp v CSS Hotels, Inc.
2015 NY Slip Op 32547(U)
September 24, 2015
Supreme Court, Westchester County
Docket Number: 59831/2014
Judge: Charles D. Wood
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 OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

SHAYAN POROOSHASP, infant by his mother and natural guardian, FERESHTA POROOSHASP and FERESHTA POROOSHASP, individually,

Plaintiff,

-against-

CSS HOTELS, INC. D/b/a HOLIDAY INN, COOPER HOTELS, INC., d/b/a HOLIDAY INN, KINGSTON MOTEL d/b/a HOLIDAY INN,

Defendants.

---X

DECISION & ORDER
Index No. 59831/2014
Sequence No. 1

WOOD, J.

The following documents were read in connection with defendants' motions for summary judgment:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits, Memorandum of Law.
Plaintiffs' Counsel's Affirmation in Opposition, Exhibits.
Defendants' Counsels' Reply Affirmation.

This action arises out of a claim for alleged personal injuries sustained by infant plaintiff, Shayan Porooshasp ("plaintiff"), who was 17 years old at the time of the subject accident on February 18, 2013 at a Holiday Inn in Kingston. Plaintiff was with a group on a skiing trip. After dinner, plaintiff went to the recreation area of the hotel, which consists of a ping pong table, a hockey table, a pool table, and video game machines. He was in the recreation area for fifteen to twenty minutes prior to the accident. Plaintiff testified that he did not know there was also a pond close by to the pool table; he thought it was just part of the design of the hotel. He did not see a bridge over

the pond. When he went to the recreational area, he first played ping pong, then arcade games and then he went to use the pool table. Other kids were using the pool table as well, he was playing pool for about three to seven minutes before the accident occurred. While he was playing pool, he walked backwards to try to get a good shot, where he went into the pond.

Plaintiff commenced this action by filing the summons and complaint on October 2, 2013, with the Westchester County Clerk. Issue was joined by the defendants having interposed their answer. Plaintiff alleges that defendants were negligent, careless and reckless in the ownership, operation, maintenance and control of the subject premises where plaintiff became injured, in causing permitting and/or allowing the premises to become and remain in a dangerous trap-like and hazardous condition.

Defendants move for summary judgment dismissing the complaint, arguing that they cannot be held liable for plaintiff's injuries. Plaintiffs oppose the motion.

NOW based upon the foregoing, the motions are decided as follows:

It is well settled that "a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]).

A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). Further, CPLR 3212(b), specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

Further, the elements of common law negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (Darby v Compagnie Natl. Air France, 96 NY2d 343 [2001]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public

policy considerations juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (Church v Callanan Indus., 99 NY2d 104, 110-11, [2002]; (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it within a reasonable time (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]); Baillet v Auerbach, 277 AD2d 335 [2d Dept 2000]). In other words, to be entitled to summary judgment in a trip and fall case, defendant must establish, prima facie, that it maintained the premises in a reasonable safe condition and did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (Villano v Strathmore Terrace Homeowners Assn., Inc, 76 AD3d 1061 [2d Dept 2010]).

Further, an owner or possessor of real property is not an insurer of the safety of the people on its property (Nallan v Helmsley-Spear, Inc., 50 NY2d 507, 6 [1980]: Donohue v Seaman's Furniture Corp., 270 AD2d 451 [2d Dept 2001]). A property owner has no duty to protect or warn against an open or obvious condition that is inherent or incidental to the nature of the property, that could be reasonably anticipated by those using it and is " readily observable by the use of one's senses" (Neiderbach v 7-Eleven, Inc., 56 AD3d 632, [2d Dept 2008]); (Groom v Village of Sea Cliff, 50 AD3d 1094 [2d Dept 2008];

The facts here are that the pond was installed in 1978, and is approximately twenty feet

long and varied from three or four feet to eight to ten feet wide. The pond had a stone border or capping which was about six inches high, and was approximately fifteen to eighteen feet from the pool table at the shortest distance between them. According to the complaint, plaintiffs allege that defendants created an unsafe condition by positioning the pond too close to the pool table, especially in the vicinity that children and teenagers would be playing at that pool table, knowing that the players would often have their backs to the pond.

Defendant argues that the pond upon which plaintiff tripped and fell was not, as a matter of law, an inherently dangerous condition and was readily observable by the reasonable use of one's senses (Jang Hee Lee v Sung Whun Oh, 3 AD3d 473, 474 [2d Dept 2014]). To support their motion for summary judgment, defendants offer the testimony of plaintiff and the general manager of defendants who has been with defendant CSS Hotels since 1969. The general manager testified that there wasn't anything separating the pool table from the pond, such as a wall or a partition. (Ex G 23). Nobody ever brought to his attention any safety issues regarding the location of the pool table, and he was not aware of anyone having ever tripped over the edge of the pond prior to the accident (Ex G at 35).

This court rejects defendants' contention that they had no duty to protect or warn against the condition complained of because it was open and obvious and not inherently dangerous. The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury (Villano v. Strathmore Terrace Homeowners Assn., Inc., 76 AD3d 1061[2d Dept 2010]). The question cannot be divorced from the surrounding circumstances. Moreover, "[a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is

distracted (Shah v Mercy Med. Ctr., 71 AD3d 1120 [2d Dept 2010]). "The fact that a defect may be open and obvious does not negate a landowner's duty to maintain its premises in a reasonably safe condition, but may raise an issue of fact as to the plaintiff's comparative negligence" (Ruiz v Hart Elm Corp., 44 AD3d 842, 843 [2d Dept 2007]).

Given the dimensions of the pond, and its location in an area close to where hotel guests and others would be traversing, a triable issue of fact exists as to whether the pond was an open and obvious condition (Villano v Strathmore Terrace Homeowners Ass'n, Inc., 76 AD3d 1061, 1062). It is concerning to the court that the pond seemed to be somewhat out of place in a recreational area that included video games, that would attract children, and in this case, teenagers on a trip. Indeed, its foreseeable that persons playing pool would be concentrating on the angles of the game, and would move backward to make a shot. Moreover, the stone border of the pond could be considered a tripping hazard, given its nature and location near the pool table. In particular, there is an issue regarding whether, under the circumstances, a person who was unfamiliar with the premises could reasonably perceive the existence of the pond, in a playroom type of area. Under the circumstances of this case, the issue of whether this condition was open and obvious is an issue of fact. Even if this condition was open and obvious as a matter of law, this did not relieve defendants of their duty to maintain their premises in a reasonably safe condition, and raises an issue of fact concerning plaintiff's comparative negligence.

Under the circumstances, defendants failed to eliminate all triable issues of fact as to whether the condition was open and obvious or was rendered a trap due to its proximity to the pool table (Gordon v Pitney Bowes Mgmt. Servs., Inc., 94 AD3d 813, 815 [2d Dept 2012]).

As the defendant failed to meet its prima facie burden on the motion, it is unnecessary to

consider the adequacy of the opposing papers (Clark v AMF Bowling Centers, Inc., 83 AD3d 761, 762 [2d Dept 2011]).

Accordingly, based upon the stated reasons, it is hereby

ORDERED, that defendants' motion for summary judgment dismissing the complaint is **DENIED;** and it is further

ORDERED, that plaintiffs' counsel shall serve a copy of this order to all parties within ten (10) days of notice of entry, and file proof of service within five (5) days of service; and it is further

ORDERED, that the parties are directed to appear on October 20, 2015, at 9:15 a.m, in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.

All matters not specifically addressed are herewith denied. This constitutes the decision and order of the court.

Dated: September 24, 2015
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

By NYSCEF:

To: Law Office of Stephen B. Kaufman, P.C.
Attorney for Plaintiffs

Goergen, Manson & McCarthy
Attorneys for Defendants