Berr v Grant
2016 NY Slip Op 32382(U)
December 2, 2016
Supreme Court, New York County
Docket Number: 154360/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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MICHAEL BERR,

Plaintiff,

DECISION/ORDER
Index No. 154360/2014

-against-

RON GRANT, UNITED LEASING, LLC and 915 DUNE ROAD, LLC,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action seeking to recover damages for injuries he allegedly sustained when he slipped or tripped and fell while walking between a pool and a hot tub located on premises owned by defendants (the "premises"). Defendants now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint. For the reasons set forth below, defendants' motion is denied.

The relevant facts are as follows. On or about July 3, 2013, plaintiff hosted a party at a house that he rented from defendants, which was located at 915 Dune Road, Westhampton, New York. The backyard of the house contains a deck with a pool and a hot tub. The pool and the hot tub had been "closed" earlier in the day and plaintiff testified during his deposition that the area where the pool and the hot tub were located was dry at the time of the party. A barbecue grill owned by defendants had been placed by the party's caterer in a location that blocked a pathway around the pool to the house. Plaintiff testified that he was walking from the pool area back to the house, between the pool and the hot tub, when he suddenly slipped and fell into the hot tub, thereby sustaining injuries (the "accident"). When asked how and why the accident occurred, plaintiff testified that "[i]t happened so fast it's difficult to even remember." Plaintiff did not remember which foot slipped.

In support of their motion, defendants have submitted the building permit and the Certificate of Occupancy for the house issued on May 26, 2004 by the Village of West Hampton Dunes Building Department (the "Village"), which defendants claim referenced the pool and the hot tub. Further, defendants have submitted the affidavit of their engineering expert, James Koester ("Koester"), who states that the hot tub was shown on the April 14, 2004 survey in the Village's file. Defendants argue that these documents establish that there was no dangerous condition with respect to the area between the pool and the hot tub as the layout of the pool and the hot tub was approved by the Village.

In opposition to the motion, plaintiff has submitted the affidavit of his engineering expert, Andrew S. Haimes ("Haimes"). Haimes states in his affidavit that he inspected the premises and found two defective conditions in the area between the pool and the hot tub. He states that there was a height differential of 0.05 inches between and among the coping bricks located between the pool and the hot tub, presenting a "significant tripping hazard." Further, Haimes states that the gap of approximately 15 inches between the pool and the hot tub did not constitute a safe or code compliant passageway.

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). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). 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." *Id.*

Defendants' argument that they are entitled to summary judgment dismissing the complaint on the ground that there was no dangerous condition at the site where the accident occurred is without merit. 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 did not create a dangerous condition and that it did not have actual or constructive notice of the condition. *See Branham v. Loews Orpheum Cinemas,* 31 A.D.3d 319 (1st Dept 2006).

In the present case, defendants have failed to make a *prima facie* showing that there was no dangerous condition with respect to the deck, pool or hot tub based on their contention that the construction of the deck, pool and hot tub had been approved by the Village as none of the documents submitted by defendants, including the building permit, the Certificate of Occupancy or the April 14, 2004 survey, references the hot tub. Thus, they have failed to submit any evidence that the layout of the area between the pool and hot tub was approved by the Village.

Defendants' argument that they are entitled to summary judgment dismissing the complaint on the ground that plaintiff is unable to identify the cause of his accident is also without merit. It is well settled that "a *prima facie* case of negligence must be based on something more than conjecture; mere speculation regarding causation is inadequate to sustain the cause of action." *Mandel v. 370 Lexington Ave., LLC*, 32 A.D.3d 302, 303 (1st Dept 2006). "Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defects, absent which summary judgment is appropriate." *Kane v. Estia Greek Rest.*, 4 A.D.3d 189, 190 (1st Dept 2004). A plaintiff need only identify the site of his fall and provide expert testimony identifying "defective conditions at that spot" to connect the slip and fall to the supposed defects and thus avoid summary judgment. *Rodriguez v. Leggett Holdings, LLC*, 96 A.D.3d 555, 556 (1st Dept 2012) (holding that an expert's identification of various defects and code violations with regard to the step on the stairway where the plaintiff fell was sufficient for the plaintiff to avoid summary judgment).

In the present case, defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff is unable to identify the cause of his accident is denied on the ground that there is an issue of fact as to whether the accident was caused by the allegedly dangerous conditions of uneven coping bricks or the narrow width of the area between the pool and hot tub. Defendants have made a *prima facie* showing of their entitlement to summary judgment dismissing the complaint through their submission of plaintiff's deposition testimony wherein he was unable to identify what caused him to slip and fall. In opposition, plaintiff has raised a triable issue of fact through his submission of the expert testimony of Haimes that there were two defects in the area between the pool and the hot tub where he fell, namely a

dangerous height differential between and among the coping bricks, which allegedly presented a "significant tripping hazard," and the narrow width of the area, which allegedly did not constitute a safe or code compliant passageway. Moreover, defendants have failed to submit reply papers to plaintiff's opposition papers, thereby conceding the correctness of plaintiff's argument.

Accordingly, defendants' motion for summary judgment is denied. This constitutes the decision and order of the court.

DATE : 12/2/16

CK

KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.