

Tuminello v Village of New Hyde Park

2017 NY Slip Op 33421(U)

August 30, 2017

Supreme Court, Nassau County

Docket Number: Index No. 605101/2016

Judge: James P. McCormack

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____x

LOUIS TUMINELLO,

Plaintiff(s),

-against-

**THE VILLAGE OF NEW HYDE PARK and
METRO PAVING, LLC,**

Defendant(s).

_____x

**TRIAL/IAS, PART 27
NASSAU COUNTY**

Index No.: 605101/2016

**Motion Seq. No.: 001 & 002
Motion Submitted: 6/27/17**

XXX

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....	X
Notice of Cross Motion.....	X ¹
Affirmation in Opposition.....	X
Reply Affirmations.....	XX

Defendant, The Village of New Hyde Park (the Village), moves this court for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Co-Defendant Metro Paving, LLC (Metro), cross moves for

¹Metro paving LLC's cross motion is improper as it seeks relief from Plaintiff who is a nonmoving party. (*Terio v. Spodek*, 25 A.D.3d 781, [2nd Dept. 2006]; *Mango v. Long Is. Jewish-Hillside Med. Ctr.*, 123 A.D.2d 843 [2nd Dept. 1986]. However, Plaintiff did not object and was given time to respond to and oppose the relief sought. As such, the court sees no prejudice to any party in ignoring the technical defect. (*Daramboukas v. Samlidis*, 84 A.D.3d 719 [2nd Dept. 2011]).

summary judgment against Plaintiff, dismissing the complaint against it. Plaintiff, Louis Tuminello (Tuminello) opposes both motions.

Plaintiff commenced this action, sounding in negligence, by service of a summons and complaint dated July 8, 2016. Issue was joined by service of an answer with cross claims by the Village dated August 18, 2016. Metro interposed an answer with cross claims dated October 25, 2016.

On June 7, 2016, Tuminello was at the basketball courts in Memorial Park which is contained in, and owned by, the Village. The basketball courts are surrounded on all sides by a chain-link fence. There are white out-of-bounds lines around the court, and the fence is approximately four feet beyond the white lines.

According to his 50-h testimony, Tuminello had met his 20 year old son at the park and after watching a five-on-five pick-up basketball game for approximately 30 minutes, Tuminello and his son began to play in a full court five-on-five game. For the first approximately 10-15 minutes of the game, Tuminello ran up and down the court without issue, and he acknowledged there was no issue with the surface of the court itself. At one point, he attempted to secure a rebound that was heading out of bounds and possibly lightly collided with another player. While running to track down the ball, he ran straight into the fence, and alleges he was injured as a result. The Village, as the owner of the basketball court, and Metro, as the entity that constructed the court, both move for summary judgment asserting assumption of risk.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept

1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 NY2d 361 [1974]).

“A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk” (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

“To impose liability upon a defendant landowner for a plaintiff’s injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

The doctrine of primary assumption of risk provides that a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. *Morgan v. State*, 90 N.Y.2d 471 [1997]. The doctrine, however, does not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased. *Id. at 485.*

The Village and Metro both make essentially the same argument that Tuminello assumed the risk of injury by voluntarily playing in a pick-up basketball game, and that any risks were open and obvious, particularly since he observed the game for a half hour before playing. In support of these arguments, each Defendant offers, *inter alia*, Tuminello's 50-h testimony. The court, having reviewed the testimony, and in applying the doctrine of primary assumption of risk, finds that the Village and Metro have each established entitlement to summary judgment as a matter of law. The burden shifts to Tuminello to raise a material issue of fact requiring a trial for the action.

In opposition, Tuminello raises a number of arguments, both technical and substantive. First, Tuminello argues that the motions are premature as discovery has not yet taken place. However, Tuminello has neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. "The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion" (*Hanover Ins. Co. v. Prakin*, 81 AD3d 778 [2d Dept. 2011]; *see also Essex Ins. Co. v. Michael Cunningham Carpentry*, 74 AD3d 733 [2d Dept. 2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978 [2d Dept. 2009]; *Gross v. Marc*, 2 AD3d 681 [2nd Dept. 2003]).

Second, Tuminello alleges that the motions rely on inadmissible evidence. The 50-h transcript provided by Defendants is incomplete and does not contain a signature page, rendering it inadmissible. As the transcript is relied upon to authenticate the

pictures that are also annexed to the motion papers, the pictures are also inadmissible. In general, an inadmissible transcript cannot be relied upon to support a summary judgment motion. Further, any defect in the movant's *prima facie* case cannot be remedied in reply papers. (*Migdol v. City of New York*, 291 A.D.2d 201[1st Dept. 2002]). However, where, as here, the defect is merely failing to include a signature page, and where that failure does not result in prejudice, it may be remedied by including the signature page in reply papers. (See *Pavane v Marte*, 109 A.D.3d 970, [2nd Dept. 2013]; *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008 [2nd Dept. 2008]).

Third, Tuminello argues that both defendants rely on outdated law. Citing to *Trupia v. Lake George Cent. School Dist.* 14 N.Y.3d 392 [2010], Tuminello asserts that assumption of risk does not apply to "every sporting activity", and that it is, in effect, in conflict with comparative negligence jurisprudence. In *Trupia*, the Court of Appeals found that assumption of risk could not be applied to a situation where an injury occurred as the result of "horseplay" because the defendant was not sponsoring or supporting a risk-laden but socially valuable voluntary activity. In that case, a young person was injured while sliding down a stairwell bannister while at summer school. To the contrary, the facts herein are the exact situation that *Trupia* and its progeny describe as appropriate for assumption of risk. The Village provides a basketball court for the purpose of allowing members of the public to play the game, which facilitates participation in sporting activity. *Id.* Tuminello was hurt while playing the game in the manner in which

it is supposed to be played. (*Cf. Braile v. Patchogue Medford Sch. Dist of Town of Brookhaven*, 123 A.D.3d 960 [2nd Dept 2014] (assumption of risk did not apply where a player on a soccer team was injured while running sprints in the hallway of the school during indoor practice). His injuries were inherent in the activity of playing basketball in Memorial Park, and the fence that caused the injury was open and apparent. (*Altagracia v. Harrison Cent. Sch. Dist.*, 136 A.D.3d 848 [2nd dept. 2016])). As the court finds assumption of risk does apply, the remaining question is whether or not there were unassumed, concealed or unreasonably increased risks. *Id.* The court finds there were none. It cannot be argued the fence was concealed, nor can it be argued that Tuminello did not assume the risk when he voluntarily agreed to play on the court. Finally, the risks were not unreasonably increased by the presence of the fence. Tuminello, who acknowledged his lack of prowess in the game of basketball, was injured because he pursued the ball beyond the out-of-bounds line, as he admittedly did not slow down in doing so. Tuminello increased his own risk by playing in the manner in which he did. Finally, Tuminello relies on the affidavit of his expert who states that the basketball court was constructed in a way that increased the risk of injury. The expert bases his opinion on the American Society for Testing and Materials (ASTM) guidelines. However, ASTM “guidelines are nonmandatory, and insufficient to raise a triable issue of fact as to whether the defendant was negligent”. (*Augustin v. Grand Prix New York Racing, LLC*, 138 A.D.3d 902 [2nd Dept. 2016])(cites omitted).

Accordingly, it is hereby

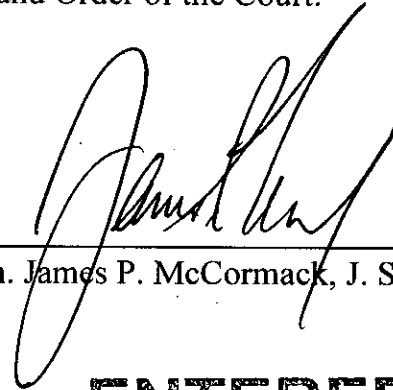
ORDERED, that the Village's motion for summary judgment is GRANTED in its entirety; and it is further

ORDERED, that Metro's motion for summary judgment is GRANTED in its entirety.

The complaint is dismissed.

This foregoing constitutes the Decision and Order of the Court.

Dated: August 30, 2017
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

SEP 06 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE