Cortes v Westchester County
2017 NY Slip Op 33510(U)
December 20, 2017
Supreme Court, Westchester County
Docket Number: Index No. 50037/2016
Judge: Lawrence H. Ecker
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.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

BARBARA CORTES and BARBARA CORTES AS TEMPORARY GUARDIAN OF THE PROPERTY AND PERSON OF DENNIS A. CORTES,

Plaintiffs,

-against-

WESTCHESTER COUNTY, and KATHLEEN O'CONNOR, COMMISSIONER OF WESTCHESTER COUNTY DEPARTMENT OF PARKS, RECREATION, AND CONSERVATION,

Defendants.

---X

INDEX NO. 50037/2016

DECISION/ORDER

Motion Date: 9/13/17
Motion Seqs. 4, 5

ECKER, J.

The following papers numbered 1 through 44 were read on the motion of WESTCHESTER COUNTY, and KATHLEEN O'CONNOR, COMMISSIONER OF WESTCHESTER COUNTY DEPARTMENT OF PARKS, RECREATION, AND CONSERVATION ("defendants"), made pursuant to CPLR 3212, for an order granting summary judgment dismissal of the complaint, as against BARBARA CORTES and BARBARA CORTES AS TEMPORARY GUARDIAN OF THE PROPERTY AND PERSON OF DENNIS A. CORTES (collectively "plaintiff") (Mot Seq. 4); and on the cross-motion of plaintiff, made pursuant to CPLR 3212, for an order granting plaintiff's summary judgment of liability as against defendants (Mot Seq 5):

PAPERS	**NUMBERED**
Motion Sequence 4	
Notice of Motion, Affirmation, Exhibits A-Y	1 - 27
Affirmation in Opposition, Exhibits A-F [1]	28 - 34
Reply Affirmation	35

[1] Part rules require plaintiff to use numbered exhibit tabs.

Motion Sequence 5

Notice of Cross-Motion, Exhibits A-G	36 - 43
Affirmation in Opposition	44

Upon the foregoing papers, the court determines as follows:

In this action for personal injuries, plaintiff alleges on the afternoon of August 24, 2014, Dennis Cortes fell off the Derby Racer ride [2] at Rye Playland Amusement Park ("Playland") located in Rye (Westchester County), New York. Barbara Cortes, sues derivatively as Dennis's mother. Defendants move, pursuant to CPLR 3212, to dismiss the complaint, and plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment as to liability.

On November 10, 2014, plaintiffs served a Notice of Claim on defendants. [Deft. Ex. A]. The Notice of Claim states in relevant part:

> 2. The nature of the claim:
> Tort/Negligence
>
> 3. The time when, the place where and the manner in which the claim arose:
>
> At approximately 12:30 P.M. on August 24, 2014, while riding the Derby Racer at Rye Playland Amusement Park, DENNIS A. CORTES was caused to fall off the ride due to lack of proper safety equipment and negligent supervision of Playland Personnel. At the time and place stated herein DENNIS A. CORTES was lawfully permitted upon aforesaid area when without any negligence on his part, the claimant was caused to fall headlong to the floor boards of the Derby Racer ride with great force, due to the negligence of the County of Westchester, their agents, servants, and/or employees in the ownership, operation maintenance, management, construction and control of the Rye Playland Amusement Park.

In February, 2015, defendants conducted GML 50-h hearings of Dennis Cortes and his parents, Barbara Cortes and Daniel Cortes. The complaint, filed in Bronx Supreme Court on October 8, 2015, alleges causes of action for negligence based on numerous theories against Westchester County and Kathleen O'Connor, Commissioner of Parks. as defendants. On December 24, 2015, defendants filed their answer. By Decision/Order of this court, dated May 17, 2016, the action was removed from the Bronx to Westchester County. On

---

[2] A merry-go-round ride where the patron sits on a simulated horse.

July 6, 2016, plaintiffs served defendants with the Verified Bill of Particulars. Following depositions conducted between October, 2016, and January, 2017, plaintiffs filed the note of issue on May 23, 2017. Defendants' motion and plaintiff's cross-motion were filed on July 7, 2017.

In support of their motion for summary judgment, defendants initially argue the causes of action cannot be maintained against Kathleen O'Connor, as she had no personal involvement in the day-to-day operations of Playland, and as such, the complaint against her should be dismissed. Defendants further argue the court lacks subject matter jurisdiction over the causes of action pled in the complaint and Bill of Particulars because they were not originally pled in the Notice of Claim; that the causes of action in the Notice of Claim should be dismissed against the defendants; that as a matter of law, the County did not breach its duty; and that plaintiff assumed the risk of riding the Derby Racer such that defendants owed no duty of care to plaintiff.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party "has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure. *Matter of Suffolk Co. Dept. of Social Services v James M.,* 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp,* 3 NY2d 395, 404 [1957]. In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. *Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh,* 22 NY3d 470, 475 [2013]; *Nash v Port Washington Union Free School District,* 83 AD3d 136, 146 [2d Dept 2011]; *Pearson v Dix McBride, LLC,* 63 AD3d 895 [2d Dept 2009]. Every available inference must be drawn in the [non-moving] party's favor. *De Lourdes Torres v Jones,* 26 NY3d 742, 763 [2016].

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. Failure to make such prima facie "showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Pullman v Silverman*, 28 NY3d 1060 [2016]; *Winegrad v New York University Medical Center, supra.* Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], *quoting LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the

existence of a triable issue of fact. *Zuckerman, v City of New York, supra*; *Alvarez v Prospect Hosp., supra.*

Addressing the argument that the causes of action cannot be maintained as against O'Connor since she was not involved in the day-to-day operations of Playland, pursuant to the doctrine of respondeat superior, an employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment. *Scott v Lopez,* 136 AD3d 885 [2d Dept 2016]. As County Commissioner of the Department of Parks, Recreation and Conservation overseeing the operation of all County parks and recreation facilities, including Playland, her proffered defense that a lack of day-to-day involvement in the operation of Playland lacks merit under the doctrine of respondeat superior. Accordingly, the court declines to grant defendants motion for summary judgment dismissal of the claims against O'Connor.

Defendants next argue the causes of action pled in the complaint and the Bill of Particulars should be dismissed as they were not originally included in the Notice of Claim. In response, plaintiffs aver that the Notice of Claim requirements were satisfied, adequately alerted defendants of the later filed negligence claims, and that any technical deficiency with the Notice of Claim did not prejudice defendant.

The requirements of the statute are met when the notice describes the incident with sufficient particularity so as to enable the defendant to conduct a proper investigation and to assess the merits of the claim. *Davis v City of New York,* 153 AD3d 658 [2d Dept 2017]. The legislature did not intend that the claimant have the additional burden of pleading causes of action and legal theories in the Notice of Claim. *Schwartz v City of New York,* 250 NY 332 [1929]. A claimant need not state a precise cause of action in haec verba in the notice of claim." *Se Dae Yang v New York City Health and Hospitals Corp.*, 140 AD3d 1051 [2d Dept 2016]. Hence, the court finds the notice of claim adequately apprises the defendants that plaintiffs will seek to impose liability under multiple theories of recovery.

Defendants argue that the claims cannot be sustained as noticed because proper safety equipment was in place, and there was no negligent supervision. Upon review of the deposition transcripts, and other papers submitted in support of defendants' motion, the court finds there is conflicting evidence in the record before it sufficient to raise issues of fact as to whether there was proper safety equipment, and whether the supervision of the ride was negligent.

Defendants further contend as a matter of law, the County did not breach its duty of care. However, the court finds there are examples of possible breaches of duty, namely whether safety instructions given to riders were

adequate and whether pegs placed on the ride to aid placement of a rider's feet were improperly placed. Lastly, defendants argue that Dennis assumed the risk of riding the derby racer ride so that defendants owed no duty of care to him.

According to the doctrine of primary assumption of the risk, when an individual voluntarily participates in a sport or recreational activity, he or she consents to those commonly appreciated risks that are inherent in and arise out of the nature of the sport generally and flow from participation therein. *Morgan v State of New York,* 90 NY2d 471, 484 [1997]; *Siegel v Albertus Magnus High School*, 153 AD3d 572 [2d Dept 2017]; *Perez v New York City Dept. of Educ.,* 115 AD3d 921 [2d Dept 2014]; *Welch v Board of Educ. of City of N.Y.,* 272 AD2d 469 [2d Dept 2000]; "This encompasses risks associated with the construction of the playing field, and any open and obvious conditions on it." *Safon v Bellmore–Merrick Cent. High Sch. Dist.,* 134 AD3d 1008 [2d Dept 2015]. "If the risks are known by or perfectly obvious to the participant, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be." *Perez v New York City Dept. of Educ.,* supra at 921; *Turcotte v Fell,* 68 NY2d 432, 439 [1986]. " 'It is not necessary... that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results. *Ferrari v Bob's Canoe Rental, Inc.,* 143 AD3d 937, 938 [2d Dept 2016], quoting *Maddox v City of New York,* 66 NY2d 270, 278 [1985].

Here, there is evidence in the record that there were pegs placed on the horses on the ride to aid placement of the rider's feet, and they may have been improperly placed. Hence, there is an issue of fact as to whether Dennis should have foreseen the potential for injury by using the foot pegs. This is likewise an issue of fact for the trier of fact.

The court similarly finds that summary judgment for the plaintiff does not lie. There are issues of fact as to whether Dennis heeded the warning signs which were present, and whether defendants' employees acted negligently in the duty and care they owed to him. Thus, a trial is required to resolve the specific issues raised by plaintiffs and defendants.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of WESTCHESTER COUNTY, and KATHLEEN O'CONNOR, COMMISSIONER OF WESTCHESTER COUNTY DEPARTMENT OF PARKS, RECREATION, AND CONSERVATION, made pursuant to CPLR 3212, for an order granting summary judgment dismissal of the complaint as against BARBARA CORTES and

BARBARA CORTES AS TEMPORARY GUARDIAN OF THE PROPERTY AND PERSON OF DENNIS A. CORTES [Mot. Seq. 4], is denied; and it is further

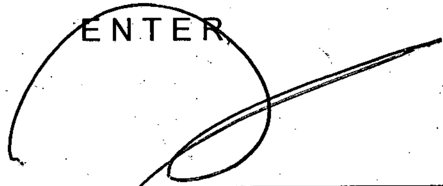
ORDERED that the cross-motion of BARBARA CORTES and BARBARA CORTES AS TEMPORARY GUARDIAN OF THE PROPERTY AND PERSON OF DENNIS A. CORTES, made pursuant to CPLR 3212, for an order granting plaintiff summary judgment of liability as against WESTCHESTER COUNTY, and KATHLEEN O'CONNOR, COMMISSIONER OF WESTCHESTER COUNTY DEPARTMENT OF PARKS, RECREATION, AND CONSERVATION [Mot. Seq. 5], is denied; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part of this Court, Room 1600, on January 30, 2018 at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
December 20, 2017

ENTER



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Law Offices of Soto & Associates, P.C.
Attorneys for Plaintiff
Via NYSCEF

Westchester County Attorney
Attorneys for Defendants
Via NYSCEF