

Segal v Haverstraw Mar. Corp.
2018 NY Slip Op 32284(U)
March 30, 2018
Supreme Court, Westchester County
Docket Number: 60126/2016
Judge: Sam D. Walker
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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
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
WENDY SEGAL,

Plaintiffs,

Decision & Order
Index No. 60126/2016
Seq # 1

-against-

HAVERSTRAW MARINA CORPORATION d/b/a
HAVERSTRAW MARINA,

Defendants.
-----X

The following papers were read on a motion by the defendant for an order dismissing all claims asserted against it pursuant to CPLR 3212:

Notice of Motion/Affidavit/Exhibits 1-3	1-5
Affirmation in Opposition/Exhibit A-D	6-10
Reply Affidavit	11

The plaintiff, Wendy Segal ("Segal") commenced this action on July 25, 2016, by filing a summons and complaint against the defendant Haverstraw Marina Corporation d/b/a Haverstraw Marina ("Haverstraw") alleging causes of action in premises liability and failure to warn. Haverstraw filed an answer joining issue and the parties conducted discovery.

Haverstraw, by its attorney, now files a motion for summary judgment to dismiss the plaintiff's complaint against it. In support of its motion, Haverstraw relies upon, *inter alia*, Segal's deposition, the attorney's affidavit and copies of the pleadings. Haverstraw argues that Segal was unable to identify what struck her in the head and therefore, she cannot

recover damages for personal injuries because a finding that Haverstraw's negligence proximately caused her injuries would be based on speculation.

In opposition, Segal, by her attorney, argues that the motion should be denied because the defendant failed to establish its entitlement to judgment as a matter of law, such that the burden would be shifted to the plaintiff to rebut Haverstraw's contentions. The attorney argues that the defendant improperly conflates speculation with lack of direct evidence and asserts that the plaintiff presented sufficient circumstantial evidence in support of her claims.

In reply, Haverstraw's attorney argues that Segal's contention that there is not sufficient circumstantial evidence to support a finding of negligence in this case and that the cases cited by the plaintiff for the proposition of proving her case by circumstantial evidence, are distinguishable from this fact pattern. The attorney argues that circumstantial evidence must lead to a reasonable inference of negligence to bar a motion for summary judgment, but in this case, no reasonable inference can be drawn.

Segal, a fifth grade teacher, testified that on June 15, 2015, she was on a field trip with students in her class. There were approximately fifty students and three teachers on the trip. Segal stated that they traveled on a bus to Haverstraw Marina to go aboard the Mystic Whaler. After returning the Marina from Mystic Whaler, Segal was the first one off the boat and proceeded to walk up the hill to get back to the bus, leading her group of children and following the path. On the way up the path, a man in some type of utility vehicle called her over to the side of the road and asked her if the children would need to use the restrooms. She said yes and he told her he would provide access to the restrooms. She turned around to make sure the children were walking on the side of the road and she

stumbled because something had hit her. Segal testified that she later discovered that some gate had hit her.

Segal further testified that she asked the teachers who were going on the field trip the next day to look to see what was in the location where she was to determine what could have hit her. She said she told them to look for something that could have hit her in the head on the road, but she did not tell them where she was on the road. One of the teachers provided her with three photographs of the gate.

Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issue of fact from the case (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Id.*).

To prevail on a negligence claim, the plaintiff must establish: (1) the existence of a duty owed to the plaintiff; (2) the breach of such duty; (3) and that the breach of the duty was the proximate cause of the injury incurred (*see Engelhart v County of Orange*, 16 AD3d 369 [2005]).

"A defendant can establish its prima facie entitlement to judgment as a matter of law by showing that the plaintiff cannot identify the cause of the accident" (*see Antelope v Saint Aidan's Church, Inc.*, 110 AD3d 1020 [2d Dept 2013]). "A plaintiff's inability to identify the

cause of the fall is fatal to the cause of the action because a finding that the defendant's negligence, if any, proximately caused the injuries would be based on speculation" (*Id.*).

Here, Segal testified that she did not know what struck her in the head and only later surmised that it must have been a gate based on pictures taken the following day by teachers who were not present on the day of Segal's accident. Further, the plaintiff did not tell the teachers where she was when she was struck in the head, so the teachers were operating based on pure speculation when they presented her with photographs. Additionally, Segal did not recognize the areas in the photographs, but only the road and none of the other teachers who were with her that day nor the children testified as to cause of the accident.

The plaintiff's attorney asserts that the evidence in this case is circumstantial evidence and sufficient for the plaintiff to go forward. However, "[a]lthough "[p]roximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident,...mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" (see *Ash v City of New York*, 109 AD3d 854 [2d Dept 2013]). The teachers presented the plaintiff with pictures of the gate and the plaintiff then assumed that the gate must have struck her, but the plaintiff testified that she did not see the gate the day before and the man whom she stopped to speak with (Mervin R. Livsey, Jr. ["Livsey"]), testified that he was at least 25 to 30 feet from the gate when he stopped and he waited until everyone had passed his tractor before he opened up the gate to pass through.

Therefore, Haverstraw has established its entitlement to judgment as a matter of law dismissing the complaint against it by demonstrating that the plaintiff did not know what struck her in the head and the plaintiff has failed to show the existence of material issues of fact.

Accordingly, it is

ORDERED that the defendant's motion, seeking dismissal of the complaint, is granted; and it is further

ORDERED that the action is dismissed.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
March 30, 2018


HON. SAM D. WALKER, J.S.C.