

Balzer v Santy

2018 NY Slip Op 33845(U)

April 10, 2018

Supreme Court, Saratoga County

Docket Number: 20142602

Judge: Thomas D. Nolan

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

BENJAMIN J. BALZER, JR.,

Plaintiff,

-against-

LISA M. SANTY and TRACY A. SOLAREK,

Defendants.

Action No. 1
RJI No. 45-1-2017-0061
Index No. 20142602

DECISION AND ORDER

BENJAMIN J. BALZER, JR.,

Plaintiff,

-against-

WPD HOLDINGS LLC and STEWART'S SHOPS CORP.,

Defendants.

Action No. 2
RJI No. 45-1-2016-0879
Index No. 20153689

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FILED

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

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These two actions arise from the same trip and fall by the plaintiff. On December 23, 2012, plaintiff, a truck driver, was tasked with making a delivery of fuel oil to 9 Terminal Road, Town of Halfmoon, a residential rental property owned by Lisa Santy and Tracy Solarek (collectively Santy), the defendants in Action No. 1. The property is located next to a commercial property, a convenience store, owned and operated by the defendants in Action No. 2 (collectively Stewart's). Plaintiff intended to make the delivery in the morning but was unable to verify the location of the Terminal Road property. Later on his route, plaintiff made a delivery in the Village of Round Lake to what turned out to be the residence of defendant Santy, who confirmed for plaintiff the location of the Terminal Road property and who allegedly told plaintiff that in the past when fuel was delivered, the delivery truck parked in the Stewart's lot rather than on Terminal Road in front of the property. When plaintiff reached the property, he parked the fuel truck in Stewart's paved parking lot. Between the paved parking lot and the Santy property, there was a grassy, landscaped, and shrub filled area, which Stewart's owned and maintained. Plaintiff first walked through this area to the Santy property to locate the fill pipe, and plaintiff testified in a deposition given in Action No. 1 that, as he walked back towards the truck, he "stepped in a hole, tripping". Plaintiff testified the hole was located near "a manhole cap or cover", "just slightly northeast of the cover", and "within a foot of the manhole cover". In that deposition, plaintiff was unable to describe the dimensions of the hole and testified that the ground was "covered with leaves". In a second deposition given in Action No. 2, plaintiff testified that the depression was "not a flat surface. So, in my eyes, that's a hole. The depression was approximately four to six inches deep" and that "the grass that was in it had grown to the same height as the outside grass which was mowed at some point in time, creating a same level

experience". Plaintiff also testified that he went back to the site "days afterwards" and "placed [his] hand into the location determining that it was approximately four to six inches".

After his fall, plaintiff completed the oil delivery and told an unidentified Stewart's employee that he had fallen and twisted his ankle. Plaintiff that day told his employer what had happened and sought medical attention on December 24, 2012.

In 2014 plaintiff commenced Action No. 1 against the Santy defendants and in 2015 commenced Action No. 2 against the Stewart's defendants. Discovery has been completed. Three motions are pending. Plaintiff moves for an order consolidating the two actions. The Stewart's defendants oppose consolidation. The Santy defendants and the Stewart's defendants respectively move for orders granting summary judgment dismissing the plaintiff's complaint. Plaintiff opposes both dismissal motions.

First considered are the summary judgment motions. Relying on a certified survey showing that the catch basin or sewer grate was on Stewart's property and 9/10 of a foot west of and beyond Santy's nearest property line, defendants Santy contend that the depression or hole, the alleged dangerous condition, was thus simply not on their property. Defendants Santy also assert they lacked actual and constructive notice of the allegedly hazardous condition, even if it were on their property, and that they did not create the hazard. Defendants Santy also contend neither was aware that the catch basin and grate had been installed by Stewart's until after they learned of plaintiff's fall.

Defendants Stewart's, although admitting that in 2011 it installed the catch basin and grate and conceding for purposes of its motion that the allegedly hazardous condition was on its property, nevertheless contend that it owed no duty of care to this plaintiff because the area in

question was not a public walkway or a designated access route to or from its property but was a partially landscaped and maintained grass and shrub filled area bordering its paved parking lot which plaintiff chose to enter to facilitate a delivery to the adjacent property. Defendants Stewart's further contend that the depression or hole was a naturally occurring physical feature of which it lacked notice - constructive or actual - and, any danger that it posed.

The summary judgment motions are supported by the pleadings, the plaintiff's two depositions, depositions and affidavits from defendants Santy and Solarek, the deposition of Stewart's maintenance employee, Brian Kelley, several photographs of the area in question and a 2016 survey of defendants Santy's and Solarek's property.

In opposition, plaintiff disputes the claim that the depression/hole was a naturally occurring condition but rather contends that this hazardous condition was created in 2011 by defendants Stewart's when the catch basin/grate was installed and points out that the hole was less than 12 inches from the northeast corner of the grate. Moreover, plaintiff argues that neither defendant Santy nor defendants Stewart's have satisfactorily proven that the depression/hole was not on their respective properties and that Stewart's has not satisfactorily established it did not create the condition when it constructed/installed the catch basin/grate. Moreover, plaintiff contends that the allegedly hazardous condition should have been discovered by both defendants and remedied prior to his fall.

First, the general principles governing summary judgment in negligence actions. Since summary judgment is a drastic remedy which if granted deprives a party of a full presentation of evidence before a trier of fact, the burden is on the moving party, here the defendants, to tender sufficient evidence to demonstrate the absence of any material issue of fact, and in reviewing the

motion, the facts must be viewed in the light most favorable to the party opposing the motions, here plaintiff. Friends of Thayer Lake, LLC v Brown, 27 NY3d 1039, 1043 (2016); Vega v Restani Constr. Corp., 18 NY3d 499 (2012). And in negligence actions, summary judgment is “rarely granted”, however the court need not “ferret out” speculative issues to get the case to a jury. Andre v Pomeroy, 35 NY2d 361, 364 (1974). Once defendants meet their threshold burden, plaintiff must produce “affirmative proof to demonstrate that the matters are real and capable of being established upon trial”. Nelson v Lundy, 298 AD2d 689, 690 (3rd Dept 2002). And, when there is conflicting evidence, the court is precluded from assessing credibility and must leave that task to the factfinder. Ferrante v American Lung Assoc., 90 NY2d 623 (1997).

And, in a premises liability case of this type, to be held liable a defendant must have owned, occupied, controlled, or made special use of the property where the plaintiff’s mishap occurred; and thus to meet its initial burden, a defendant may establish that the plaintiff’s fall did not take place on its property. Rossal-Daub v Walter, 58 AD3d 992 (3rd Dept 2009); Baker v Cayea, 74 AD3d 1619 (3rd Dept 2010). When one or more indicia of ownership is shown, a duty to exercise reasonable care arises but “[w]here none is present, a party cannot be held liable for injuries caused by the dangerous and defective condition of the property”. Turressi v Ponderosa, Inc., 179 AD2d 956, 957 (3rd Dept 1992); Giglio v Saratoga Care, Inc., 117 AD3d 1143, 1144 (3rd Dept 2014).

As an initial matter, the court finds that defendants Santy meet their burden of showing non-liability by offering a survey establishing that the catch basin/manhole while close to their boundary line with Stewart’s was not on its property, even though that the boundary line between their property and Stewart’s property was 9/10 of a foot east of the frame of the catch basin and

by offering the deposition testimony of Santy and Solarek that neither owner had knowledge, actual or constructive, of the hole/depression's existence until notified of plaintiff's fall. The plaintiff has not offered proof sufficient to create an issue of fact whether the hole/depression was within the defendant Santy's boundary lines. And, as well, plaintiff offers no evidence that defendants Santy created the condition or had actual or constructive knowledge of it.

Defendant Santy's motion is granted, and plaintiff's complaint in Action No. 1 is dismissed, without costs.

Now, defendant Stewart's motion. Again, Stewart's concedes for purposes of its motion that the depression/hole was on its property. Again, the depression/hole was less than 12 inches from the corner of the catch basin/grate defendant installed one year before plaintiff's fall. Yet, Stewart's does not concede that the depression/hole was the result of that construction. In any event, defendant also argues that it owed no duty of care to plaintiff because the area where plaintiff tripped and fell was not a walkway or a designated thoroughfare for ingress from or egress to its property. The court agrees. A landowner's duty of care requires "reasonable care under the circumstances whereby foreseeability shall be a measure of liability". Basso v Miller, 40 NY2d 233, 241 (1976). And, "the likelihood of the injured party's presence in light of the frequency of the use of the area determines the questions of foreseeability and the owner's duties". Baczkowski v Zurn, 235 AD2d 894, 895 (3rd Dept 1997); accord Hendricks v Lee's Family, Inc., 301 AD2d 1013 (3rd Dept 2003); Elwood v Alpha Sigma Phi, 62 AD3d 1074 (3rd Dept 2009), lv denied 13 NY3d 711 (2009). In Kirby v Summitville Fire Dist., 152 AD3d 926 (3rd Dept 2018), the court recently held that the plaintiff's fall down an embankment when he tripped over a piece of pipe the presence was not foreseeable since the strip of land plaintiff used

to leave the property was not a regular means of ingress and egress.

Here, the deposition testimony and photographs of the area establish that the land beyond the paved area of the Stewart's property was grassy and improved only with shrubs and mulch and was not intended to be used to either enter or leave Stewart's property or to access its neighbor's property.¹ Nor is there evidence that Stewart's was aware that prior oil deliveries to the Santy property were accomplished by traversing that portion of Stewart's property.

Defendant Stewart's motion is granted and plaintiff's complaint is dismissed, without costs.

Based on the court's determination, plaintiff's motion to consolidate the two actions is moot and it is therefore denied, without costs.

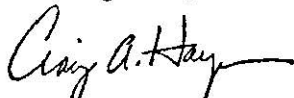
This constitutes the decision and order of the court. The original decision and order is returned to counsel for defendants in Action No. 1. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendants in Action No. 1 is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: April 10, 2018
Saratoga Springs, New York

ENTERED

Craig A. Hayner



Saratoga County Clerk



HON. THOMAS D. NOLA
Supreme Court Justice

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ENTERED

¹After these actions were commenced and depositions given, defendant Stewart's erected a fence along the boundary line, a factor not relevant to the court's determination.