

Durocher v Rivera

2018 NY Slip Op 34347(U)

June 11, 2018

Supreme Court, Orange County

Docket Number: Index No. EF008254-2016

Judge: Maria S. Vazquez-Doles

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This opinion is uncorrected and not selected for official publication.

At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at the 1841 Court House located at
101 Main Street, Goshen, New York 10924 on the 11th day of June, 2018.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE**

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, on all parties.

TINA DUROCHER,
PLAINTIFF,

-AGAINST-

JACQUELINE RIVERA,
DEFENDANT.

DECISION & ORDER
INDEX # EF008254-2016
Motion date: 2/2/18
Motion Seq. #1

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 9 were read on Defendant's motion for summary judgment dismissing this action pursuant to CPLR §3212:

Notice of Motion/Affirmation of Iacobucci, Esq./Exhibits A - E	1 - 7
Affirmation in Opposition of Campbell, Esq.	8
Reply Affirmation of Gaztambide, Jr., Esq.	9

This action for personal injury was commenced by the filing of a Summons and Complaint on December 7, 2016. Issue was joined on or about January 2, 2017 with the service of an Answer. All discovery has been completed and the matter is ready for trial. Plaintiff alleges that on August 22, 2016 at 59 Taft Avenue, she walked backwards into a drain area located on Defendant's property and injured her foot. Defendant moves for a dismissal of the action on the grounds that Plaintiff has failed to show that she created, designed, built, or maintained the drainage ditch, as the ditch is maintained by the Town of Newburgh. Defendant further argues that the ditch is clearly visible and constitutes an open and obvious condition that is not inherently dangerous, and that Defendant had no actual or constructive notice of the alleged dangerous condition. Plaintiff opposes the motion and contends that there are issues of fact requiring a trial, because Defendant extended her driveway and created the hazard.

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." (*Anyanwu v Johnson*, 276 AD2d 572, 714 NYS2d 882 [2d Dept 2000]) Issue finding, not issue determination, is the key to summary judgment. (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. (*See, Kutkiewicz v Horton*, 83 AD3d 904, 920 N.Y.S.2d 715 [2d Dept 2011]).

A New York landowner owes "... people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition...". *Tagle v Jakob*, 97 NY2d 165, 168 [2001]. However, "[i]n order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (citing *Lezama v. 34-15 Parsons Blvd, LLC*, 16 A.D.3d 560, 560; see *Friedman v. 1753 Realty Co.*, 117 A.D.3d 781, 783, 986 N.Y.S.2d 175)." *Tavarez v Pistilli Assoc. III, LLC*, 2018 NY Slip Op 03727 [2d Dept May 23, 2018].

The facts in this case do not support either theory of liability. In this case, Plaintiff's deposition testimony indicated that she came to the home at the request of a third party, walked backwards into a drainage ditch, and injured her foot. Plaintiff testified that it was dark and she

was backing away from her vehicle when the incident happened. Defendant was no where around and in no way caused the injury. Defendant avers that this ditch was not created by her, but instead was created by the Town of Newburgh to ensure water runoff on the street. Plaintiff shows no evidence to the contrary. Although Plaintiff argues that Defendant created a defective condition by extending her original driveway, the photos do not depict any dangerous condition. The ditch was not changed and or covered and is still open and obvious to the ordinary person. Moreover, there is no evidence indicating that there was ever a problem with the extended parking area which would put the landowner on notice, actual or constructive, that the location of this parking area had any defect, or dangerous condition. "A landowner is not... an insurer of the safety of those using his property (citing *Thackeray v. Novak*, 124 A.D.2d 946, 947, 508 N.Y.S.2d 692); no liability will be imposed when the injury does not result from an unsafe condition, but is the direct result of the manner in which the injured party engaged in a voluntary activity and the landowner neither participated in the activity nor exercised any supervision and control over the activity. (citing *Macey v. Truman*, 70 N.Y.2d 918, 524 N.Y.S.2d 393, 519 N.E.2d 304; *Blais v. Balzer*, 175 A.D.2d 385, 572 N.Y.S.2d 457; *Farley v. Smith*, 172 A.D.2d 800, 569 N.Y.S.2d 172, lv. denied 78 N.Y.2d 859, 575 N.Y.S.2d 455, 580 N.E.2d 1058; *Collins v. Petroski*, 155 A.D.2d 799, 548 N.Y.S.2d 76)." *Jarvis v Eastman*, 202 AD2d 826, 827 [3d Dept 1994]. In the instant case, Plaintiff's injury was not caused by any defect or unsafe condition left uncorrected by Ms. Rivera, but was the direct result of the manner in which Plaintiff backed away from the car, in flip flops, and slipped into the drainage ditch. Ms. Rivera did not participate in the activity and there is no evidence that she directed or supervised the activity. In these circumstances, Defendant cannot be held liable for plaintiff's injuries.

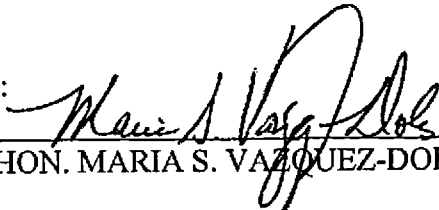
Accordingly, Defendant has met her "...prima facie entitlement to judgment as a matter of law by eliminating all material issues of fact as to its potential liability", and Plaintiff has submitted no evidence to support her theory of a defective condition. *Tavarez v Pistilli Assoc. III, LLC*, 2018 NY Slip Op 03727 [2d Dept May 23, 2018], citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324[1986]. Therefore, it is hereby

ORDERED that Defendant's motion for summary judgment dismissing this complaint in its entirety, is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 11, 2018
Goshen, New York

ENTER:


HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: All parties via NYSCEF.