Dunham v Watson
2018 NY Slip Op 34417(U)
December 24, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 15-606863
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 15-606863
CAL. No. 17-01319OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 12-11-17
ADJ. DATE 04-06-18
Mot. Seq. # 001 - MD
002 - MD

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GREGORY M. DUNHAM,

Plaintiff,

- against -

CHRISTOPHER WATSON, KAREN WATSON and SUMMERHILL LANDSCAPING, INC.,

Defendants.

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Upon the following papers read on these motions for summary judgment ; Notice of Motion and supporting papers by defendant Summerhill Landscapes, Inc., dated November 6, 2017 ; Notice of Motion and supporting papers by defendants Christopher Watson and Karen Watson, dated November 9, 2017 ; Answering Affidavits and supporting papers by plaintiff, dated March 23, 2018 ; Answering Affidavits and supporting papers by defendants Christopher Watson and Karen Watson, dated January 12, 2018 ; Answering Affidavits and supporting papers by defendant Summerhill Landscapes, Inc., dated January 12, 2018 ; Replying Affidavits and supporting papers by defendant Summerhill Landscapes, Inc., dated April 2, 2018 ; Replying Affidavits and supporting papers by defendants Christopher Watson and Karen Watson, dated April 5, 2018 ; Other Memo of Law by defendants Christopher Watson and Karen Watson, dated April 5, 2018 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Summerhill Landscapes, Inc., and the motion by defendants Christopher Watson and Karen Watson are consolidated for purposes of this determination; and it is

ORDERED that the motion for summary judgment by defendant Summerhill Landscapes, Inc. dismissing the complaint and all cross claims against it, pursuant to CPLR 3212, is denied; and it is further

ORDERED that the motion for summary judgment by defendants Christopher Watson and Karen Watson dismissing the complaint and all cross claims against them, pursuant to CPLR 3212, is denied.

Plaintiff commenced this action to recover damages for injuries allegedly sustained when he was cutting and removing bamboo and fell into a well on residential property owned by defendants Christopher Watson and Karen Watson. The complaint alleges that defendants were negligent in causing an unsafe and hazardous condition to exist on the premises in that the well was covered by a dilapidating piece of wood. By his bill of particulars, plaintiff alleges, in relevant part, that the defendants were negligent in permitting an approximately 8 to 12 foot deep, hidden, artificially-created well in a state of disrepair to exist on the premises, in failing to inspect the complained of area, and in failing to warn plaintiff of the existence of such dangerous condition on the premises.

Defendant Summerhill Landscapes, Inc. now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it did not have any duty to repair or maintain the well or the structure within which the well was located, that it did not have any actual or constructive notice of the condition, that it owed no duty of care to plaintiff, and that there is no basis for contractual indemnity between it and defendants Christopher Watson and Karen Watson. In support of its motion, defendant Summerhill Landscapes submits copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony, maintenance proposals, an invoice relative to maintenance of the subject premises, and photographs.

Defendants Christopher Watson and Karen Watson also move for summary judgment dismissing the complaint and all cross complaints against them on the grounds that they did not create or have actual or constructive notice of the allegedly dangerous condition that caused the plaintiff's accident; that they barricaded the well; that they warned defendant Summerhill Landscapes of its existence and cautioned that no work was to be conducted at or near it; that plaintiff's conduct was the proximate cause of the accident; and that there was no contractual indemnification agreement between them and defendant Summerhill Landscapes, Inc. In support of their motion, the Watson defendants submit copies of the pleadings, bills of particulars, transcripts of the parties' deposition testimony, a contract between the defendants, email exchanges between the defendants, their own affidavits, and photographs.

Plaintiff opposes both motions, contending that defendants had constructive notice of the alleged dangerous condition and failed to warn that such condition existed on the property. Additionally, plaintiff argues that there are triable issues of fact as to whether he was required to conduct bamboo removal in the subject area.

Plaintiff testified that he was employed by Eduardo's Lawn Care Services. He testified that his duties included maintenance, lawn-mowing, hedge-cutting, planting trees, and landscaping. Plaintiff testified that on July 18, 2014, he and two other workers met with Eduardo, the owner of Eduardo's Lawn Care Services. He testified that at that meeting he and his fellow workers were told to go to the

property at 182 Old Montauk Highway, in Montauk, New York to do a certain number of hours of general maintenance. Plaintiff testified that no other instructions were given as to what to do at the property.

Plaintiff testified that there is a walkway leading down to the beach at the property in Montauk that is surrounded by an area of bamboo approximately one thousand feet wide. Plaintiff testified that employees from Eduardo's Lawn Care Services regularly cut the bamboo at the property to enable the owners to see down to the ocean from the back deck. He testified that although he was not one of those employees, he had previously trimmed the bamboo on the property. Plaintiff testified that he had not been given specific instructions to trim the bamboo on the day of the accident, but arrived at the property knowing that this would be part of the maintenance work that he was to perform that day. Plaintiff testified that there was a visible open structure consisting of a roof with four posts within the bamboo area that was visible from the path leading to the beach. He testified that he proceeded to trim bamboo near this structure by cutting the tops and laying the cut stalks in piles. He testified that, as a result, the floor of the structure was covered in bamboo leaves. Plaintiff testified that he had made a dozen or so trips in and out of the structure before he stepped in a hole that he had not seen within the structure, and fell in. He testified that he caught himself before falling to the bottom, and hit his right knee on the side of the well. Plaintiff testified that subsequent to the accident he knocked on the back door to the house on the premises and told the woman who responded to his knock that he had fallen in a hole that was not marked and unsafe, injuring his arm. Plaintiff testified that, after the accident, he observed wood that seemed to have rotted within the well.

Defendant Karen Watson testified that she and her husband, defendant Christopher Watson, have owned 182 Old Montauk Highway in Montauk for approximately fifteen years. She testified that, at the time that she and her husband purchased the property, the prior owner told them about the well. Defendant Karen Watson testified that the well had a wood cover and was surrounded by a wooden structure like a gazebo, which had been placed there by the previous owner. Defendant Karen Watson testified that the property was inspected prior to the Watsons purchasing it. She testified that the well was used to supply water to the house until 2013, when the Watsons connected to the town's water line. She testified that she never visited the wooden structure prior to July 2014. She testified that when the bamboo was to be trimmed, she and her husband would stand on the patio and tell defendant Summerhill Landscapes where to cut, which was only on a line between the home and the beach. Defendant Karen Watson testified that she told Summerhill that there was a well, and not to go in that area. Defendant Karen Watson testified that, on July 18, 2014, she and plaintiff discussed the work planned for the day, and she did not recall discussing bamboo trimming in that conversation. She testified that, as she was headed down on the day of the accident to see if plaintiff wanted water, plaintiff approached her and said that he had fallen down the well. She testified that when she asked plaintiff what he was doing down there, he said that he was "just looking around." Further, in an affidavit dated November 10, 2017, defendant Karen Watson averred that on July 18, 2014, no cutting of bamboo was to be done.

Defendant Christopher Watson testified that prior to the purchase of the subject property in Montauk, he met with the owner and walked around the property and along the path to the beach, but not into the bamboo forest because it was too thick and full of ticks. Defendant Christopher Watson testified that he did see the well prior to purchasing the property, and saw that it had a wood box

surrounding it, with a wooden cap on top. He testified that the well was six feet from the edge of the path, and that the bamboo was too thick to go in and put barricades around the well area. Defendant Christopher Watson testified that he contracted with defendant Summerhill Landscapes to conduct spring and summer maintenance at the Montauk property, which was ongoing over the course of the season, and to perform winter and fall cleanups which were "one-off jobs." He testified that he was not aware that defendant Summerhill Landscapes would subcontract work to other landscaping companies. He testified that the contract with defendant Summerhill Landscapes called for a once a year trimming of the bamboo. According to defendant Christopher Watson's testimony, his wife would alert him when the bamboo was being cut, and he was usually present. He testified that based upon the landscaping work requested on the date of the accident, there was no reason for any workers to be on or near the well.

Peter Feeney testified that he was employed by defendant Summerhill Landscapes as a project manager. He testified that it was his job to act as liaison between defendant Summerhill Landscapes and its customers, and to dispatch a crew in accordance with requests made by them. He testified that in April, 2014, defendant Summerhill Landscapes hired Eduardo's Lawn Care Services to do spring clean-up at the Watson property. He testified that the bamboo trimming was an annual special project that routinely took place in July or August, which Eduardo's Lawn Care Services was tasked with performing. He testified that he learned about the plaintiff's accident one week after it allegedly occurred, and went to look at the property. He testified that he stood on the deck and looked towards the wooden structure around the well, observing that the bamboo had been trimmed approximately thirty feet on the left and right of the path to the beach. He testified that the wooden structure was approximately seventy-five feet from the path, and that there was no reason for Eduardo's Lawn Care Services workers to be in the area where the structure was located. According to Peter Feeney's testimony, the Watsons never told him of the wooden structure, never advised him that there was anything on their property to watch out for or be careful of, and that he was informed by Brendan O'Dwyer of defendant Sumerhill Landscapes that he, Brendan O'Dwyer, had never been advised of the well or wooden structure on the property.

As to the liability of defendants Christopher Watson and Karen Watson, generally, owners have a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2006]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see* ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2005]; ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 472, 781 NYS2d 47 [2004]; ***Lee v Bethel First Pentecostal Church of Am.***, 304 AD2d 798, 762 NYS2d 80 [2003]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 434, 739 NYS2d 186 [2002]). In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Chianese v Meier***, 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986], *citing* ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]). The issue of whether a dangerous or defective condition exists on the property of another is generally dependent upon the peculiar

circumstances of each case (*see* ***Portanova v Kantlis***, 39 AD3d 731, 833 NYS2d 652 [2007], *citing* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]).

"Where, as here, an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area of potential defect" (***Hayes v Riverbend Hous. Co., Inc.***, 40 AD3d 500, 501, 836 NYS2d 589 [1st Dept], *lv denied* 9 NY3d 809, 844 NYS2d 784 [2007]; *see also* ***Singh v United Cerebral Palsy of New York City, Inc.***, 72 AD3d 272, 896 NYS2d 22 [1st Dept 2010]; ***Sanders v Morris Hgts. Mews Assoc.***, 69 AD3d 432, 892 NYS2d 99 [1st Dept 2010]). However, the failure to inspect constitutes negligence only if such an inspection would have disclosed the defect (***Hayes v Riverbend Hous. Co., Inc.***, *supra*; ***Singh v United Cerebral Palsy of New York City, Inc.***, *supra*; ***Lee v Bethel Pentecostal Church of Am., Inc.***, *supra*; ***Monroe v City of New York***, 67 AD2d 89, 414 NYS2d 718 [2d Dept 1979]).

As to the liability of defendant Summerhill Landscapes, Inc., it is fundamental that to recover for negligence, a plaintiff must establish that the defendant owed him or her a duty to use reasonable care, that the defendant breached the duty of care, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Pasquaretto v Long Is. Univ.***, 106 AD3d 794, 964 NYS2d 599 [2d Dept 2013]; ***Fox v Marshall***, 88 AD3d 131, 928 NYS2d 317 [2d Dept 2011]; ***Solan v Great Neck Union Free School Dist.***, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (***Eisman v State of New York***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 229, 513 NYS2d 356 [1987]). Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 586, 611 NYS2d 817 [1994]; *see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]).

Ordinarily, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]). The Court of Appeals, however, has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Thus, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002], *quoting* ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]); (2) where a plaintiff suffered injury as a result

of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 557 NYS2d 286 [1990]); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Sarisohn v Plaza Realty Servs., Inc.***, 109 AD3d 654, 971 NYS2d 115 [2d Dept 2013]).

Here, plaintiff has raised a triable issue of fact as to whether the periodic inspection of the well by the Watson defendants as owners of the property, or by defendant Summerhill Landscapes in the performance of its contractual obligation to maintain the property, would have disclosed the allegedly deteriorated condition of the wood cap to the well. Additionally, there is a question of fact as to whether defendant Summerhill Landscapes and/or the Watson defendants had constructive notice of the dangerous condition alleged by plaintiff. Finally, there are material issues of fact as to whether plaintiff had reason to be at the site of the well, whether the defendants had reason to believe that he would be there, and the extent to which his being there was the proximate cause of the accident. Accordingly, defendants' respective motions for summary judgment are denied.

Dated: December 24, 2018

HON. DAVID T. REILLY J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION