Bogda v Yankee Stadium LLC
2019 NY Slip Op 30762(U)
February 26, 2019
Supreme Court, Bronx County
Docket Number: 28674/2016E
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------X **Index No. 28674/2016E**

Michael Bogda,
Plaintiff,

-against- DECISION & ORDER

Yankee Stadium LLC, Yankee Stadium Holdings LLC, New York Yankees Partnership, New York City Industrial Development Agency and City of New York,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants' motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint and, pursuant to CPLR 3216, to preclude plaintiff from alleging notice or other statutory rules and regulations.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Reply Affirmation	**3**

In the instant action, plaintiff alleges he was injured when he tripped and fell on a walkway known as Babe Ruth Plaza along E. 161st Street, Bronx, NY after leaving a baseball game at Yankee Stadium on May 15, 2016. The City of New York ("the City") owns the land upon which Yankee Stadium was built. The New York City Industrial Development Agency ("NYCIDA") leases the land from the City and is the owner of Yankee Stadium. NYCIDA subleased the land and leased the stadium to Yankee Stadium LLC. Yankee Stadium Holdings LLC manages Yankee Stadium LLC.

Defendants now move for summary judgment, pursuant to CPLR 3212, dismissing the complaint on the grounds that: (1) the barricade was an open and obvious condition which was not inherently dangerous, (2) the alleged sidewalk condition was trivial and not actionable (3) defendants had no notice of any alleged defective condition on the sidewalk and (4) finding defendants liable for plaintiff's injuries would require a jury to engage in speculation. Defendants also seek to preclude plaintiff from alleging that defendants had notice of the alleged

dangerous condition of the sidewalk and that defendants violated any statutory rules, regulations or ordinances, pursuant to CPLR 3126, due to plaintiff's failure to comply with certain court orders.

In support of summary judgment, defendants submitted, *inter alia,* the deposition and 50(h) hearing testimony of plaintiff, the deposition testimony of Gerald McPartland and Susan Chung, Winthrop University Hospital records and several photographs.

At his 50(h) hearing, plaintiff testified as follows: Immediately preceding the accident, he walked from the doors outside of Yankee Stadium and took 20 to 30 steps to where the accident occurred. He did not know how many feet he had walked. The accident occurred on the same surface level as when he exited the stadium. He was with his brother-in-law Gerry McPartland who was walking about ten feet away from him. There were a lot of people of other people leaving in front of him; the next person was about five feet in front of him. He did not look down toward the ground or see a crack in the cement prior to his fall. The accident occurred when the toes of his right foot went down into a hole. After his foot went into the hole, he fell forward and stretched his hands out to break his fall. He fell onto his hands and knees. He did not report the accident to anyone at the stadium. He and McPartland walked to the car and drove to Winthrop University Hospital, about an hour away on Long Island. When he was asked by a staff member of the hospital how his accident occurred, he said that he fell at Yankee Stadium and hurt his wrist. When his daughter attended a game at Yankee Stadium on June 6, 2016, he asked her to take photographs of the area where he fell on May 15, 2016. She had gone to many games with him and she knew the area where they always entered the stadium. Specifically, he told her to "go up the stairs that we always go up from the parking lot, about 30, 40 feet from the stairs . . . [and] take pictures around that area and tell me if you see anything, a blemish or a hole, please take pictures of it." This is the path he would take to the stadium "99 percent of the times." He marked the location of his fall on a photograph taken by his daughter. The photograph depicts an area with cracked cement and metal barricades in the background. The stadium is not depicted in the photograph.

At his deposition, plaintiff testified as follows: After watching a Yankee game at Yankee Stadium with his brother-in-law, Gerry McPartland, he walked 50 feet from Gate 6 towards Babe Ruth Plaza. Police officers were standing behind nearby barricades which were approximately ten feet from where he tripped and fell. There were a lot of people in front of and close to him. He was looking straight ahead at eye level. He fell into a hole that he did not see before he fell. He felt embarrassed after he fell and got up and continued to walk towards the steps to Babe Ruth Plaza and then to the parking garage. He did not report his fall to anyone at Yankee Stadium. No police officer offered him any aid or assistance after he fell. A barricade was not involved in his fall. He did not recall "a hundred percent the exact words [he] said to medical staff at the emergency room, but he believes he told them that he fell "right outside the stadium in a hole." He did not tell any emergency room staff that he fell over a barricade. When presented with a printout of his emergency room chart, he testified that he might have stated to emergency room staff that he tripped over a barricade at Yankee Stadium. He also testified that he did not tell emergency room staff that he tripped due to a hole in the sidewalk.

At his deposition, Gerry McPartland testified as follows: After the game, he and plaintiff exited the stadium and walked to the right towards the steps to return to the parking garage. He and plaintiff were about two arms-lengths away from each other. There was a large volume of people walking towards the steps. He saw plaintiff fall forward but did not see what caused him to fall. He walked over to plaintiff, helped him get up and they continued walking towards the steps. There were people behind them. He never looked back to see what caused plaintiff to fall. Plaintiff told him that he might have tripped over the metal leg of a barricade.

At her deposition, Susan Chung testified as follows: She has been working as a Physician's Assistant at Winthrop University Hospital for 15 years. It was part of her practice as a PA to make notes in a patient's chart when she saw them. She would take a history from the patient which included why they were there and how they either got sick or hurt themselves. She would then record their responses in the patient's computer chart. Upon examining a patient, she would document her findings in the patient's computer chart. Chung authenticated her typed entry of May 15, 2016 at 8:57 p.m. regarding her examination of plaintiff, which includes the

following language: "55-year-old male presents to the ED complaining of RIGHT wrist pain after tripped [sic] over a barricade at Yankee stadium today and landed with both arms outstretched. Denies head trauma, preceding chest pain or dizziness, other injuries." Based upon what she wrote, she believes that that's what the plaintiff/patient told her that day. If he had told her something else about how he was injured that day, she would have recorded that as well.[1]

In opposition to summary judgment, plaintiff submitted a copy of a photograph and a printout of an Orthopedic Consult Note of Winthrop University Hospital for plaintiff which was electronically signed by Seth Korbin, M.D. on May 15, 2016 at 11:40 p.m. The note includes the language "States that he was leaving the Yankee game and tripped, falling onto his R hand." There is no mention of either a barricade or a hole in the sidewalk in the note. The photo does not clearly depict a specific location or defect in the sidewalk.

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The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.,* 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

A prima facie case of negligence must be based on something more than conjecture, "mere speculation regarding causation is inadequate to sustain the cause of action. *See Mandel*

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[1]Contrary to plaintiff's contention, the PA Chang's entry in plaintiff's computer chart as to how he became injured is admissible as a business record since the statement attributed to plaintiff was germane to his medical diagnosis and treatment. *See People v. Duhs,* 16 N.Y.3d 405, 947 N.E.2d 617 (2011). It is also admissible as an inconsistent statement.

A prima facie case of negligence must be based on something more than conjecture, "mere speculation regarding causation is inadequate to sustain the cause of action. *See Mandel v. 370 Lexington Avenue., LLC,* 32 A.D.3d 302, 303, 820 N.Y.S.2d 249 (1st Dept. 2006) quoting *Segretti v. Shorenstein Co., E.,* 256 A.D.2d 234, 235, 682 N.Y.S.2d 176 (1st Dept. 1998).

Also, a court may grant summary judgment to a landowner on the ground that the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous. *See Schulman v. Old Navy/The Gap, Inc.,* 45 A.D.3d 475, 845 N.Y.S.2d 341 (1st Dept. 2007); *Cupo v. Karfunkel,* 1 A.D.3d 48, 52, 767 N.Y.S.2d 40 (1st Dept. 2003).

Here, there are two possible scenarios as to how plaintiff was injured: (1) He tripped on a defect in the sidewalk or (2) He tripped over the leg of a metal barricade. Given that plaintiff did not see any defect in the sidewalk before he fell and that he identified the location of the alleged defect in a photo taken by his daughter three weeks after the accident after being directed by him to look for any defects in the sidewalk in a general area outside the stadium, to find defendants liable for plaintiff's injury under the first scenario would require a jury to engage in speculation. Assuming, *arguendo*, that plaintiff tripped over a metal barricade, considering the size of the barricades and that plaintiff's accident occurred in daylight, the Court finds that this condition was open and obvious and not inherently dangerous.

Based upon the foregoing, that branch of defendants motion seeking dismissal of the complaint is **granted**, and it is ORDERED that the complaint is dismissed. Given this finding, the Court need not address that branch of defendants' motion seeking preclusion.

Dated: Bronx, New York
February 26, 2019

Hon. Julia I. Rodriguez, J.S.C.