Desroches v Heritage Bldrs. Group, LLC
2019 NY Slip Op 34022(U)
February 8, 2019
Supreme Court, Saratoga County
Docket Number: 20162285
Judge: Thomas D. Nolan

[* 1]

ORIGINAL

STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

MICHAEL R. DESROCHES,

Plaintiff,

-against-

HERITAGE BUILDERS GROUP, LLC and HERITAGE CUSTOM BUILDERS, LLC,

Defendants.

DECISION AND ORDER
RJI No. 45-1-2017-0038
Index No. 20162285

FILED
2019 FEB 25 PM 2:32
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PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

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In this negligence action, plaintiff seeks damages for injuries he sustained when he fell into an uncovered, unguarded opening in a single-family home under construction.

First, the background. On Friday, July 31, 2015, plaintiff, then 22 years old, and a friend, Daniel O'Grady (Daniel), both residents of Connecticut, arrived at about 6:00 p.m at Daniel's older brother's residence located in the Timber Creek residential subdivision in the Town of Ballston, Saratoga County. Plaintiff, Daniel and Ryan O'Grady (Ryan), Daniel's brother, spent several hours that evening visiting, watching movies and/or television, and drinking beer and

vodka. During his deposition, Daniel testified he had about "10 Bud Lights", that Ryan drank "Red Bull and vodka with a couple of Bud Lights", and plaintiff drank "mostly Bud Lights with one, maybe two Red Bull vodkas". Plaintiff had no recollection of the incident. During his deposition, he testified that he remembers "in some sorts" leaving Ryan's residence but nothing else until "waking up in the hospital". According to Daniel, all three became intoxicated. Sometime after midnight on August 1, 2015, the three decided to go for a walk in the neighborhood, and they eventually entered a section of the subdivision that was still under construction. During his deposition, Ryan testified that the three reached a single-family home under construction designated as 27 Ironwood Street and decided to go in. Ryan, who had lived in the subdivision with his family in a newly built single-family residence he purchased in 2011, testified it was "common" for residents of the subdivision to "go through the new construction as it was going on" and that he "always see [sic] people walking around going through the houses". The three decided to enter "for curiosity" the unfinished structure at 27 Ironwood Street, "a house that was up and framed". According to Ryan, the front door was "wide open", and there were no no trespassing signs posted. Daniel entered first followed by plaintiff and Ryan. Ryan testified there was an opening in the floor some 10 feet beyond the front door and it was "a hole where the stairs to the basement would be". Ryan testified that Daniel, who entered first, saw the hole and walked around it but that plaintiff, who followed Daniel in, did not see it and fell through the hole into the basement. Realizing that plaintiff was injured, Daniel lowered himself into the basement through the opening and found plaintiff unconscious. Daniel stayed with plaintiff and Ryan called for help. State police and the local fire department arrived. Plaintiff was airlifted to Albany Medical Center where he was admitted for nine days before being transferred to a

Connecticut hospital where he was a patient for three weeks. Plaintiff sustained a traumatic subarachnoid hemorrhage and a traumatic brain injury and required rehabilitation and therapy.

In this action, plaintiff sues defendant Heritage Builders Group, LLC, the owner/developer of the Timber Creek subdivision and, in particular, the 27 Ironwood lot, and Heritage Custom Builders, LLC, the general contractor of the residence under construction. Plaintiff's amended complaint alleges that the defendants were negligent in that the subject property was not "marked for 'no trespassing/construction area'", that there was an uncovered opening in the floor of the under construction residence, that the defendants were negligent in allowing the hazardous condition to exist, and that such negligence caused plaintiff's injuries.

Discovery has been completed and the action is scheduled for trial.

Defendants' motion for an order granting summary judgment dismissing the complaint is supported by the pleadings, the depositions of defendants' principal owner, Geoffrey Brooks, and those of plaintiff, Ryan O'Grady and Daniel O'Grady, and the affidavit of Dr. Michael G. Holland, a physician who opined, based on a review of plaintiff's medical records, that plaintiff at the time of the incident was "extremely intoxicated" with a documented blood alcohol concentration of .325%. Defendants contend that plaintiff's conduct in trespassing upon and entering the uncompleted residence in an intoxicated condition was a superceding cause absolving defendants of any and all liability to him.

Plaintiff opposes and cross-moves for an order granting him summary judgment on the issue of defendant's liability and relies on the deposition testimony of Ryan O'Grady and Kevin O'Grady, the fact that the defendant's property was not posted with a "no trespassing" sign, that the subject property was in a hazardous condition, and that plaintiff's presence was foreseeable

since defendants had prior notice that individuals, like plaintiff and the O'Gradys, often entered properties under construction in that subdivision.

Defendants oppose the cross motion both on the merits and for procedural reasons, namely that the cross motion was made prior to plaintiff's payment of the required motion filing fee and that the motion was not made within 120 days of the filing of the note of issue as prescribed in CPLR 3212 (a).

In reply, plaintiff submits an affirmation in further support of his cross motion and addressing defendants' timeliness objection.

First addressed are the alleged procedural errors. After service of the cross motion, plaintiff paid the required fee. Since that defect was non-prejudicial, it is excused (CPLR 2001). Next, the cross motion may be considered on the merits notwithstanding that it was not made within 120 days of the filing of the note of issue since it essentially is based on the same issues that defendants' rely on in their timely made summary judgment motion. Reutzel v Hunter Yes, Inc., 135 AD3d 1123, 1124 (3rd Dept 2016).

Now, the merits of the motion and cross motion and the general principles governing summary judgment motions. Since summary judgment is a drastic remedy, it may be granted only when the moving party, here the defendants, "'tender sufficient evidence to demonstrate the absence of any material issues of fact'". Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012), quoting Alvarez v Prospect Hosp., 68 NY 320, 234 (1986). And, the facts must be viewed "in the light most favorable to the non-moving party", here the plaintiff. Ortiz v Varsity Holdings LLC, 18 NY3d 335 (2011). "The court's role on a motion for summary judgment is to determine whether there is a material issue to be tried not to resolve it." Sommer v Federal

Signal Corp., 79 NY2d 540, 554 (1992). "Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts (citations omitted)." Friends of Thayer Lake, LLC v Brown, 27 NY3d 1039 (2016). And, on such a motion, the court does not make credibility determinations when conflicting evidence is presented unless an issue is clearly feigned. Hall v Queensbury Union Free School Dist., 147 AD3d 1249 (3rd Dept 2017).

Relevant to plaintiff's cross motion, the Court of Appeals in Rodriguez v City of New York, 31 NY3d 312, 317-319 (2018), recently held that a plaintiff's own fault will not preclude a finding of liability against defendants. accord Thompson v Brown, __AD3d__, 2018 NY App Div LEXIS 8648 (3rd Dept 2018).

The liability of any owner or possessor of land is measured by "the single standard of reasonable care under the circumstances". Basso v Miller, 40 NY2d 233 (1976). This standard applies to trespassers and the extent of the duty of care is owed to a trespasser dependent on whether plaintiff's presence and actions were reasonably to be foreseen since "foreseeability shall be a measure of liability", Baczkowski v Zurn, 235 AD2d 894, 895 (3rd Dept 1997), with the caveat that courts must "limit the legal consequences of wrongs to a controllable degree". Tobin v Grossman, 24 NY2d 609, 619 (1969). Whose presence was reasonably foreseeable and what accidents are reasonably foreseeable are usually factual questions for the jury, but the "questions of foreseeability may be determined as a matter of law only when a single inference can be drawn from the undisputed facts." Perrelli v Orlow, 273 AD2d 533, 534 (3rd Dept 2000), citing, Hessner v Laporte, 171 AD2d 999 (3rd Dept 1991). "The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the

jury." Palsgraf v Long Island R.R. Co., 248 NY 339, 344 (1928). Expressed differently, "[T]he scope of any such duty varies with the foreseeability of the possible harm." Tagle v Jakob, 97 NY2d 165, 168 (2001) and "[t]he risk reasonably to be perceived defines the duty to be obeyed". Palsgraf, supra, 344.

Here, as it must, the facts are accepted and viewed most favorably to the plaintiff, namely that there were no no trespassing signs posted on the subject property on August 1, 2015, that there were prior instances of residents of the development entering uncompleted residences, and that defendants' principal was aware that trespassers had previously entered active construction sites in this development.

Notwithstanding these facts, the record discloses, without contradiction, that plaintiff was intoxicated when he and his two companions entered at about 3:00 a.m. the unfinished structure at 27 Ironwood Street. Precedent militates against imposing a duty of care on a property owner in like circumstances. Elwood v Alpha Sigma Phi, 62 AD3d 1074 (3rd Dept 2009), lv denied 13 NY3d 711 (2009) [Intoxicated trespassers parked illegally on private property and crossed over fence in the dark and fell down an 80 foot gorge]; Hendricks v Lee's Family, Inc., 301 AD2d 1013 (3rd Dept 2003) [Intoxicated plaintiff fell from a retaining wall located beyond tavern's parking lot]; Tracey v Lord Baltimore Capital Corp., 298 AD2d 383 (2nd Dept 2002) [Intoxicated plaintiff trespasser climbed onto roof of warehouse and fell through a skylight]; Garcia v City of New York, 205 AD2d 49 (1st Dept 1994) [Intoxicated plaintiff illegally entered municipal swimming pool after closing and drowned].

The court here finds that plaintiff's actions in entering this under construction unfinished structure at 3:00 a.m. while he was intoxicated was not reasonably foreseeable as a matter of law,

and thus defendants owed no duty of care to this plaintiff.

Defendants' motion is granted and the complaint is dismissed, all without costs.

Plaintiff's cross motion is denied, without costs.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for defendants. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendants 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: February 8, 2019
Saratoga Springs, New York

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

ENTERED
Craig A. Hayner
Saratoga County Clerk

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