Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Ludwin Carbajal,

Plaintiff,

-against-

Rene Rodriguez,

Defendant.

Motion Sequence No.: 002; MD
Motion Date: 12/19/18
Submitted: 1/23/19

Index No.: 611164/2017E

Attorney for Plaintiff:

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Attorney for Defendant:

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Clerk of the Court

Upon the **E-file document list** numbered 25 to 41 read on this application by defendant for an order granting him summary judgment pursuant to CPLR 3212 on the issue of liability and dismissing plaintiff's complaint; it is

ORDERED that defendant's motion for summary judgment on liability is denied (CPLR 3212).

This is a personal injury action commenced by the filing of a summons and complaint on June 14, 2017. Issue was joined on July 13, 2017. Depositions of the parties and non-parties have concluded. Plaintiff alleges that on June 11, 2016, while at a nighttime graduation party held at defendant's home, he tripped and fell into a light fixture that was placed in the middle of defendant's backyard allegedly causing severe burns to his arm. Defendant now moves for summary judgment

on liability alleging that plaintiff's injuries were caused by his own conduct, that defendant placed a metal grill on each of the light fixtures as a reasonable precaution to avoid anyone coming into direct contact with the light itself, that he placed the four-to-five feet tall light fixtures in obvious locations for all to see, that it was not foreseeable that any guests at defendant's would injure themselves on a light fixture, and that there was a warning on the light fixture indicating that it could become hot. Defendant submits an affirmation of counsel, the pleadings, and the deposition transcripts of the parties and non-parties in support of his motion for summary judgment on liability.[1] Plaintiff opposes the motion asserting that questions of fact exist as to whether defendant breached his duty to maintain his property in a reasonably safe condition by positioning the light fixtures near the area where guests would congregate and near a difference in height between the concrete patio and the grass and also whether that breach proximately caused plaintiff's alleged injuries. Plaintiff asserts that it was foreseeable that one of the guests could come into contact with the light fixtures due to their location in defendant's backyard. Plaintiff submits an affirmation of counsel, photographs of the light fixture, and the deposition transcripts of the parties and non-parties in opposition. Defendant replies.

Plaintiff's deposition was conducted on December 28, 2017 during which he testified that he attended a graduation party on June 11, 2016 for Jair Rodriguez, and there were approximately 50 guests present when he arrived at 10:00 p.m. Plaintiff further testified that he drank beer at the party, that music was playing and guests were dancing in the grass area of the backyard. Plaintiff testified that he consumed about six beers over a two to two-and-a-half hour period that night and was "buzzed." Plaintiff further testified that while attempting to hug a friend at the party, he lost his balance due to an elevation difference where the grass and pavement met. Plaintiff further testified that one foot was on the pavement and another foot was on the grass and when he lost his balance, he leaned forward and his arm came into contact with the front of the light that was located on the grass near the concrete patio, causing him to suffer burns to his arm. On March 1, 2018, defendant's deposition was held. Defendant testified during his deposition that he is the sole owner of 356 Atlantic Street, Copaigue, New York, that he hosted a graduation party for his daughter on June 11, 2016, that neither he nor any members of his family provided food or beverages for the graduation party, that the guests were to bring all food and beverages to the party, that the guest consisted of his daughter's high school classmates, that he told his daughter there was to be no drinking of alcohol at the party, that he set up three light fixtures in his backyard to provide lighting for the party, that each light fixture had a metal grill preventing direct contact with the light, that two of the three lights were set up on a pedestal about five feet above the ground, that the lamps were faced upwards to avoid damaging the eyes of any of the guests, that the three lamps used at the party would get hot,

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[1]The court notes that while the deposition transcripts are unsigned, they were all certified by a stenographer, their accuracy has not been challenged, and indeed both parties rely upon the testimony contained therein. Accordingly, the transcripts are admissible (*see* ***Celestin v. 40 Empire Blvd., Inc.,*** —NYS3d—, 2019 WL 209130 , 2019 N.Y. Slip. Op. 00256 [2d Dept. January 16, 2019]; ***Thomas v City of New York,*** 124 AD3d 872, 2 NYS3d 578 [2d Dept 2015]).

that he had used these lights for other parties at his residence in the past and no one was ever injured by any of the light fixtures during those parties, that he was not present at the party as he had gone to bed, and that there is a height differential between the grass and the brick patio in his backyard of approximately one and one-half inches . The deposition of defendant's wife, Rosa Rodriguez, was taken on March 1, 2018 at which time she testified that one of the light fixtures in the backyard was on a pedestal in the middle of the yard, that it was approximately four-to-five feet tall, that the light was facing up, and that this light had a grill on it during the party.[2] On March 1, 2018, the deposition of defendant's son, Jean Rodriguez, was taken, during which he testified that each of the three light fixtures had a metal grill attached to it during the party, that no food, beverages, or alcohol was served at the party by any member of his family, and that he did not see anyone at the party who was visibly intoxicated.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see* ***Chimbo v. Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v. Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v. Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]) ***Doize v. Holiday Inn Ronkonkoma***, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the non-moving party and all inferences which may be drawn from them must be accepted as true (*see* ***O'Neill v Town of Fishkill***, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Alvarez,*** *supra*, 68 N.Y.2d at 324-325, 508 N.Y.S.2d 923, 501 N.E.2d 572; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v. Bolivar***, *supra*; ***Benetatos v. Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

"Although a jury determines whether and to what extent a particular duty was breached, it is for the court to first determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally" (***Cupo v Karfunkel***, *supra*, quoting ***Tagle v Jakob***,

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[2]The court has not considered the hearsay statements contained in Rosa Rodriguez's testimony, which were relied upon herein by defendant.

97 NY2d 165, 168, 737 NYS2d 331 [2001]). A landowner must maintain his or her property in a reasonably safe condition considering all of the circumstances, such as the likelihood and seriousness of injury to others and the inconvenience of avoiding the risk (***Cupo v Karfunkel***, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003]; *see* ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). Whether a dangerous condition exists on real property generally is an issue to be determined by the jury based on the unique facts of each case (***Elfassi v. Hollister Co.,*** 167 AD3d 569, 88 NYS3d 505 [2d Dept. 2018]; ***DeLaRosa v City of New York***, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]; *see* ***Trincere v County of Suffolk***, 90 NY2d 976, 977, 655 NYS2d 615 [1997]).

While proximate cause is generally an issue for the trier of fact, it "may be decided as a matter of law where only one conclusion may be drawn from the established facts" (***Howard v. Poseidon Pools, Inc.,*** 72 NY2d 972, 534 NYS2d 360 [2d Dept. 1988]). For example, summary judgment is warranted when the sole proximate cause of the accident was the plaintiff's own conduct (*see* ***Yedynak v. Citnalta Constr. Corp.,*** 22 AD3d 840, 803 NYS2d 705 [2d Dept. 2005]; *see also* ***Conte v. Orion Bus Indus., Inc.,*** 162 AD3d 638, 78 NYS3d 236 [2d Dept. 2018]). Thus, a defendant will be relieved of liability where a superseding cause interrupts the causal chain of connection between the injuries and the defendant's negligence, including the plaintiff's own conduct (***Mesick v. State of New York,*** 118 AD2d 214, 504 NYS2d 279 [3d Dept. 1986]). An intervening act may be a superceding cause which "breaks the causal connection if it is extraordinary, not foreseeable in the normal course of events, or far removed from the defendant's conduct...[however,] an intervening act which is a normal consequence of the situation created by the defendant cannot constitute a superseding cause absolving the defendant from liability" (***Jackson v. New York City Hous. Auth.,*** 214 AD2d 605, 606, 624 NYS2d 720 [2d Dept. 1995]; ***Soomaroo v. Mainco Elevator & Elec. Corp.,*** 41 AD3d 465, 838 NYS2d 119 [2d Dept. 2007]). "Whether a plaintiff's act is a superceding cause or whether it is a normal consequence of the situation created by the defendant are generally questions for the trier of fact to determine" (***Soomaroo v. Mainco El. & Elec. Corp.,*** *supra,* 41 AD3d at 465).

"A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Peralta v. Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003], *quoting* ***Basso v. Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). However, "[a] property owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous. . ., or where the allegedly dangerous condition can be recognized simply as a matter of common sense" (***Rivas-Chirino v. Wildlife Conservation Socy.***, 64 AD3d 556, 557, 883 NYS2d 552; *see also* ***Boland v. 480 E. 21st St., LLC***, 133 AD3d 698, 19 NYS3d 188 [2d Dept 2015]; ***Burke v. Canyon Rd. Rest.***, 60 AD3d 558, 559, 876 NYS2d 25 [1st Dept 2009], *quoting* ***Cupo v. Karfunkel***, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]. Notwithstanding, evidence that the dangerous condition was open and obvious does not relieve a property owner of the burden to exercise reasonable care to remedy the condition (***Cupo v. Karfunkel***, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]). Moreover, a property owner will not be held liable for trivial defects, not constituting a trap or nuisance, over which one might merely stumble, stub his or her toes, or trip (*see* ***Ambriose v. New York City Tr. Auth.***, 33 AD3d 573, 826

NYS2d 261 [2d Dept 2006]; ***Fairchild v. J. Crew Group, Inc.***, 21 AD3d 523, 800 NYS2d 735 [2d Dept 2005]; ***Hagood v. City of New York***, 13 AD3d 413, 785 NYS2d 924 [2d Dept 2004]). "There is no 'minimal dimension test' or per se rule that a defect must be a certain minimum height or depth in order to be actionable" (***Hutchinson v. Sheridan Hill House Corp.,*** 26 NY3d 66, 77, 19 NYS3d 802 [2015]). The court, in determining if the defect is trivial, is required to examine all the facts presented, including the "width, depth, elevation and irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury" (***Trincere v. County of Suffolk***, 90 NY2d 976, 978, 665 NYS2d 615 [1997]; *see* ***Wasserman v. Genovese Drug Stores***, 282 AD2d 447, 723 NYS2d 191 [2d Dept 2001]; ***Sanna v. Wal-Mart Stores***, 271 AD2d 595, 706 NYS2d 156 [2d Dept 2000]). "A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperils the safety of a person" (***Hutchinson v. Sheridan Hill House Corp.,*** 26 NY3d 66, 78, 19 NYS3d 802 [2015]) "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" ***(Schenpanski v. Promise Deli, Inc.***, 88 AD3d 982, 984, 931 NYS2d 650 [2d Dept 2011]; *see also* ***Maiello v. Eastchester Union Free School Dist.***, 8 AD3d 536, 778 NYS2d 716 [2d Dept 2004]). However, a defendant is not entitled to summary judgment where the dimensions of the alleged defect are unknown and the photographs and descriptions do not conclusively establish triviality (***Hutchinson v. Sheridan Hill House Corp.,*** 26 NY3d at 84).

Here, defendant has not established a prima facie case to warrant summary judgment in his favor (*see, e.g.*, ***Dudnik v. 1055 Hylan Offices, LLC,*** 164 AD3d 870, 83 NYS3d 202 [2d Dept. 2018]). There is no dispute that defendant placed the light fixtures in the backyard of his residence, that the light fixtures would get hot, and that there was a height differential between the paved patio area and the grass area where plaintiff was standing when the accident occurred. In addition, it is undisputed that the light fixtures were located near the area where guests were congregating. Considering all of the circumstances, including plaintiff's condition at the time of the accident, the court cannot find that defendant established, prima facie, that he did not create a dangerous condition or that it was not foreseeable that a guest at the party could be injured by coming into contact with a hot light fixture or its metal grill, especially guests, like plaintiff, who were unfamiliar with defendant's backyard and the height difference between the patio and the grassed area where the light fixture at issue was situated. Further, defendant has not provided any evidence that the placing of a metal grill over a hot light fixture, prima facie, was a reasonable precaution to ensure that guests would not get burned by the hot lights. Indeed, it cannot be said that defendant met his burden of showing that he took all reasonable steps to avoid a guest from being burned by the hot light or metal grill, inasmuch as the light fixture was placed in close proximity of the uneven area where guests were congregating. As to defendant's claim that plaintiff was the sole cause of the accident, defendant offered no expert evidence to support this claim or any other material and relevant evidence which would lead the court to conclude that plaintiff was unsteady on his feet or acting in a manner that placed his safety in danger. Rather, the testimony from defendant's son was that no one was acting rowdy or appeared intoxicated and defendant's wife testified that the party was calm. Notwithstanding, even had defendant established a prima facie case, there are questions of fact as to whether a dangerous condition was created by the location of the light fixtures, whether defendant

took reasonable measures to ensure the safety of the guests attending the backyard party, whether the height differential was trivial or significant in light of all of the circumstances, whether it was foreseeable that one of the guests could be injured by one of the hot light fixtures or its metal grill, and the degree, if any, of plaintiff's comparative fault (*see* ***Oldham-Powers v. Longwood Cent. Sch. Dist.,*** 123 AD3d 681, 997 NYS2d 687 [2d Dept. 2014]; ***DiVietro v. Gould Palisades Corp.,*** 4 AD3d 324, 771 NYS2d 527 [2d Dept. 2004]).

Accordingly, defendant's motion for an order granting him summary judgment on liability is denied.

Dated: 4/1/2019

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**