

<b>Noonan v Incorporated Vil. of Garden City</b>
2019 NY Slip Op 34812(U)
April 16, 2019
Supreme Court, Nassau County
Docket Number: Index No. 602374/2017
Judge: Anna R. Anzalone
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: Honorable Anna R. Anzalone  
Justice of the Supreme Court**

\_\_\_\_\_ X

**KATHLEEN NOONAN,**

**Plaintiff,**

**- against -**

**TRIAL/IAS, PART 18**

**NASSAU COUNTY**

**Motion Seq# 1**

**Index No. 602374/2017**

**INCORPORATED VILLAGE OF GARDEN CITY,**

**Defendants.**

\_\_\_\_\_ X

**The following papers read on this motion:**

Defendant’s Notice of Motion.....1

Plaintiff’s Affirmation in Opposition.....2

Reply Affirmation.....3

Defendant, Incorporated Village of Garden City’s (“Village”) motion for an Order pursuant to CPLR §3212 granting summary judgment and dismissing plaintiff’s complaint is denied.

On November 2, 2016, Kathleen Noonan, the plaintiff was playing doubles tennis on court number 4 at the Garden City Recreational Tennis Complex. The Tennis complex is a public facility that is owned, operated and maintained by defendant Village. The plaintiff testified at her oral deposition that as she was playing tennis, she had to back pedal in an attempt to get in a position to return the ball. She indicated that she back pedaled past the baseline and raised her racket back to hit the ball. At that point, her left foot went into a depression and her heel became caught on a sprinkler head, causing her to fall to the ground. She testified that she was later diagnosed with a fractured elbow, amongst other injuries. Plaintiff testified that the sprinkler head

on which she tripped was located approximately 4/5 of the way from the baseline toward the back screen/curtain.

The Village moves for an Order pursuant to CPLR §3212 granting summary judgment and dismissing the plaintiff's complaint on the grounds that (1) plaintiff assumed the risk of injury inherent in the sports/activity of tennis; (2) the Village did not have actual or constructive notice of the alleged defective condition; and (3) the alleged defective condition of the tennis court was *de minimus*, and thus not actionable.

The proponent of a summary judgment motion must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1968). To make *prima facie* showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Once *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Id.*; see also *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The evidence must be viewed in the light most favorable to the non-moving party. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499(2012); *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931(2007); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 315 (2004). It is not the court's function on a summary judgment to assess credibility. *Vega, supra*; *Ferrante v. American Lung Assn.*, 90 NY2d623(1997).

To prove a *prima facie* case of negligence, a plaintiff must establish: (1) the existence of a duty on the part of the defendant to the plaintiff, (2) a breach of that duty, and (3) injury suffered by the plaintiff as a result of the breach. *Boltax v. Joy Day Camp*, 67 N.Y.2d 617, 499 N.Y.S.2d 660, 490 N.E.2d 527; *Solomon v. City of New York*, 66 N.Y.2d 1026, 499 N.Y.S.2d 392, 489 N.E.2d 1294; *Iannelli v. Powers*, 114 A.D.2d 157, 161, 498 N.Y.S.2d 377.

Defendant submits the testimony of Tom McGerty, the recreational attendant for the Incorporated Village of Garden City, a position he held for the past six years. His responsibilities included running the tennis facility which was constructed over 17 years ago. He was responsible for identifying whether a sprinkler head needed to be changed. Mr. McGerty indicated that the

sprinkler heads located on the ground were flush with the court surface and were situated five inches from the screen separating the wall and the court. After he was notified of the accident, he inspected the court at the location identified by the plaintiff and found no depressions or defects. Additionally, Mr. McGerty had no knowledge of any other tennis players falling or tripping over the sprinkler heads located on court number 4.

Assuming that the defendant made a *prima facie* case for a summary judgment based upon the evidence submitted in their papers, this Court finds the plaintiff's expert, Stephen E. Schwartz, PHD, CRSS raises several questions of fact for the jury to decide. Mr. Schwartz is certified by the National Intramural and Recreational Sports Association as a recreational sports specialist. Based upon his experience, expert Schwartz affirms that he is familiar with the relevant standards with regard to the construction, configuration and maintenance of Har-Tru tennis courts (the type of tennis court in question) as they existed at the time of plaintiff's accident. Har-Tru is a product made from a specific type of natural green stone, and although the playing surfaces are stable and durable, they are not like cement or asphalt and are thus subject to erosion through regular play and weather. They require regular maintenance. A daily schedule is required for certain aspects of appropriate maintenance, specifically, the courts must be inspected for play hazards such as divots, hard spots or slippery spots and if such hazard are identified they must be repaired. The courts must also be watered daily through a sprinkler system that provides coverage for the entire court surfaces. In addition to daily maintenance, periodic maintenance is required as well as annual reconditioning. There are numerous irrigation options available to accomplish this, the safest type being a subsurface system that irrigate the court from below with no components on the court surface. The second-best way is to utilize overhead sprinkler systems. Lastly, surface sprinkler system, including the use of "pop up" heads may be used; however, such system requires careful placement of the sprinkler head outside all areas of play so as to prevent tripping hazards and the risk of resulting injury to players on the court. When these "pop up" sprinklers are retracted they are designed to be flush with the courts surface. Mr. Schwartz explained that the retractable head sprinklers will result in a depression in the Har-Tru surface surrounding the sprinkler head that develops over time and careful daily inspection is required.

Plaintiff's opposition papers included a photograph of the sprinkler head in question on the day of the accident. Expert Schwartz opined that within a reasonable degree of certainty, the

picture clearly depicts that the sprinkler head was well within the area of play and had a significant depression around it. Expert Schwartz further opined that the tennis court in question was negligently configured given the location of the sprinkler head in the area of play. The placement of a sprinkler head in such a location is improper and constitutes a breach of appropriate standards for the proper placement of sprinkler heads for Har-Tru tennis courts. Water continues to leak when the sprinklers are turned off which result in erosion of the Har-Tru material around the sprinkler head which creates a depression or “divot” around the sprinkler head. This danger is compounded by the fact that such sprinkler heads can become “camouflaged” through the aggregation of dust and staining created from play on the Har-Tru surface.

Furthermore, expert Schwartz affidavit indicated that it was his opinion that the Villages’ employee, Mr. McGerty failed to properly inspect and repair the tennis court on the morning of the accident because the depression was there to be seen and he did not observe it. Moreover, since the sprinkler were last run the evening before the incident, the depression could not have formed after his inspection on the morning of the incident. In conclusion, expert Schwartz opined that the sprinkler head was improperly located within the area of play; there was a failure to properly inspect the court and identify the depression as well as repair its cause; as a result of the depression, which had a camouflaged sprinkler head top consequently above surface level in its center, was located in the area of play; this posed an unacceptable tripping hazard, in the nature of a trap, to players on the court; and as a result, the plaintiff foot and the depression became caught on the sprinkler head located in the play area; and there can be no doubt that this condition was not a risk inherent to the sport of tennis.

Accordingly, Defendant, Incorporated Village of Garden City’s (“Village”) motion for an Order pursuant to CPLR §3212 granting summary judgment and dismissing Plaintiff’s complaint is denied.

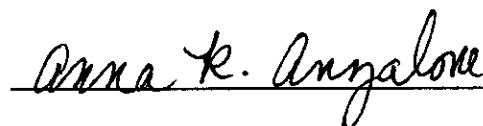
Counsel for defendant shall file and serve a copy of the within order with notice of entry upon Plaintiff within twenty (20) days from the date of this Order. The parties shall appear in the

Central Jury part of the Supreme Court located at, 100 Supreme Court Drive, Mineola, NY on May 2, 2019 as scheduled.

This decision is the order of the court.

DATED: April 16, 2019

ENTER



HON. ANNA R. ANZALONE

**ENTERED**

APR 19 2019

NASSAU COUNTY  
COUNTY CLERK'S OFFICE