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SHORT FORM ORDER

INDEX No. 14-20391
CAL. No. 18-01758OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

***PRESENT:***

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 1-22-19
ADJ. DATE 4-2-19
Mot. Seq. # 004 - MG; CASEDISP

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J.G., an Infant by Her Father and Natural Guardian JAMES GALLO, and JAMES GALLO Individually,

Plaintiffs,

- against -

L.I. ADVENTURELAND and ADVENTURELAND AMUSEMENT PARK,

Defendants.

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 37; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 38 - 39; Replying Affidavits and supporting papers 40 - 41; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendant L.I. Adventureland, Inc. for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by J.G. on June 26, 2014, when the roller coaster on which she was riding came to a sudden stop and she was required to exit the ride via a ladder on the premises owned by defendant L.I. Adventureland, Inc. ("Adventureland"), also improperly sued herein as Adventureland Amusement Park, in Farmingdale, New York. Plaintiff James Gallo, suing on behalf of his daughter, J.G., alleges that Adventureland was negligent in, among other things, maintaining, operating, and controlling "the Hurricane" roller coaster. By the supplemental bill of particulars, plaintiff also alleges that the doctrine of res ipsa loquitur applies herein. Plaintiff contends that the Hurricane malfunctioned, lost electrical power, and stopped prior to the intended conclusion of the ride. Plaintiff also sues derivatively for loss of services.

J.G. testified that she was 9 years old at the time of the incident and that she had been to Adventureland 20 times prior to the incident, but never rode the Hurricane. She testified that she saw the Hurricane moving before she boarded and did not see anything wrong with it during those times, and that the ride appeared to be working right before she boarded. J.G. stated that neither she nor her friend Kasha made complaints to the ride attendants prior to boarding the Hurricane. She explained that she was on the Hurricane between one and five minutes before it stopped suddenly and that she sat on the stopped ride for approximately 15 minutes before a park employee arrived with a ladder. J.G. further explained that the employee instructed her to get out of the roller coaster car and climb down the ladder, which she did with his assistance. She stated that she had never been on a ride that suddenly stopped at Adventureland prior to the incident and that she never heard of any other time the Hurricane had stopped.

Stephen Eger testified that he is one of the owners of Adventureland and the director of maintenance. He stated that his duties as director of maintenance include maintaining the grounds and all the rides within the park, and that Adventureland staff serviced and maintained the rides. Mr. Eger explained that the Hurricane is an electric roller coaster with pneumatic air brakes on the track at the end of the ride. Mr. Eger estimated that the braking area of the track was waist heigh and the train was four feet high on top of the track. He estimated that passengers were seven feet from the ground while the train was stopped in the braking area. Mr. Eger testified that he inspected the Hurricane along with another mechanic every day the park was open, in the morning before the park opened to customers. He explained that inspections usually lasted 45-60 minutes and included running cars through the track, walking around to look at the supporting structure, and visual inspection of the trains, the track, and the blocking. Mr. Eger testified that he completed state Department of Labor inspection forms daily and that if something incorrect was found upon inspection, it would be fixed, but not noted on the daily inspection form. He also stated that if work was done on the Hurricane in 2013 or 2014, paperwork regarding such work was not generated. Mr. Eger further testified that he never personally received complaints about the condition of the Hurricane and that he was not aware if anyone at Adventureland received any complaints. Mr. Eger explained that during an electrical brownout, the rides stop as a safety measure, as they will not run with low electricity. However, he could not recall whether there was a blackout or brownout on the day of the incident.

Joseph Nocella, a maintenance worker at Adventureland, testified that his daily job duties included ensuring the rides were safe and operable. He testified that seven or eight maintenance workers worked during the park's open season from March to October, and that at least two workers would inspect each ride along with Mr. Eger. Mr. Nocella explained that maintenance workers and Mr. Eger would check all the safety items using a checklist of safety items for each ride. He stated Mr. Eger filled out daily forms related to safety of the rides and that the maintenance workers were not required to fill out any documents or forms during their daily inspections. He testified that he was not required to report to Mr. Eger that a ride passed daily inspection. Mr. Nocella further testified that if something was "found not to be up to par" or "alarming," he was required to notify Mr. Eger and that any issues would then be immediately resolved. Mr. Nocella explained that as part of his inspection of the Hurricane, he would operate a test run of the roller coaster trains and visually observe them as it completed their loops. He stated that he was working on the day of the subject incident, but that he could not recall whether he conducted an inspection of the Hurricane. Mr. Novella explained that he became aware that an incident

occurred through the employee radios and arrived at the Hurricane to find a train stuck in the back part of the brakes, approximately five feet off the ground. He stated that within 10 to 15 minutes, he began to assist riders off of the train using a ride-specific ladder. Mr. Nocella testified that he did not know what caused the train to stop and that he did not recall hearing the Hurricane experiencing similar problems prior to the subject incident.

Dale Anthony testified that he was a ride operator of the Hurricane and that he constantly checked the Hurricane's equipment each day to make sure everything was okay. Mr. Anthony stated that he evaluated all the buttons to make sure everything was going to run smoothly for the day, and that he had no forms to fill out on a daily basis when completing any inspection. Mr. Anthony testified that no one else from Adventureland would perform a similar inspection. He explained that before opening the ride, he informed another Adventureland employee that the ride was ready and that he was going to open it to customers. He further explained that he did not open the ride until he felt it was ready. Finally, Mr. Anthony testified that he never had the Hurricane stop mid-ride.

Adventureland now moves for summary judgment dismissing the complaint on the grounds that it neither created nor had actual or constructive notice of the alleged defective condition and that plaintiff's injuries do not rise to the level required for a claim of negligent infliction of emotional distress. Adventureland further argues that plaintiff cannot rely upon the doctrine of res ipsa loquitur, because it does not have exclusive control over electrical brownouts that can cause rides to stop. Adventureland submits, in support of the motion, copies of the pleadings, the bills of particulars, the affidavit of Paul Gentile, and the transcripts of the deposition testimony of J.G., Stephen Eger, Joseph Nocella, and Dale Anthony. In opposition, plaintiff argues that triable issues of fact remain as to the extent of J.G.'s injuries, how the breach of Adventureland's duty occurred, and whether Adventureland had constructive notice, as the ride may have stopped prior to the incident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***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]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). Property owners, however, are not insurers of the safety of people on the premises (***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Covelli v Silver***

***Fist, Ltd.***, 167 AD3d 980, 91 NYS3d 181 [2d Dept 2018]). To establish liability in a premises liability action, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (***Witkowski v Island Trees Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]; ***Hoffman v Mucci***, 124 AD3d 723, 2 NYS3d 531 [2d Dept 2015]; ***Sermos v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]).

A defendant moving for summary judgment must show, prima facie, that he or she did not create the defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discover and remedy it (***Williams v Island Trees Union Free Sch. Dist.***, 177 AD3d 936, 2019 NY Slip Op 08443 [2d Dept 2019]; ***Kozik v Sherland & Farrington, Inc.***, 173 AD3d 994, 103 NYS3d 128 [2d Dept 2019]; ***Ariza v Number One Star Mgt. Corp.***, 170 AD3d 639, 93 NYS3d 603 [2d Dept 2019]; ***Witkowski v Island Trees Pub. Lib.***, *supra*). In order to constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit the landowner to discover and remedy it, and it will not be imputed where the defect is latent or would not, upon reasonable inspection, be discovered (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Williams v Island Trees Union Free Sch. Dist.***, *supra*; ***Reed v 64 JWB, LLC***, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]; ***McDermott v Santos***, 171 AD3d 1158, 98 NYS3d 646 [2d Dept 2019]; ***Radosta v Schechter***, 171 AD3d 1112, 97 NYS3d 664 [2d Dept 2019]). To meet the prima facie burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the accident (***Kelly v Roy C. Ketcham High Sch.***, 113 NYS3d 572, 2020 NY Slip Op 00111 [2d Dept 2020]; ***Williams v Island Trees Union Free Sch. Dist.***, *supra*; ***Coker v McMillan***, 177 AD3d 680, 112 NYS3d 272 [2d Dept 2019]). However, mere reference to general cleaning practices is insufficient to meet the prima facie burden (***Williams v Island Trees Union Free Sch. Dist.***, *supra*). A defendant who has actual notice of an ongoing and recurring dangerous condition may be charged with constructive notice of each reoccurrence of such condition (***Pagan v New York City Hous. Auth.***, 172 AD3d 888, 101 NYS3d 168 [2d Dept 2019]; ***Toussaint v Ocean Ave. Apt. Assoc., LLC***, 144 AD3d 664, 40 NYS3d 508 [2d Dept 2016]; ***Mauge v Barrow St. Ale House***, 70 AD3d 1016, 895 NYS2d 499 [2d Dept 2010]; ***Kohout v Molloy Coll.***, 61 AD3d 640, 876 NYS2d 505 [2d Dept 2009]). However, general awareness of a condition is insufficient to constitute notice of the particular condition (***Mauge v Barrow St. Ale House***, *supra*). A defendant cannot satisfy its burden by merely pointing to gaps in the plaintiff's case (***Ariza v Number One Mgt. Corp.***, *supra*).

Adventureland made a prima facie case of entitlement to summary judgment by demonstrating that it neither created nor had actual or constructive notice of the defective condition (*see* ***Gordon v American Museum of Natural History***, *supra*; ***Koutsiaftis v Alliance Parking Servs., LLC***, 175 AD3d 1519, 109 NYS3d 431 [2d Dept 2019]; ***Espinal v Six Flags, Inc.***, 122 AD3d 903, 998 NYS2d 110 [2d Dept 2014]; *cf.* ***Williams v Island Trees Union Free Sch. Dist.***, *supra*). By his affidavit, Paul Gentile, Adventureland's operations manager, stated that the Hurricane underwent daily inspections and maintenance procedures. He stated that the daily inspection log included with his affidavit demonstrated that the Hurricane was inspected every day in June 2014 prior to the incident and that no issues or dangerous conditions were found. Mr. Gentile also stated that there were no prior complaints of similar incidents regarding the Hurricane. The daily inspection log indicates that the Hurricane was inspected

on June 26th by its checkmarks in the columns entitled "control devices," "speed limit device," "brakes," anti-roll back," "signal system," elect. equip.," "mach. guard.," "struct. assem.," and "maintenance." The daily inspection log also bears Mr. Eger's initials on the date of the incident.

While res ipsa loquitur does not create a presumption of negligence, it permits the inference of negligence from the mere happening of an event (*see* ***Marinaro v Reynolds***, 152 AD3d 659, 59 NYS3d 87 [2d Dept 2017]). Reliance on the doctrine of res ipsa loquitur requires that the accident must (1) be of a kind that ordinarily does not occur in the absence of negligence, (2) be caused by an agency or instrumentality within the defendant's exclusive control, and (3) not have been due to any voluntary action or contribution of the plaintiff (*see* ***Dilligard v City of New York***, 170 AD3d 955, 96 NYS3d 306 [2d Dept 2019]; ***Marinaro v Reynolds***, *supra*; ***Levinstim v Parker***, 27 AD3d 698, 815 NYS2d 596 [2d Dept 2006]).

Adventureland established a prima facie case of entitlement to summary judgment dismissing plaintiff's reliance on the doctrine of res ipsa loquitur. Mr. Nocella testified that power surges can cause the Hurricane's trains to stop and that he could recall power surges shutting down rides prior to the incident. Therefore, an inference of negligence is not warranted, as the incident was one that could occur in the absence of negligence and without instrumentality within Adventureland's exclusive control (*see* ***Little v Kone, Inc.***, 139 AD3d 678, 31 NYS3d 147 [2d Dept 2016]; ***Tucci v Starrett City, Inc.***, 97 AD3d 811, 949 NYS2d 419 [2d Dept 2012]; ***Forde v Vornado Realty Trust***, 89 AD3d 678, 931 NYS2d 687 [2d Dept 2011]; ***Cilinger v Arditi Realty Corp.***, 77 AD3d 880, 911 NYS2d 75 [2d Dept 2010]).

Adventureland having established its prima facie case of entitlement to summary judgment, the burden shifted to plaintiff to raise a triable issue of fact (CPLR 3212 [b]; *see* ***Zuckerman v City of New York***, *supra*). The affirmation of plaintiff's attorney is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*). Plaintiff failed to raise a triable issue of fact as to whether Adventureland created or had actual or constructive notice of the alleged dangerous condition (*see* ***Koutsiaftis v Alliance Parking Servs., LLC***, *supra*; ***Espinal v Six Flags, Inc.***, *supra*). Plaintiff presented no evidence that Adventureland received any complaints about the Hurricane, or that the alleged dangerous condition was visible and apparent and had existed for a sufficient length of time before the incident for it to discover and remedy it. Adventureland's general awareness that there were occasions when the Hurricane stopped working prior to the incident due to electrical brownouts or blackouts is insufficient to constitute notice of the particular condition that caused the ride to stop while J.G. was a passenger (*see* ***Pagan v New York City Hous. Auth.***, *supra*).

Accordingly, Adventureland's motion for summary judgment to dismissing the complaint is granted.

Dated: 2/6/20

Martin L. Cahn
A.J.S.C.

**__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION**