

Dinhofer v County of Westchester
2020 NY Slip Op 34674(U)
December 4, 2020
Supreme Court, Westchester County
Docket Number: Index No. 52772/2019
Judge: Janet C. Malone
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

SCOTT DINHOFER,

Plaintiff,

-against-

THE COUNTY OF WESTCHESTER and
WESTCHESTER COUNTY DEPARTMENT OF
PARKS, RECREATION AND CONSERVATION,

Defendants.

-----X

MALONE, J.

Index No. 52772/2019

DECISION AND ORDER
Motion Sequence: 1

The papers numbered 1-3¹ were reviewed² and considered by the Court in deciding Defendant’s motion for summary judgment pursuant to CPLR R 3212 seeking to dismiss Plaintiff’s Verified Complaint with prejudice:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Affirmation of Assistant County Attorney Haylei P. Peart/Exhibits A-L/Memorandum of Law/	1
Affirmation ³ of Glenn A. Herman, Esq./Affidavit of Plaintiff/ Affidavit of Plaintiff’s Expert Duje Tadin, Ph.D./Exhibits 1-6	2
Reply Affirmation of Assistant County Attorney Haylei P. Peart/ Affidavit of Defendant’s Expert Timothy G. Joganich, M.S., C.H.F.P./ Exhibit A/Memorandum of Law in Reply	3

¹Without leave of Court (CPLR R 2214), Glenn A. Herman, Esq. filed a Sur-Reply requesting that the Court not consider new evidence and arguments raised for the first time by Defendant in Reply and requesting leave to file a Sur-Reply (NYSCEF Doc. No. 50) to which Defendants’ Counsel submits an Affirmation (NYSCEF Doc. No. 52) to Plaintiff’s Sur-Reply. As such, neither documents were considered, and the new arguments raised by Defendant for the first time in her Reply Memorandum were disregarded.

² All documents were reviewed on the New York State Courts Electronic Filing system.

³ Counsel submits and a 30-page Affirmation and Memorandum of Law as one document in contravention of 22 NYCRR § 202.8 (c).

As set forth herein, Defendants' The County of Westchester and Westchester County Department of Parks, Recreation and Conservation's ("the County"), motion seeking summary judgment against Plaintiff Scott Dinhoff is **denied** in its entirety as the County failed to make a *prima facie* showing with evidence in admissible form that it is entitled to summary judgment. *See*, CPLR R 3212 (b) and *Marks v. Robb*, 90 A. D. 3d 863 (2nd Dept 211) *citing Alvarez v. Prospect Hosp.*, 67 N.Y. 2d 320, 324 (1986).

BACKGROUND

At approximately 8:00 a.m. on June 16, 2018, Plaintiff had already been riding his triathlon bicycle for two (2) hours or thirty (30) miles when while traveling south on the North County Trailway in the Town of New Castle in Millwood, New York (the "Trailway") his bicycle hit a bump on the Trailway that was shaded by a tree. As a result, the bicycle flipped forward causing Plaintiff to land on the right, back side of his body and Plaintiff being transported by ambulance to Westchester County Medical Center. *See*, NYSCEF Doc. No. at page 36, line 2-4, at page 39, line 13-20, at page 40, line 8-19 and at page 46, line 14-20.

Along with the Notice of Claim served on or about August 24, 2018, Plaintiff attached two (2) map images and four (4) photos, one of which identified the location and defect that purportedly caused his accident (NYSCEF Doc. No. 20 at paragraph 4). At the hearing held on November 29, 2018 pursuant to General Obligations Law 50-h, Plaintiff testified that he has been bike riding since 1989 and owns a mountain, gravel, road and triathlon bike; he rides three or four days a week on various terrain depending on whether he is training or riding in a group sometimes riding between 30 and 115 miles during a single ride (NYSCEF Doc. No. 21 at page 11, line 22-page 12, line 6.) Since 1997, Plaintiff has been riding the Trailway either alone or with his children

(NYSCEF Doc. No. 21, page 15, lines 7-10) and sometime weekly runs on the Trailway (NYSCEF Doc. No. 22 at page 30, line 17-23).

The instant tort action was commenced on February 18, 2019 with Plaintiff filing the Summons and Verified Complaint (NYSCEF Doc. No. 23) that alleges the County was negligent in its ownership, operation, control and maintenance of the Trailway and with prior notice that the Trailway was in a dangerous, hazardous and defective condition constituting a trap, nuisance and hazard, the County failed to repair back-fill, level or pave said condition which caused Plaintiff to sustain injuries when his triathlon bicycle came into contact with the alleged condition (NYSCEF Doc. No. 21, at page 17 lines 13-16).

Now, with issue joined (NYSCEF Doc. No. 3) the County's motion seeks to dismiss Plaintiff's Complaint in its entirety with prejudice pursuant to CPLR R 3212 arguing that as a matter of law Plaintiff cannot establish his claims against the County because his claims are trivial in nature, barred by the Primary Assumption of Risk Doctrine and by failing to establish compliance with the County's prior written notice law pursuant to Section 780.01 of the Laws of Westchester County and New York State General Municipal Law Section 50-e (4). (NYSCEF Doc. No. 19 at paragraph 3).

NOTICE

Section 780.01 of the Westchester County Laws states in pertinent part that:

“No civil action shall be maintained against the county... for damages or injuries to person or property sustained in consequences of any...sidewalk being defective, out of repair, unsafe, dangerous or obstructed unless prior written notice of such defective, unsafe, dangerous or obstructed condition, specifying the particular place, was actually given to the Clerk of the Board of Legislators or the Commissioner of Public Works and Transportation and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect,

danger or obstruction complained of or, in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence...”

See also, Mullen v. Town of Hempstead 66 A.D. 3d 745, 746 (2d Dept. 2009) (A paved bike path over which the public has a general right of passage is the functional equivalent of a sidewalk or a highway) and NYSCEF Doc. No. 35 at paragraph 163, No. 38, and No. 32, at pages 5-6.

While the County correctly argues that Plaintiff failed to prove compliance with the County’s prior written notice⁴ requirement, the County’s witnesses establish that the County had constructive notice of the bump on the Trailway as far back as 2013 and except to initiate a capital improvement project to resurface the Trailway, no further action was taken by the County. *See, Fischer v. Westchester County*, 24 A.D.3d 498 (2d Dept. 2005).

For example, Evelio Lopez, who has been with the County’s Department of Parks, Recreation & Conversation for thirty-one (31) years, of which six (6) years, from 2013 to July 2018, were spent working on the Trailway⁵, testified that in 2013 he was aware of a bump on the Trailway and that the Parks Department did nothing to warn bicycle riders of the bump prior to June 16, 2018. Mr. Lopez describes the alleged defect in the Trailway as a “bump in the road” that did not need repair and that he did not view it as hazardous because he has seen numerous people ride over it without issue. *See, NYSCEF Doc. No. 27* at page 13, line 8-11; at page 22, line 5-page 25, line 18; at page 49, line 7-12; at page 29, line 12-page 30 and at page 54, line 6-25.

⁴ Malika Vanderberg Clerk of the Board of Legislators, states in her Affidavit (NYSCEF Doc. No. 30) that the County has not received any prior written notices regarding the Trailway, approximately 458 feet north of Route 133 in Millwood, New York.

⁵ Mr. Lopez is currently the Supervisor at Merestead mansion in Mount Kisco and the South County Trailway. *See, NYSCEF Doc. No. 27* at page 10, line 18-page 12, line 2.

David DeLucia, with County's Parks, Recreation and Conservation since 1982 has served as a Construction Coordinator for the County since February 2019. *See*, NYSCEF Doc. No. 28 at page 7 at line 3-8 and line 14-21. In his November 4, 2019 testimony, Mr. DeLucia stated that he reviewed the notice of claim and photographs of the condition provided by Plaintiff (NYSCEF Doc. No. 20 at page 9, line 6-21) and had passed the site of the accident, at least once a month either on a police bike or a road bike for recreation or by foot with his staff putting up signage⁶ "for no motorized vehicles" (NYSCEF Doc. No. 28 at page 14, line 5-page 15, line 17).

Mr. DeLucia also testified that there was a capital project in the works since approximately 2015 to resurface the entire Trailway (NYSCEF Doc. No. 28 at page 15, line 23-page 16, line 4), but believed the bump on the Trailway was a reasonably safe condition for a bicycle describing it as "small, minor bump," that the County's Expert Timothy G. Joganich described as ". . . upheaved pavement [that] measured approximately 1 and 1 ½ inches in height at 1 ½ and 3 feet, respectively from its apex. Surface cracking along the apex spanned the full width" (NYSCEF Doc. No. 47 at paragraph 10.) Mr. DeLucia further testified that although the Trailway has lots of areas with shade, he did not believe the bump presented a hazard that necessitated immediate repair based on his experience in riding over the bump , looking over the bump and standing near the bump. Mr. DeLucia states that the County, Parks, Recreation and Conservation, believed tree roots were the cause of the bump. (NYSCEF Doc. No. 28 at page 28, line 2-10 and at page 50, line 9-page 51, line 7 and at page 62, line 24-page 64, line 6).

⁶ Although the County's Expert Timothy G. Joganich, M.S., C.H.F.P. testified that he saw a sign that read "CAUTION AHEAD-EROSIONS MAY HAVE CAUSED CRACKED OR UNEVEN SURFACES-WALK AND RIDE SAFELY" was located 257 feet from the incident area in the southbound direction; his site inspections were conducted on October 7, 2018 and June 13, 2010. *See*, NYSCEF Doc. No. 47 at paragraphs 3 and 14.

As the County had constructive notice of the bump in the Trailway prior to June 16, 2018, Plaintiff's failure to show compliance with the written notice requirement is not fatal. The County's motion for summary judgment on this ground is **denied**.

Doctrine of Primary Assumption of Risk

“As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation.” *See, Turcotte v. Fell*, 68 N.Y. 2d 432 (1986) (internal citations omitted).

Here, the County argues that because the instant action arises out of a sporting and/or recreational activity, it is barred by the doctrine of assumption of risk claiming that as an experienced cyclist, familiar with the Trailway from decades of regular use, Plaintiff should have been aware of the general condition of the Trailway and assumed the risks associated with riding his bicycle on the Trailway. *See, Restaino v. Yonkers Board of Education*, 13 A.D. 3d 432 (2nd Dept. 2004), and *Goldberg v. Town of Hempstead*, 289 A.D. 2d 198 (2d Dept. 2001).

The County's argument is antithetical to the findings in *Cotty v. Town of South Hampton*, where the Court rejected the notion that a bicycle rider subjected himself or herself to the doctrine of primary assumption of risk noting that “. . .it is not sufficient for a defendant to show that the plaintiff was engaged in some form of leisure activity at the time of the accident.” *See, Cotty v. Town of South Hampton*, 64 A.D. 3d 251, 254 (2d Dept. 2009); *see also, Fornuto v County of Nassau*, 149 AD3d 910 (2d Dept. 2017).

As Plaintiff was a noncompetitive recreational bicyclist on June 16, 2018, the County's motion for summary judgment on the theory that the instant action is barred by the doctrine of primary assumption of risk, is **denied**.

Trivial Claim

Plaintiff testified that before his bicycle hit the bump on the Trailway, he saw approximately 10-12 people cycling, running, or walking on the Trailway and that the bump was shaded by a tree. *See*, NYSCEF Doc. No. 21, at page 36, lines 9-23 and at page 39, lines 13-20.

The County argues that the alleged condition of the Trailway does not rise to the level of a dangerous condition but rather, is trivial and, by extension, not actionable claiming that the bump on the Trailway would have been clearly visible to Plaintiff at 8:00 a.m. on a clear, sunny morning. *See, Nathan v. City of New Rochelle*, 282 A.D. 2d 585 (2nd Dept. 2001) and *Trincere v. County of Suffolk*, 90 N.Y. 2d 976, 977 (1997).

In formulating its argument, the County apparently relies on video footage and a video compilation of video footage (NYSCEF Doc. No. 29), that the County mistakenly believes is in the Court's possession (NYSCEF Doc. No. 19 at footnote 1⁷) of numerous pedestrians and people on bicycles and rollerblades successfully navigating the bump in the Trailway. Plaintiff, also under the belief the Court has the video compilation, refers to same (NYSCEF Doc. No. 35 at paragraph 6), even providing still photographs taken from the video compilation (NYSCEF Doc. No. 35 at paragraphs 115 and 116). Although the video footage might show numerous people, of various ages and cycling abilities, successfully navigating the bump, of the two still photographs Plaintiff

⁷ The County claims that upon assignment of the instant motion, it would provide the "footage" to the Court. NYSCEF Doc. No. 19 at footnote 1.

presents, the accuracy of which is not disputed in the County's Reply, one is of an adult male and one is of a young girl in the process of falling to the ground where Plaintiff fell.

The County relies on the case of *Bekritsky v. TACS-4, Inc.* where the Court found “. . . that the alleged defect did not, by reason of its location, adverse weather, or lighting conditions, or other relevant circumstances, have any of the characteristics of a trap or snare, and was too trivial to be actionable”. See, *Bekritsky v. TACS-4, Inc.* 27 A.D. 3d 680, 681 (2nd Dept. 2006) (*internal citations omitted*). “A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.” See, *Hutchinson v. Sheridan Hill House Corp.* 26 N.Y. 3d 66, 78-79 (2015) (“. . . intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it ‘unreasonably imperil[s] the safety of’ a pedestrian”) citing *Trincere v. County of Suffolk*, 90 N.Y. 2d 976, 977 (1997).

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Such is not the case here, considering that the surrounding circumstance of the tree shading the Trailway is characteristic of a snare or trap that caught Plaintiff; therefore, his action is not trivial. The county's motion for summary judgment on the ground of the Trivial Defect Doctrine is **denied**.

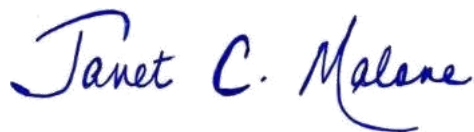
This matter is referred to the Settlement Conference Part and a conference will be scheduled at a later date.

To the extent relief sought is not addressed, the relief is denied.

This constitutes the Decision and Order of the Court.

Dated: December 4, 2020
White Plains, New York

ENTER:



HON. JANET MALONE, J.S.C.

TO PLAINTIFF'S COUNSEL VIA NYSCEF