

Vanzetta v Jacobsen
2020 NY Slip Op 34921(U)
April 9, 2020
Supreme Court, Orange County
Docket Number: Index No. EF008796-2018
Judge: Sandra B. Sciortino
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ORIGINAL

To commence the statutory time for 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 ORANGE

-----X
JOSEPH VANZETTA, JR.,
Plaintiff,

DECISION AND ORDER

NDEX NO.: EF008796-2018
Motion Date: 2/12/2020
Sequence No. 2

-against-

ROGER C. JACOBSEN and CATHERINE A. GOLEBIEWSKI,
Defendants,

-----X
SCIORTINO, J.

The following papers numbered 1 to 19 were considered in connection with the application of the defendant for summary judgment dismissing the complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Liebman)/Exhibits A-M	1 - 15
Affirmation in Opposition (Cambareri)/Exhibits 1-2	16-18
Reply Affidavit (Liebman)	19

Upon the foregoing papers it is ORDERED that motion for summary judgment is granted.

Background and Procedural History

This is an action for personal injuries arising out of an alleged slip and fall accident which occurred at a residence, owned by defendants Roger C. Jacobsen and Catherine A. Golebiewski, in January 2016. The Plaintiff commenced this action by the filing of a Summons and Complaint (Exhibit A) on August 21, 2018. Issue was joined by the service of an Answer (Exhibit B) on October 12, 2018.

The Complaint (as supplemented by plaintiff's Bill of Particulars) alleges that, on January 3, 2016, at approximately 1:30 p.m., plaintiff was delivering oil to defendants' residence. In order to reach the oil fill located near the walkway of defendants' residence, plaintiff traveled up defendants' front lawn with the hose from his employer's truck to the oil fill. Plaintiff alleges that defendants instructed plaintiff's employer that its truck was not to enter or utilize defendants' driveway when delivering heating oil, and that delivery persons were required to leave the truck in the street and walk across the front lawn for access. After providing the oil delivery, plaintiff was leaving defendants' residence when he slipped and fell on the wet front lawn.

Plaintiff alleges that defendants were negligent, wanton, reckless and careless in, among other things, allowing, causing and/or permitting dangerous, hazardous, slippery and/or unsafe conditions to exist on the premises; in directing the plaintiff to traverse the front yard; in directing the plaintiff not to drive over or park near the driveway; in directing the plaintiff to work in an unsafe location; in failing to provide a safe place to work; in failing to provide a safe and appropriate place to walk; in acting with reckless disregard for the safety of others. (Exhibit C) Plaintiff alleges that he suffered severe and serious personal injuries as a result. (Exhibit A)

The Court notes the discrepancy in the date of the incident provided in Plaintiff's Verified Bill of Particular, plaintiff's deposition testimony and medical documents. This incident may have happened on January 3, 2016, January 4, 2016 or March 2, 2016.

Plaintiff's Deposition Testimony

Plaintiff was deposed on August 5, 2019 (Exhibit H) He testified that, on January 30, 2016, he was working as a driver for Eastern Oil Company. He had made over 50 different deliveries to the defendants' residence between April 29, 1996 and February 23, 2017. At the

homeowners' request, he believed he was not permitted to drive the truck in the driveway. In order to provide the oil delivery, plaintiff parked the truck on the street in front of the residence, and traveled up the front lawn to the fill point located near a walkway.

According to the plaintiff, he had completed his oil delivery and, as he walked down the front lawn with the truck hose, he slipped on the wet grass and fell. Plaintiff also testified he had "slid down that hill a million times" and told his employer "a million times" about those slips.

Defendant Roger Jacobsen Deposition Testimony

Defendant Roger Jacobsen was deposed on August 19, 2019. (Exhibit J) Mr. Jacobsen testified that, while he has never watched the oil delivery driver bring the hose to the tank, he believes the driver parks his truck on the street and walks across the front lawn to make a delivery. He further testified that he never gave instruction to anyone at Eastern Oil where the truck should park. He never received any complaints about the access to deliver oil from Eastern Oil, or any of the four different drivers that had delivered oil from plaintiff's employer since 1995.

Defendant Catherine Golebiewski Deposition Testimony

Defendant Catherine Golebiewski was deposed on August 18, 2019 (Exhibit L). The defendants moved into the residence in January of 1995. Golebiewski testified that, soon after having the builder lay asphalt on the driveway in the spring of that year, she contacted Eastern Oil to share the builder's recommendation to not use delivery trucks on the driveway while the asphalt cured. Although she remembered contacting Eastern Oil and asking them not to use the driveway, she did not recall whether she gave the instructions for a specific period of time. She

did not contact Eastern Oil afterwards to advise them they could use the driveway for deliveries. She has never received any complaints from anyone at Eastern Oil about the deliveries to the residence, nor has she received complaints about drivers having to walk up the lawn to access the oil fill.

Non-Party Rocco Picciano Deposition Testimony

Non-party Rocco Picciano was deposed on October 7, 2019 (Exhibit I). Mr. Picciano is a manager of Eastern Oil Company, responsible for dispatching, answering the phones and “whatever needs to be done for that day.” He testified that plaintiff had made complaints about delivering oil to the defendants’ premises. However, he had no knowledge of contacting the homeowners with respect to these complaints.

Defendant’s Motion

By Notice of Motion originally returnable on December 27, 2019, adjourned at the request of the plaintiff to February 12, 2020, defendants seeks summary judgment dismissing the complaint. Defendants assert that, based on the record, plaintiff has failed to establish a *prima facie* case of negligence against the defendants. The defendants argue that they did not have actual or constructive notice of the alleged defect or the manner in which plaintiff made oil deliveries to the property. Furthermore, walking up or down the yard is not inherently dangerous.

Defendants argue that, though the plaintiff told his employer of the alleged defective condition, notice was never given to the defendant homeowners. Defendants, at their depositions of defendants, testified that they had never received a complaint about the front yard. Nor had

they ever witnessed a delivery person slip and fall.

Despite plaintiff's contention, walking up and down plaintiff's front lawn to access the fill station is not inherently dangerous. The alleged condition was open and obvious. There is no duty to warn of or protect from conditions that are not inherently dangerous and are readily observable by the reasonable use of one's senses.

On that basis, defendants assert they have made its *prima facie* showing of entitlement to summary judgment.

Plaintiff's Opposition

Plaintiff's counsel argues that defendants had a duty to provide a reasonably safe ingress and egress for the delivery of heating oil to their home. Defendants breached that duty by prohibiting the use of the driveway and walkway, requiring a steep slippery slope to be the route for delivering heating oil. Plaintiff further argues the path required by defendants gave rise to a hazardous condition.

Plaintiff relies on defendant Golebiewski's 1995 instruction to Eastern Oil that plaintiff not park the truck on the driveway. With that instruction, the only way to connect the approximately 150-foot long hose to the plaintiff's fill would be to travel across plaintiff's front lawn. The existence of a dangerous condition is an issue to be considered by the jury.

Plaintiff further argues that actual notice exists as the defendants created the conditions with instructions not to use the driveway; recurrent use of the sloped yard in any weather provided constructive notice. The defendants' knowledge that plaintiff would be on the premises to deliver oil by walking up and then down a wet, steep grassy slope raises a triable question that

should not be taken from the jury.

Finally, plaintiff argues that the issue of an open and obvious condition is not applicable here. The theory of open and obvious condition goes to the issue of comparative negligence, not the liability of the landowner, who has a duty to keep the premises safe.

On that basis, plaintiff asserts that defendants have failed to meet their burden of proof necessary to warrant summary judgment.

Reply

In reply, Defendants reiterate their position and argue that plaintiff relies on the 1995 instruction given in order to allow newly laid asphalt to cure. The decision to avoid the driveway entirely was made voluntarily on the part of plaintiff and Eastern Oil.

The Court has fully considered the submissions before it.

Discussion

“A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dep’t 2011], citing *Alvarez v Prospect Hosp.*, 68 NY 2d 320, 324 [1986])

The function of the court on such a motion is issue finding, and not issue determination, (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) and the court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dep’t 1995]) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. (*Anyanwu v. Johnson*, 276 AD2d

572 [2d Dep't 2000])

A property owner has a duty to keep 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 (*Twersky v. Incorporated Village of Great Neck*, 127 Ad3d 739 [2d Dep't 2015]). However, the landowner's duty does not extend to open and obvious conditions on the land that are natural geographic phenomena which ‘can readily be observed by those employing the reasonable use of their senses (*Cohen v. State*, 50 AD3d 1234, 1235 [3d Dep't 2008], *Torres v. State of New York*, 18 AD3d 739 [2005] citing *Cupo v. Karfunkel*, 1 AD3d 48 [2003]). These open and obvious conditions, as a matter of law, are not inherently dangerous (*Bluth v. Bias Yaakov Academy for Girls*, 123 Ad3d 866 [2d Dep't 2014]). In such situations, defendant is not liable for injuries caused thereby (*Cohen v. State*, 50 AD3d 1235, 1235).

Of significance to the Court is the fact that the plaintiff's did not identify the natural slope of the land as a defect. The bill of particulars specified the defect as “slippery, icy lawn.”(Exhibit C, ¶18). Wetness itself does not impose liability. “To impose liability upon the defendants, there must be evidence tending to show the existence of a dangerous or defective condition and that the defendants either created the condition or had actual or constructive knowledge of it (*see Gordon v American Museum of Natural History*, 67 NY2d 836; *King v New York City Tr. Auth.*, 266 AD2d 354; *Patrick v Cho's Fruit & Vegetables*, 248 AD2d 692). (*Richardson v Campanelli*, 297 AD2d 794 [2d Dept 2002])

In the instant matter, defendants satisfied their burden, as the moving parties, by

establishing that they did not create the condition, which occurred as the result of natural seasonal changes. The wet grassy area upon which the injured plaintiff allegedly slipped and fell was readily observable by a reasonable use of the plaintiff's senses, and as a matter of law, the lawn was not inherently dangerous. Plaintiff testified that, on the day of the incident, the ground was wet and lightly covered with snow. Plaintiff was familiar with the conditions of the front yard, as his testimony establishes he had performed oil deliveries in this manner for over 20 years. Plaintiff further testified that he had slipped on the grass on defendants' yard before and had different types of footwear to accommodate the different weather conditions.

In opposition, the plaintiff has failed to raise a triable issue of fact as to whether the front lawn constituted a dangerous condition.

On the basis of the foregoing, the application of defendants for summary judgment is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 9, 2020
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*