

Flores v Harvest Moon Farm & Orchard
2020 NY Slip Op 35195(U)
August 26, 2020
Supreme Court, Westchester County
Docket Number: Index No. 68122/2018
Judge: Linda S. Jamieson
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To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X
CARMEN CASTRO FLORES and MARCO CARDOSO,

Index No. 68122/2018

Plaintiffs,

DECISION AND ORDER

-against-

HARVEST MOON FARM & ORCHARD,

Defendant.

-----X

The following papers numbered 1 to 3 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition ¹	2
Affirmation and Exhibit in Reply	3

Defendant brings its motion seeking summary judgment dismissing the action in this trip-and-fall case at defendant apple orchard.

Plaintiff Carmen Castro Flores and her family went apple picking at defendant orchard. It was plaintiff's first time apple picking. She wore flip-flop-style open sandals. At the time that she tripped, she was carrying her baby because, as she stated at her deposition, the road was too rough for the stroller. Although there was a sign at the entrance warning

¹Although counsel references a memorandum of law in his affirmation, no such document was e-filed.

visitors of the uneven and unpaved terrain, and to consider their physical fitness before entering, plaintiff, who does not read English, did not notice the sign.

Plaintiffs submitted to the Court a video taken by plaintiff Cardoso that showed the terrain and the area in which plaintiff slipped. It appears to be typical orchard natural ground. The video does not show any unusual or hidden hazards. Nor does plaintiff allege that there was anything unusual at the site where she fell. Plaintiff contends that there was straw or hay on the ground,² which may have made the ground slippery. There is no evidence that there was any straw or hay on the ground, however. Instead, it was mown grass, left on top of the ground as a natural practice.

"By engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. While a premises owner owes a duty to exercise due care to make the conditions as

²Plaintiff's friend uses the terms "straw" and "hay" interchangeably in her affidavit submitted on this motion, and states that in her opinion, based on her time working as a landscaper, the straw/hay was placed deliberately on top of the ground. She denies that it could have been mowed grass. Defendant, in contrast, argues that "straw" and "hay" are not, in fact, the same thing. Defendant's manager testified at his deposition, and stated in his affidavit submitted on this motion, that the orchard uses **no** hay or straw near the fruit trees. Instead, it mows the grass and leaves the cuttings on top of the ground, a common practice.

safe as they appear to be, if the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty." *Festa v. Apex Capital, LLC*, 171 A.D.3d 1016, 1017, 98 N.Y.S.3d 318, 320 (2d Dept. 2019). Apple picking is a natural outdoor activity, and an apple orchard is not a manicured garden.

As plaintiff herself admitted at her deposition, it was obvious from the outset that the terrain was bumpy, making it hard for her to push her baby in the stroller. She should have realized that she needed to be careful while walking. The recent First Department case of *Mangiafridda v. Masker Fruit Farms, Inc.*, 168 A.D.3d 406, 407, 88 N.Y.S.3d 888 (1st Dept. 2019), cited by defendant, is directly on point. In that case, the First Department observed that "Plaintiff alleges that she was injured because of the hazardous nature of the roadway at defendants' apple orchard, which sloped downward and was rocky," just as plaintiff here complained about the rough terrain and the slippery straw or hay (which was actually neither straw nor hay, but merely grass). The Court concluded in that case that "as the rocky nature of the roadway is an open and obvious condition, inherent in the nature of an apple orchard, which plaintiff should have reasonably anticipated, the court correctly dismissed the complaint." So here too, the uneven and rough terrain is an open and obvious condition, inherent in the nature of an apple orchard, which plaintiff should reasonably have anticipated. The

motion for summary judgment is thus granted, and the action is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
August 26, 2020



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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