

Smith v Dutchess Motor Lodge
2020 NY Slip Op 35231(U)
May 11, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2016-51811
Judge: Peter M. Forman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

<p>BENJAMIN SMITH,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>DUTCHESS MOTOR LODGE, CARMDEL ENTERPRISES, INC., and BILL YENO BUILDERS, INC.,</p> <p style="text-align: right;">Defendants.</p> <hr/> <p>BENJAMIN SMITH,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>WILLIAM F. YENO,</p> <p style="text-align: right;">Defendant.</p>	<p><u>DECISION & ORDER</u></p> <p>Index Number: 2016-51811</p> <p>Motion Sequence No. 1</p>
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FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents in determining the motion for summary judgment submitted by Defendants Dutchess Motor Lodge and William Yeno:

NYSCEF Docket Numbers 30 - 46

Plaintiff commenced these actions¹ to recover damages for personal injuries allegedly arising from a fall sustained on the premises of Defendant Dutchess Motor Lodge (“the Motor Lodge”), owned by Defendant William Yeno (“Yeno”). Plaintiff alleges that the Defendants allowed “the existence of a dangerous condition within said premises, namely an uncovered window well on the ground...causing a hazard and danger to persons traveling thereon” [see Bill of Particulars, NYSCEF Docket No. 34, ¶ 3a].

¹ Plaintiff commenced two separate actions for negligence against the various defendants set forth above. Both actions have been consolidated under the above-referenced index number by so-ordered stipulation [see NYSCEF Docket No. 29].

Following joinder of issue² and the completion of discovery, the Motor Lodge and Yeno moved for an order, pursuant to CPLR §3212, granting summary judgment dismissing Plaintiff's complaint. In moving for summary judgment, Defendants argued that they owed no duty to Plaintiff and were without notice of any dangerous or defective condition on the premises. Plaintiff opposed the motion³. For the reasons set forth herein, Defendants' motion is denied.

DISCUSSION

Because summary judgment "deprives the litigant of its day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" [*Andre v. Pomeroy*, 35 NY2d 361, 364 (1974)]. "But when there is no genuine issue to be resolved at trial, the case should be summarily decided" [*Id.*]. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact" [*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986)]. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" [*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985)]. "Once this showing has been made, however, 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" [*Alvarez, supra*, at 324]. "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury

² Defendants Carmdel Enterprises, Inc. and Bill Yeno Builders, Inc., defaulted in answering.

³ In support of his opposition, Plaintiff submits an expert's affidavit and report based on an inspection of the premises over a year after the accident. While this in and of itself may not be disqualifying, Plaintiff's expert failed to state that the condition of the alleged defect at the time of his inspection was the same as at the time of the accident. As such, it fails to raise a triable issue of fact [see *Cruz v Deno's Wonder Wheel Park*, 297 AD2d 653 (2d Dept. 2002)].

determination” [*Ugaririza v. Schmieder*, 46 NY2d 471, 474 (1979); *see also Davis v. Federated Dept. Stores, Inc.*, 227 AD2d 514, 515 (2d Dept. 1996)].

The facts are largely undisputed. After work on the evening of June 3, 2016, Plaintiff and his co-workers left straight from their job site to go to dinner. Plaintiff claims he had one beer with dinner⁴. Just before 3 a.m. on the morning of June 4, Plaintiff and his co-workers returned to the Motor Lodge, where they were all staying as they were working in the area. They each went to their separate rooms, but Plaintiff’s roommate stated he needed to use the bathroom. Consequently, Plaintiff did not enter the motel but, instead, went around the corner of the main entrance of the motel to urinate outdoors. Plaintiff admitted that he was looking for some place more private, away from the common, well-lit area of the motel entrance. Leaving the well-lit main entrance, Plaintiff walked down a sidewalk parallel to the motel, past three or four doorways, when the sidewalk abruptly ended at the end of the building. He then turned left off the sidewalk, took two or three strides, tripped and fell into the window well. Plaintiff reached out his hands to break his fall and a piece of broken blue glass became embedded in his right forearm and wrist. Plaintiff admitted that it was too dark to see where he was going, and he tripped immediately upon turning off the sidewalk. There was no light above the window well.

At the time, Plaintiff did not know what caused him to trip. After Plaintiff fell, a co-worker went to look at the area and told Plaintiff he had tripped on cinder blocks and cut his arm on a broken flower vase. Plaintiff surmised that the “vase had to have been in the hole with the blue glass⁵” [*see* Pltf. Dep. Tr., NYSCEF Docket No. 35, pp 63-64]. The County Sheriff’s case report summary states that Plaintiff went around the side of the building to urinate, but “due to the darkness, [Plaintiff] failed to see a 4-foot-deep window well and fell into it” [*see* NYSCEF Docket No. 37].

⁴ Plaintiff denied that he was intoxicated after one beer. Although an incident report states he had a “couple of beers,” there is no evidence in the record that Plaintiff was intoxicated at the time of his accident.

⁵ It is not clear from the record whether the broken glass came from a vase or whether they were two separate objects.

In an affidavit submitted in support of the motion for summary judgment, Yeno explained that each room in the motel has a working bathroom. Yeno was the only person who used the window-well to access a basement utility crawlspace where the plumbing was located. There was adequate lighting in the areas which were public places for the guests. However, the spot lights which illuminate the public areas did not reach the back of the building, where guests were not “invited or expected to be” [see Yeno Aff., NYSCEF Docket No. 39, ¶¶ 7 - 8].

Since he purchased the building in 2000, Yeno had not been issued any code violations and never received any complaints about the window-well, nor was he aware of any accidents involving the window-well [*id.* at ¶¶ 12-14]. At least twice a day, Yeno walked around the entire property to clean, inspect, and address any maintenance issues [*id.* at ¶¶ 16-18]. On the day of Plaintiff’s accident, Yeno followed his usual routine and made his last inspection at 10:00 pm [*id.* at ¶¶ 18-20]. Despite the fact that Yeno had no expectation that anyone would be in the area which accessed the cellar window, he placed “several orange construction cones around the cellar window-well to serve as a warning to anyone who might pass by. This was done through an abundance of caution, and not based on any expectation that anyone would be in the that area” [*id.* at ¶ 24; *see also* Yeno Dep. Tr., NYSCEF Docket No. 36, pp 25-28].

It is well-settled that a property owner “has a duty to exercise reasonable care to maintain its premises 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’” [*Dawkins v. Mastrangelo*, 137 AD3d 739, 739 (2d Dept. 2016) quoting *Salomon v. Prainito*, 52 AD3d 803 (2d Dept. 2008); *see also* *Basso v Miller*, 40 NY2d 233 (1976)]. However, this duty of care “is not limitless” [*DiPonzio v Riordan*, 89 NY2d 578, 583 (1997)]. The scope of the duty is defined by “the foreseeability of the possible harm” [*Tagle v Jakob*, 97 NY2d 165, 168 (2001); *see also* *Kriz v. Schum*, 75 NY2d 25, 34-35 (1989)]. “The existence and scope of a duty of care is a question of law for the courts entailing the

consideration of relevant policy factors” [*Abbott v. Johnson*, 152 AD3d 730, 732 (2d Dept. 2017) (internal quotation marks omitted) quoting *Church v. Callanan Indus.*, 99 NY2d 104, 110-111 (2002); see also *Knight v. 177 West 26 Realty, LLC*, 173 AD3d 846, 847 (2d Dept. 2019); *Zylerberg v. Wagner*, 119 AD3d 675 (2d Dept. 2014)].

In this case, the focus of inquiry is on the foreseeability of the risk. “Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated” [*DiPonzio*, 89 NY2d at 583, citing Prosser and Keaton, Torts §31, at pp 169-170 (5th Ed.)]. Here, the Defendants have failed to establish, as a matter of law, that they did not owe a duty of reasonable care to the Plaintiff. Plaintiff walked along a sidewalk parallel to the motel until it ended. He then stepped off the sidewalk in an unlit area in the back of the motel. There were no signs prohibiting entry into the unlit area. Moreover, Defendant Yeno testified that he had placed orange safety cones around the window well prior to Plaintiff’s accident. Based upon the factual record before it, the Court cannot conclude, as a matter of law, that it was not reasonably foreseeable that a patron of the motel would walk around the back of the motel, in an unlit area at night, where there were no signs prohibiting entry.

The Defendants rely on two cases out of the Appellate Division, Third Department, each of which affirmed Supreme Court’s award of summary judgment to the defendant in cases where the plaintiff was injured when seeking an outdoor area to urinate. In *Hendricks v. Lee’s Family* [301 AD2d 1013 (3d Dept. 2003)], the plaintiff fell from a retaining wall near the loading dock at the rear of a bar. The dock, however, was separated from the parking lot by a grassy slope containing several bushes and trees. The Third Department found that it was not foreseeable that plaintiff, in a highly intoxicated state, would leave the parking area to urinate behind the bushes. The grassy area was meant to be decorative and not intended to be used as a thoroughfare. In *Baczowski v. Zurn* [235 AD2d 894 (3d Dept. 1997)], the plaintiff arrived at defendant’s house during a snowstorm, unannounced. He knocked on the door and

was told to wait. Rather than wait as instructed, plaintiff proceeded along the side of the defendant's house where there was no walkway to an area underneath the house's deck to urinate in private. While attempting to get out his snow gear, he slipped and fell on accumulated ice and snow. The Third Department found that defendant could not have reasonably foreseen that plaintiff would go to the back of the house in the dead of winter to urinate under his deck. The Court finds these cases factually distinguishable from the case at bar and, thus, unpersuasive. Here, in contrast to the actions taken by the plaintiffs in *Hendricks* and *Baczkowski*, Plaintiff merely followed a sidewalk along the Motel until it ended. He then stepped off the sidewalk into an unlit area behind the building. At no time did Plaintiff traverse any restricted areas or treacherous terrain to get to his final destination.

Additionally, the Defendants argued that foreseeability of misuse alone is insufficient to make out a viable claim. However, the cases on which the Defendants rely are inapposite. In both *Laluna v DGM Partners* [234 AD2d 519 (2d Dept. 1996)] and *Kurshals v Connetquot Centr. Sch. Dist.* [227 AD2d 593 (2d Dept. 1996)], the plaintiff's misuse of the premises was far more pronounced than here. In *Laluna*, after consuming several cans of beer, the plaintiff entered the premises despite the fact that the building was boarded up and marked with signs against trespassing. He went under the front porch to gain access to the abandoned, dark building via an underneath window. He walked around the premises in the dark and then fell off the second floor. In *Kurshals*, the 15-year old plaintiff was playing handball when the ball went on top of the roof of the junior high school which he had attended. He climbed onto the first level of the roof, observed the skylight but continued climbing onto the second level of the roof when he stepped on the skylight and fell through to the gym floor below. Plaintiff's conduct in the instant matter, as discussed *supra*, was reasonably foreseeable and did not involve a misuse of the premises akin to the misuse described in *Laluna* and *Kurshals*. Accordingly, the Court finds that Plaintiff's alleged misuse of the premises was not "an extraordinary occurrence that need not have been guarded against" [*Kurshals*, 227 AD2d at 594].

Based upon the foregoing, Defendant's motion for summary judgment on the ground that they owed no duty of care to Plaintiff is denied.

The Defendants also argued that even if they did owe a duty to the Plaintiff, they are nevertheless entitled to summary judgment because they had no actual or constructive notice of the alleged dangerous condition. "On a motion for summary judgment dismissing a complaint for lack of actual or constructive notice, the defendant has the initial burden of establishing, prima facie, the absence of notice of the condition for a sufficient length of time to discover and remedy the condition" [*Brennan v. Wappingers Central School District*, 164 AD3d 640, 641 (2d Dept. 2018), citing *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 (1986)]. The Defendants' submissions failed to eliminate all triable issues of fact as to whether they had actual or constructive notice of the allegedly dangerous condition of the cellar window well. Defendant Yeno's placement of the orange safety cones around the window well raises a triable issue of fact as to whether the Defendants had notice of the allegedly dangerous condition.

Defendants, for the first time in their reply papers, argued that they are entitled to summary judgment because Plaintiff is unable to show that any alleged negligence on their behalf was a substantial cause of the events that produced Plaintiff's injury [*see Tesoriero Aff.*, NYSCEF Docket No. 46, ¶16]. Because this argument was improperly raised for the first time in reply, it will not be considered by the Court [*Lee v. Law Offices of Kim & Bae, P.C.*, 161 AD3d 964 (2d Dept. 2018); *Castro v. Durban*, 161 AD3d 939 (2d Dept. 2018)]. Even if the Court were to consider this argument, it would not warrant an award of summary judgment on this factual record, as questions of proximate cause are generally for the fact-finder to resolve [*see Gurmendi v. Perry St. Dev. Corp.*, 93 AD3d 635, 638 (2d Dept. 2012) ("Since the determination of legal causation turns upon questions of foreseeability and what is ... normal may be the subject of varying inferences ... these issues generally are for the fact finder to resolve" [internal quotation marks and citations omitted]); *see also Garris v. Lindemann*, 117 AD3d 785 (2d Dept. 2014)].

Based upon the foregoing, the Defendants' motion for summary judgment dismissing the respective complaints insofar as asserted against them is denied.

As to Defendants Carmdel Enterprises, Inc. and Bill Yeno Builders, Inc., more than a year has passed since they defaulted in answering the complaint, and Plaintiff has not moved for default judgment against them. Accordingly, the Court dismisses the action, *sua sponte*, insofar as asserted against Carmdel Enterprises, Inc. and Bill Yeno Builders, Inc. [*see* CPLR 3215(c)].

Based on the foregoing, it is hereby

ORDERED that motion of defendants Dutchess Motor Lodge and William Yeno for summary judgment dismissing the respective complaints insofar as asserted against them is denied; and it is further

ORDERED that the action insofar as asserted against defendants Carmdel Enterprises, Inc. and Bill Yeno Builders, Inc. is, *sua sponte*, dismissed as abandoned pursuant to CPLR 3215(c).

The foregoing constitutes the Decision and Order of the Court.

Dated: May 11, 2020
Poughkeepsie, New York



Hon. Peter M. Forman, A.J.S.C.

To: All Counsel of Record via NYSCEF