SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19
Present: Hon. Helen Voutsinas, J.S.C.

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CAROL CLAUS,

Plaintiff,

Index No. 8798/2015
Motion Sequence No.: 002

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD INDUSTRIAL DEVELOPMENT AGENCY and TOWN OF HEMPSTEAD LOCAL DEVELOPMENT CORPORATION,

Defendants.

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The following papers were read on this motion:

Notice of Motion, Affirmation in Support, Exhibits and Memorandum of Law..... 1
Affirmation in Opposition, Exhibits..... 2
Reply Affirmation..... 3

Upon the foregoing papers, the motion of defendant County of Nassau (the "County"), for an order pursuant to CPLR § 3212 granting summary judgment in favor of the County and dismissing plaintiff's complaint, is decided as hereinafter provided.

Factual and Procedural Background

The within action sounding in negligence was brought by plaintiff to recover for personal injuries allegedly suffered as a result of a fall at Wantagh Park, which is owned and managed by the County. Plaintiff alleges that the incident occurred on September 8, 2014 at 7:00 a.m. in a grassy area inside the park. She claims that she was caused to trip and fall "into a hole and/or depression" and that the County was negligent in permitting a hazardous and/or trap-like condition to exist at the park in causing, allowing and permitting an obstruction to plaintiff's safe passage. The action was discontinued as against defendants Town of Hempstead Industrial Development Agency and Town of Hempstead Local Development Corporation.

In support of its motion for summary judgment, the County submits the pleadings, transcripts of the parties' respective depositions and photographs provided by plaintiff and marked at her deposition. The County argues that it cannot be found liable for plaintiff's injuries because it was not reasonably foreseeable to expect that plaintiff would follow her dog through a bed of reeds in an area where dogs were not permitted. The County further argues that the alleged hole or

depression was inherent or incidental to the nature of the land and could be reasonably anticipated by those using it.

In opposition to the motion, plaintiff submits her counsel's affirmation and her own affidavit. Plaintiff argues that there are questions of fact precluding summary judgment. Plaintiff contends that there is an issue of fact as to whether the County created the condition by removal of a dead bush and whether there should have been warnings of dangerous conditions. She states in her affidavit that if there had been warnings about the dangerous or hazardous conditions, she would not have walked in the area of the park where she was injured.

Plaintiff testified at her deposition that she went to Wantagh Park to walk her dog. At the time of the accident she was walking along the fence line, and was not walking in a walkway or path. While walking in the grass area, she stepped into a depression and "heard [her] bones snap." She did not notice the depression prior to her fall. Plaintiff was shown five (5) pictures, which are annexed to the motion papers, which she stated accurately depicted the area in which the incident is alleged to have occurred. Plaintiff testified that she was walking in the areas depicted in the photographs. She was not aware how far she was away from the bushes because she was following her dog. Plaintiff had never complained of the condition, which is alleged to have caused the incident, nor is she aware of anyone who had made such complaint.

Sean McBride, a Deputy Commissioner of Parks was deposed on behalf of the County. He testified that Wantagh Park has facilities for public use, including a marina, tennis courts, softball and baseball fields, a fitness trail and a dog run. Maintenance, repairs and landscaping are all performed by the County. Having reviewed the photographs marked at the plaintiff's deposition, Mr. McBride testified that there were no pathways in that area of Wantagh Park

Also deposed on behalf of the County was Michael Califano, who is presently the landscaping supervisor for Wantagh Park. He testified that the plants depicted in the photographs are what he knows as Phragmites. He testified that while he didn't know if they were planted in that location, but that Phragmites "sprout up everywhere." He stated that they border the shoreline of the parks to prevent erosion and that they are a protected species "so we can't do anything to them."

Discussion and Ruling

"To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries." (*Coral v State of New York*, 29 AD3d 851, 851 [2d Dept 2006]). Where the plaintiff fails to establish a duty of care, there is no breach and no liability. (*Schindler v Ahearn*, 69 AD3d 837, 838 [2d Dept 2010]).

It is well established that property owners and occupiers owe a duty of reasonable care under the circumstances to keep their premises safe (*see Basso v. Miller*, 40 NY2d 233, 240–241 [1976]. The scope of that duty is defined by "the foreseeability of the possible harm" (*Tagle v. Jakob*, 97 NY2d 165, 168 [2001], an issue which can be resolved by the court "when but a single inference can be drawn from undisputed facts" (*Hessner v. Laporte*, 171 AD2d 999, 999 [3d Dept 1999]). Whether a landowner can be held liable in damages is determined based on the

foreseeability of the plaintiff's presence in light of the frequency of the use of the area where the accident occurred. (*Mulholland v. Willis*, 177 AD2d 482, 483 [2d Dept 1991]; see *Basso v. Miller*, 40 NY2d at 241). A municipality is under a duty to maintain its park and playground facilities in a reasonably safe condition. (*Nicholson v .Board of Educ.*, 36 NY2d 798, 799 [1975]).

The Court finds *Pusey v. Stark*, 166 AD3d 918, 919 [2d Dept 2018] analogous to the case at bar. In that case, the plaintiff sued the homeowners after she tripped and fell on stake and wire supporting a bush in flower bed adjacent to front of home. The Court held that the defendants were under no duty to warn of or otherwise protect the plaintiff from a condition that posed no reasonably foreseeable hazard (citing *Tagle v. Jakob*, supra). The *Pusey* Court held that "[t]he evidence submitted in support of the defendants' motion, which included the deposition testimony of the parties, established that this area of the premises was not intended to be used as a path or thoroughfare" and found that it was not foreseeable that the plaintiff would traverse the area where she fell. (*Pusey v Stark*, 166 AD3d 918, 919 [2d Dept 2018].

Also similar are *Reed v 64 JWB, LLC*, 171 AD3d 1228, 1230 [2d Dept 2019], *lv to appeal denied*, 35 NY3d 902 [2020])(no duty of care to keep the grassy median clear of snow, as the unpaved median was not intended to be a public walkway) *Grosskopf v. Beechwood Org.*, 166 AD3d 860, 860 [2d Dept 2018] (no duty on landowner to shovel ice and snow on grassy lawn, which was not designed to be a passageway, since it was not reasonably foreseeable that the plaintiff would be walking there) and *Kirby v. Summitville Fire Dist.*, 152 AD3d 926, 928 [3d Dept 2017](strip of land between firehouse and line of trees/shrubbery not used as a walkway).

At bar, the plaintiff fell in an area along the fence of the park, consisting of a bed of reeds and grass, not part of a path or public walkway. The Court finds that the County does not, as a matter of law, owe a duty of care to maintain the area reasonably safe as a path, when it was not intended to be a public walkway.

Plaintiff's reliance on *Caldwell v. Vill. of Island Park*, 304 NY 268 [1952] in arguing that the County had a higher duty to park users is misplaced. In that case, an infant plaintiff had been injured by fireworks. At issue was whether the municipality should have provided an adequate degree of supervision where it had been previously aware of the "illegal and ultrahazardous activity" of fireworks being set off at the park.

The Court also determines that the condition was inherent to the nature of the land and could be reasonably anticipated by those using it. (*Mazzola v.* Mazzola, 16 AD3d 629, 630 [2d Dept 2005]; *Nardi v. Crowley Mar. Assoc., Inc.*, 292 AD2d 577, 577-78 [2d Dept 2002]; *Badalbaeva v. City of New York*, 55 AD3d 764, 764 [2d Dept 2008]).

The photographs produced by plaintiff and identified at her deposition show that the area where the depression existed was a reedbed. Based on the tape measure appearing in some of the photos (taken by plaintiff's counsel) the depression was approximately 3" to 4" deep. It could be reasonably anticipated that by walking off any pathway into a bed of reeds there could be hazardous conditions inherent to the nature of the land, including small holes and divots. Moreover, there is no testimony or other evidence that the County caused the condition by the removal of any plant or shrub. The statements in plaintiff's counsel affirmation suggesting that the

County may have removed a bush or shrub are purely speculation and insufficient to create an issue of fact.

Based upon all of the foregoing, the Court finds that the County has established, prima facie, its entitlement to summary judgment, and that plaintiff has failed to raise a triable issue of fact. Accordingly, the County of Nassau's motion for summary judgment is **GRANTED** and plaintiff's complaint is **DISMISSED**.

This constitutes the Decision and Order of the Court.

Dated: ~~September~~ October 5, 2021
Mineola, NY

Helen Voutsinas
Justice of the Supreme Court

ENTERED
Oct 13 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE