

<b>Cimorelli v Monticello Raceway Mgt. Inc.</b>
2021 NY Slip Op 33283(U)
February 25, 2021
Supreme Court, Orange County
Docket Number: Index No. EF007736-2018
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 24th day of February, 2021.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

\_\_\_\_\_  
JEANINE CIMORELLI,

Plaintiff,

-against-

MONTICELLO RACEWAY MANAGEMENT  
INC.,

Defendant.

\_\_\_\_\_  
VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for appeals of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

**DECISION & ORDER**  
EF007736-2018  
Motion Date: 11/12/20  
Motion Seq. #1

The following papers numbered 1 through 22 were read on defendant's motion for summary judgment, dismissing the complaint:

PAPERS

NUMBERED

Notice of Motion/Affirmation in Support (Loftus)/Exhibits A - M	1 - 15
Affirmation in Opposition (Mainetti)/Exhibit A - B	16 - 18
Reply Affirmation (Loftus)	19
Surreply Affirmation (Mainetti)/Exhibits A & C	20 - 22

Plaintiff brings this action for injuries she had sustained on May 22, 2018, from an alleged trip and fall on a swivel chair on defendant's premises in the main Casino floor located at Route 17B, Monticello. Plaintiff died on July 16, 2019, and her husband Charles Cimorelli, Jr was appointed administrator of her estate (Exhibit E). Plaintiff filed the Summons and Complaint on July 25, 2018. A Stipulation Amending Caption was filed on October 30, 2018, discontinuing Empire Resorts Inc. from the action. An Answer was filed by defendant on October 31, 2018. Plaintiff served a Further Supplemental Bill of Particulars, dated September 16, 2020, adding that defendant had failed to

secure swivel chairs to the floor and that the chair in this incident had “excess swivel.” Defendant moves here for summary judgment, in that the alleged defective condition was open and obvious, and not inherently dangerous.

Section 3212(b) of the Civil Practice Law & Rules states, in pertinent part, that a motion for summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Section 3212(b) further states that “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” “Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact.” (*Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]). In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party (see *Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011]).

A New York landowner owes “. . . people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition . . .” (*Tagle v Jakob*, 97 NY2d 165 [2001]). However, “[i]n order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence” (citing *Lezama v. 34-15 Parsons Blvd, LLC*, 16 AD3d 560; see *Friedman v. 1753 Realty Co.*, 117 AD3d 781 [2d Dept 2014]; *Tavarez v Pistilli Assoc. III, LLC*, 2018 NY Slip Op 03727 [2d Dept May 23, 2018]).

“There is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous” (*Holdos v. Am. Consumer Shows, Inc.*, 91 AD3d 823 [2d Dept

2012]). “While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence” (*Graffino v. City of New York*, 162 AD3d 990 [2d Dept 2018]). “[W]hether a dangerous or defective condition exists on the property of another so as to create liability ‘depends on the peculiar facts and circumstances of each case’ and is generally a question of fact for the jury” (*Richardson v. Brooklake Assocs., L.P.*, 131 AD3d 1153 [2d Dept 2015]).

Defendant argues that plaintiff decedent had been to the Casino once to twice per month for over ten years prior to the incident, had used the chair involved on many occasions, and that both her and her husband had testified that the accident occurred near her favorite machine and chair (Exhibit D, p 9 and Exhibit F, p 22). Defendant further argues, that plaintiff decedent failed to utilize reasonable use of her senses, which was the direct and proximate cause of her fall. Defendant attached surveillance footage and photographs pertaining to the incident. Defendant also provided an Affidavit of David A. Guido, P.E., CSP, a licensed professional engineer, dated October 8, 2020, in which he stated the following: “There are no known applicable codes or mandatory standards requiring the Casino to bolt down the swivel chair or to place warnings in the area of the swivel chairs. Further, there is no known applicable code or mandatory standard that limited the amount of swivel in a chair at a casino. Further, the deposition testimony establishes that the slot machines at the Casino were accessible to handicapped individuals as the record reveals that upon request any handicapped individual who wished to use the machines could easily have a staff member remove the chair” (Exhibit M).

Plaintiff avers that defendant had actual notice and constructive notice of the swivel stool that caused plaintiff to fall, and had adequate opportunity to remedy it. Plaintiff further claims that it was not open and obvious that the stools were not affixed to the ground. Moreover, plaintiff argues that the decedent on the date of the accident and on prior occasions had searched for handicap accessible gaming machines. However, defendant had no designated handicap accessible machines available (Exhibit D, p 12). Plaintiff submitted a report by Stanley H. Fein, P.E., dated September 1, 2020, who provided, “The chairs were not bolted to the floor . . . The chair had a swivel of 180 degrees to 200 degrees. This was far in excess of the safe amount of swivel” (Exhibit B).<sup>1</sup>

Scott Gavin, former security supervisor for defendant, was deposed on August 14, 2020, and stated that “[p]eople have fallen out of those chairs. We’ve had people just completely miss the chairs, you know. They’ve fallen getting into them . . .” (Exhibit I, p 9). He later indicated that “I’ve seen people lose their balance, attempt to use the chair to avoid falling over and because the chair swivels they went down” (Id. at 13).

However, this Court finds that plaintiff decedent was aware of the swivel chair, and that it could reasonably have been anticipated that she would fall as a result of her actions, relieving defendants of any liability (*Torres v. State*, 18 AD3d 739 [2d Dept 2005]). Consider the following exchange which plaintiff testified to on July 9, 2019 (Exhibit D, p 9-10):

A: I came in. I went over to where I usually play. I call it my favorite machine. I went over and that’s where I played. It was the machine next to the end of the row and I usually play there because I do pretty good.

Q: Did you make it to that machine without falling or did you fall?

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<sup>1</sup> Plaintiff filed a Surreply “to correct an oversight by plaintiff’s counsel in submitting an Expert Report of plaintiff’s expert Stanley H. Fein, P.E., that was not notarized, which plaintiff attached to their opposition papers as plaintiff’s Exhibit B,” and attached a Notarized Affidavit of Mr. Fein. Defendant objected to the submission. The Court will consider plaintiff’s Surreply in the instant motion.

A: Yes, I did. I fell when I got to the machine.

Q: What caused you to fall?

A: Well, I just went to take a hold of the chair to brace me so I could get in and the chair flew and I flew with the chair.

Although plaintiff decedent testified she would have used a handicap accessible machine had they been available at the Casino, she had referred to the machine as her favorite (Id. at p 12). She later indicated that the cause of her fall was the swiveling of the stool that she grabbed (Id. at p 17). Tyrone Sanders, former security guard for defendant who had filled out the Incident Report, provided that plaintiff decedent had said “she tripped and fell from one of the chairs” (Exhibits H).

Plaintiff’s husband testified on January 13, 2020 that his wife mentioned that the man sitting next to her told her to be careful, “these chairs swivel” (Exhibit F, p 24). In reviewing the videotape of the within incident, he further testified that it looked as if his wife put her purse onto one of the swivel chairs, then put her hand on the back of the chair and then fell (Id. at p 53). However, he also testified that he and his wife went to the Casino once a month for the ten years prior to this incident and that about a year before the accident, the couple went to the Casino twice a month (Id. at p 15). He explained that his wife would play the slot machines and they would stay five hours (Id. at 16). He stated she also had a favorite chair which happened to be the same chair involved in this incident (Id. at p 22). There is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous. The court finds based on the facts of this case that there was no duty to inform or warn the plaintiff of the open and obvious condition of a swivel chair not bolted to the ground that she herself has used for over a decade without incident to her. A swivel chair in itself is not inherently dangerous. She was well aware of what chairs the casino had and the foreseeable risk of falling, when she leaned against the swivel chair. The evidence is clear and undisputed.

**Conclusion**

Upon the foregoing, it is hereby


**ORDERED** that the defendants' motion for summary judgment is granted; and it is further

**ORDERED** that the complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 25th, 2021  
Goshen, New York

ENTERED

  
HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record via NYSCEF