

Arena v Ricciardi

2021 NY Slip Op 33727(U)

June 14, 2021

Supreme Court, Nassau County

Docket Number: Index No. 617803/2019

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

MARK ARENA,

TRIAL/IAS, PART 12
NASSAU COUNTY

Index No. 617803/2019

Plaintiff,

-against-

Motion Seq. No.: 001
Motion Submitted: 5/13/21

RENATO RICCIARDI and SANDRA
RICCIARDI,

Defendant(s).

x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits/Memorandum of Law.....X
Affirmation in Opposition/Supporting Exhibits.....X
Memorandum of Law in reply.....X

Defendants, Renato Ricciardi (Renato) and Sandra Ricciardi (Sandra), move this court pursuant to CPLR §3212, for an order granting summary judgment and dismissing the complaint against them. Plaintiff, Mark Arena (Arena), opposes the motion.

This action arises from an accident that occurred on August 22, 2019 outside of 1 Deepdale Court, Glen Cove, County of Nassau, a private residence (the residence). The home is owned by Defendants. On August 22, 2019, Arena, a delivery driver, parked his truck alongside the front curb of the residence in order to deliver an envelope to

Defendants. Arena exited his truck from the passenger side, causing him to step onto the Defendants' front lawn. Defendants' driveway was bordered by one line of bricks on either side of the driveway. As Arena walked across the lawn, he stepped on one of the bricks which dislodged, causing him to fall.

Arena commenced this action by the service of a summons and complaint dated December 13, 2019. Issue was joined by service of answer dated January 10, 2020. The case certified ready for trial on March 4, 2021 and a note of issue was filed on March 9, 2021.

In support of their motion, the Defendants submit, *inter alia*, the pleadings, the deposition transcripts of the Defendants, and photographs of the residence. The Defendants argue they are entitled to summary judgment because they had no notice of any defect and they did not create the defect. Further, the Defendants argue that the brick was an open and obvious condition.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. (*see Sillman v. Twentieth Century Fox Films Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [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 action. (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, (*see Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

“A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk” (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2nd Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

“To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

In his affidavit, Renato reported that he mows his lawn weekly. During this process, his lawnmower comes into contact with the bricks bordering the driveway. Renato stated that he never observed any of the bricks moving as a result of contact with the lawnmower. Furthermore, Defendants report never having seen the brick out of place before the day of the accident. In their memorandum of law in support of the motion, Defendants equate the contact with the lawnmower and general observation of the brick not being out of place with inspection. However, Defendants describe more of a general observation, as opposed to a “particularized and specific inspection” necessary to constitute a lack of constructive notice. (*Birnbaum v. New York Racing Ass'n, Inc.*, 57 A.D.3d 598, 869 N.Y.S.2d 222 [2008]). Similarly, the weekly lawn maintenance is a generalized procedure with no specific intention of inspecting the bricks. Therefore, Defendants have not met the burden of demonstrating lack of constructive notice.

Defendants also argue that the brick was an open and obvious condition. A landowner has no duty to warn against an open and obvious condition. (*Clayton v. Marcy Supermarket and Deli Corp.*, 191 AD3d 842 [2d Dept 2021]). Herein, Defendants’ argument is misplaced. While the bricks themselves were certainly open and obvious, that one of them was loose was not. Regardless, when a condition is open and obvious it only raises issues of comparative fault and does not absolve a defendant of liability. (*Dunitz v. J.L.M. Consulting Corp.*, 22 AD3d 455 [2d Dept 2005]). Further, Defendants’ own testimony that they had never observed a brick out of place prior to the

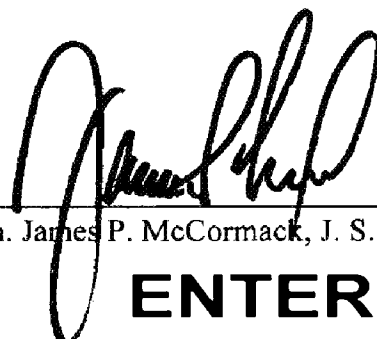
accident contradicts the argument that the brick's condition was open and obvious.

The court therefore finds the Defendants have not established entitlement to summary judgment as matter of law.

Accordingly, it is hereby,

ORDERED, that Defendants'; motion for summary judgment is DENIED in its entirety.

Dated: June 14, 2021
Mineola, New York



Hon. James P. McCormack, J. S. C.

ENTERED

Jun 18 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE