

Rampersaud v Jagdeo
2021 NY Slip Op 33958(U)
October 4, 2021
Supreme Court, Queens County
Docket Number: Index No. 719503/2018
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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GOMATTIE RAMPERSAUD,

Index No.:719503/2018

Plaintiff,

Motion
Date: September 29, 2021

-against-

POWANKUMAR JAGDEO and HARRINARINE
JADGEO,

Motion Cal. No.: 26

Defendants.

Motion Sequence No.: 3

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POWANKUMAR JAGDEO and HARRINARINE
JADGEO,

Third-Party Plaintiffs,

-against-

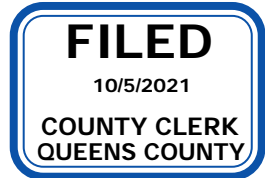
SEVENAND SUKHRA A/K/A/ MONAJ SUKHRA,

Third-Party Defendant.

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The following e-filed papers numbered EF 44-62 submitted and considered on this motion by POWANKUMAR JAGDEO and HARRINARINE JAGDEO (collectively referred to as “Jagdeo”) seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as “CPLR”) 3212 granting Jagdeo summary judgment dismissing all claims and cross claims asserted against Jagdeo and for such other and further relief as this Court deems just and proper.

	Papers
	<u>Numbered</u>
Notices of Motion - Aff. - Exhibits.....	EF 44-57
Aff. in Opp.....	EF 58-60
Reply	EF 61-62



Plaintiff commenced this action to recover for personal injuries she sustained in the backyard of the premises located at 145-42 111th Avenue, Queens, New York (“Premises”). Plaintiff was invited to the Premises to attend the 50th birthday party of third-party defendant SEVENAND SUKHRA A/K/A/MONAJ SUKHRA (hereinafter referred to as “Sukhra”). There is no dispute that at or around 12:45 AM on May 28, 2018, Plaintiff was standing in the tent situated in the backyard of the Premises, that Sukhra was in the vicinity of the tent when he tripped over a metal support bar for the tent, that protruded approximately 2 inches out of the ground, and landed on Plaintiff causing her to sustain injuries.

The moving party on a motion for summary judgment has the burden of demonstrating "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

“Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition” (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). “That duty is premised on the landowner’s exercise of control over the property, as ‘the person in possession and control of property is best able to identify and prevent any harm to others’” (*id.*, quoting *Butler ex rel. Butler v Rafferty*, 100 NY2d 265, 270 [2003]). A defendant moving for summary judgment in a premises liability action has the burden of making a prima facie showing that it neither created the alleged hazardous or defective condition nor had actual or constructive notice of its existence (*see Johnson v NBO Realty, Inc.*, 147 AD3d 743 [2017]; *Beri v Chung Fat Supermarket, Inc.*, 125 AD3d 587 [2015]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] [internal citations omitted]; see also *Diaz v LaGuardia Express, LLC*, 186 AD3d 1616 [2020]).

The Jagdeo defendants argue that the alleged hazardous condition was open and obvious not inherently dangerous or defective as a matter of law. That, assuming arguendo it was dangerous and defective it was trivial. Finally, Jagdeo defendants argue that the proximate cause of the Plaintiff’s injuries was the conduct of a third-party, not any negligence attributable to the Jagdeo defendants.

Generally, the issue of whether a dangerous or defective condition exists on the property of the defendant turns on the facts of each case and is a generally a question of fact for the jury (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]; see also *Simos v Vic-Armen Realty, LLC*, 161 AD3d 1023 [2d Dept 2018]). “A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; see also *Cortes v Taravella Family Trust*, 158 AD3d 788 [2d Dept 2018]; *Chojnacki v Old Westbury Gardens, Inc.*, 152 AD3d

645 [2d Dept 2017].) There is “no duty to warn of an open and obvious danger.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 507 [2012], quoting *Tagle v Jakob*, 97 NY2d 165, 169 [2001].) “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. (*Tagle v Jakob*, 97 NY2d at 169 [citations omitted].) “A condition can be said to be open and obvious where it is readily observable by the reasonable use of one's senses.” (*Knightner v Custom Window, Door Products, Inc.*, 289 AD2d 455, 456 [2d Dept 2001].) “Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances.” (*Calandrino v Town of Babylon*, 95 AD3d 1054 [2d Dept 2012].) However, whether the condition was open and obvious only raises a triable issue of fact as to the injured plaintiff's comparative negligence. (*Batts v IBEX Const., LLC*, 112 AD3d 765, 768 [2d Dept 2013]; *Cooper v. American Carpet & Restoration Servs., Inc.*, 69 AD3d 552, 553 [2d Dept 2010].)

Jagdeo argues, there was lighting under the tent and there is no testimony that Sukhra or anyone at the party did not observe the support bar, was unaware of its existence, or that it was hidden or concealed in any manner. Furthermore, Sukhra testified that he was in fact aware of the existence of the support bar as he has resided at the Premises for years and had both attended and hosted events at the Premises in the past. According to Jagdeo, the support bars were installed and designed by a non-party manufacturer and non-party installer years prior. Jagdeo further argues, even if this Court finds the condition was dangerous or defective it was trivial and thus Jagdeo defendants are not liable.

Plaintiff testified as follows:

Q: Can you describe the tent that's in the backyard?

A: It's a permanent tent, and at the bottom they have like a bridge like a 2-inch height of something and everything's painted gray, so there's nothing to indicate that there's a bumped – not a bump. It's a – what you call it? A 2-inch height of rod. That's my explanation. Sorry.

Q: You said everything's painted gray so it's hard to see. Has there been an issue before?

(Page 28 lines 6-17)

According to Plaintiff, the elevation is hard to discern due to the lack of contrast in colors.


Sukhra's testimony suggests that the condition was dangerous due to difficulties with observing its presence. Within his testimony, Sukhra claims he told Jagdeo to “...put a highlight or something that people can notice it that, you know, to be careful with it.” (Page 29 lines 23-25). Sukhra further testified that he was suggesting that Jagdeo put something reflective on the condition (Page 53 lines 3-10).

Aside from the aforementioned testimony, Jagdeo defendants have not presented additional evidence which this Court can use to understand the appearance of the condition. The evidence presented does not eliminate all triable issues of fact. Therefore it is,

ORDERED, that the motion is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: October 4, 2021



Hon. Chereé A. Buggs, JSC