SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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THOMAS LEDDEN,

Plaintiff,

- v -

THE GRAMERCY PARK BLOCK ASSOCIATION, INC.,TRUSTEES OF GRAMERCY PARK

Defendant.

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INDEX NO. 151588/2020

MOTION DATE 06/10/2022, 06/10/2022

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 32, 34, 36, 38, 40, 42, 43, 44, 45, 46, 54, 55, 56, 57

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 33, 35, 37, 39, 41, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that defendants' motions for summary judgment are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on October 19, 2019 while attempting to climb over the fence surrounding Gramercy Park (the Park). Plaintiff commenced this action on February 12, 2020 against defendants Gramercy Park Block Association, Inc. (Block Association) and Trustees of Gramercy Park (Trustees).

Gramercy Park is a two-acre park located in the Gramercy Park Historic District in Manhattan. It is surrounded by a fence, with gates on each of its four sides. The gates require a key for both entry and exit. According to defendants, keys are provided to the 63-and-a-half surrounding lots, and an occupant of a surrounding lot can purchase a personal key. Entry to the Park is permitted only during daylight hours. Signs are posted inside the Park stating that it is a "private ornamental park for the use, benefit and enjoyment of the owners and occupants of the surrounding lots."

Alex Nguyen, Executive Director of the Block Association, testified that Block Association is an education nonprofit, whose primary purpose is "to make neighbors aware of news, events, projects going on in the park, in the neighborhood." Block Association contracts with the Trustees to provide certain services (the "Service Contract"). The Service Contract states in relevant part that Block Association will provide "Administrative services, under direction from the Trustees, including management of: 1. Park staff and maintenance."

James Clark, Chairman of the Trustees, testified that the Trustees are fiduciaries of the Gramercy Park Trust, and it is undisputed that they are responsible for managing the Park. The Trustees employ two caretakers to maintain and supervise the Park on a day-to-day basis. Although the Trustees manage the Park, Clark testified that Block Association has "some supervisory role for the park caretakers." As examples, Clark testified that Block Association may contact the Park's caretakers when an arborist is coming to prune the trees or might suggest to the caretakers when the sidewalk needs sweeping. Further, Clark testified that he was not aware of prior complaints regarding someone not being able to get out of the Park.

Plaintiff testified that on the evening of October 19, 2019, he and his wife were let into the Park by two males exiting the Park. At the time, plaintiff was not aware that entry was limited to key holders and their guests. After walking in the Park for approximately an hour, plaintiff and his wife discovered they were locked inside. There was no one else inside the Park at the time. Plaintiff did not recall making any calls for assistance, although he testified that he or his wife had a cell phone available. Plaintiff testified that there were at least some passersby outside the Park. At no point did he seek the help of any pedestrians. Plaintiff also did not make any effort to call the nearby buildings. He testified, "I did not think I needed assistance. I thought I'd be able to flip the fence and get assistance." Plaintiff testified that the distance from the Park gate to one of the nearby buildings was approximately 40-50 feet. After waiting 15-30 minutes, plaintiff moved a bench next to the fence and used it to climb

over. Plaintiff injured his left foot upon landing on the sidewalk. Plaintiff admits that the sidewalk was even and that the area was well lit.

Defendants now move for summary judgment pursuant to CPLR 3212 dismissing all claims (motion seq. 001 & 002).

"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 eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat a motion for summary judgment, the non-moving party bears the burden to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As to Block Association's motion for summary judgment, a contract to perform work generally does not create liability towards third party plaintiffs (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138-139 [2002]). However, the Court of Appeals in *Espinal* recognized three exceptions where a contract can create a duty to third parties:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely"

(*id.* at 140 [quotation marks and citations omitted]). Plaintiff argues that the Service Contract, along with the deposition testimony of James Clark, create an issue of fact as to Block Association's maintenance duties. Block Association argues that its duties were solely administrative.

At issue is the third *Espinal* exception, namely that the contractor entirely displaced the other party's duty. Here, even viewing the facts in the light most favorable to plaintiff, Block Association did not entirely displace the Trustees in their maintenance duties. While the Service Contract does make mention of Block Association's duties to manage "Park staff and maintenance," this language is

clearly listed under the heading "Administrative services" and specifies that these services would be provided "under direction from the Trustees." The plain reading of this section is thus that Block Association's duties include administrative services as they relate to park staff and maintenance; not that Block Association replaces the Trustees. This reading is in fact supported by Clark's testimony. As previously mentioned, as examples of maintenance functions, Clark testified that the Block Association may contact the Park's caretakers when an arborist is coming to prune the trees or the Block Association might suggest to the caretakers when the sidewalk needs sweeping. The Trustees employed the Park's two caretakers, who were directly responsible for day-to-day maintenance and supervision of the Park. As Block Association's maintenance duties were minimal and limited to its administrative functions, Block Association does not fall within the third *Espinal* exception and thus cannot be held liable for negligence here.

As to Trustees' motion for summary judgment, Trustees argue that they had no duty to plaintiff in light of the circumstances and that plaintiff was the sole proximate cause of his injuries.

A landowner has a duty to exercise reasonable care maintaining the property in 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 (*Basso v Miller*, 40 NY2d 233, 241 [1976]). However, there is "no duty to warn against a condition which is readily observable or an extraordinary occurrence, which would not suggest itself to a reasonably careful and prudent person as one which should be guarded against" (*Rovegno v Church of the Assumption*, 268 AD2d 576, 576 [2d Dept 2000] [quotation marks omitted], citing *Kurshals v Connetquot Cent. School Dist.*, 227 AD2d 593 [2d Dept 1996]). Moreover, there is no duty to warn against conditions that are open and obvious (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]).

Trustees cite to *Harris v Debbie's Creative Child Care, Inc.*, 87 AD3d 615 [2d Dept 2011]. In *Harris*, a nine-year-old plaintiff was injured when he attempted to enter a locked playground by

climbing onto a picnic table and attempting to climb over the fence (*id.* at 615). The Appellate Division found that the picnic table and the fence were not defective and that the risk of plaintiff's behavior was "readily perceivable" (*id.* at 616).[1] As in *Harris*, here the risk in moving a bench next to the fence and climbing over it was "readily perceivable" and there were no defects in the fence or the sidewalk. Thus, Trustees did not owe plaintiff a duty to warn of the dangers of climbing over the fence.

Further, as to proximate cause, a plaintiff must show that defendant's negligence was a substantial cause of the events producing the injury (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Although generally a question for the finder of fact, proximate cause may be decided as a matter of law in certain instances, such as where any negligence of the defendant "merely furnished the occasion for" another's act that caused the injuries (*id.* at 315-316).

In *Guida v 154 W. 14th St. Co.*, 13 AD2d 695 [2d Dept 1961], *affd*, 11 NY2d 731 [1962], plaintiff exited a building into an alleyway where a seven-foot-high metal gate blocked the only means of egress to the street (*id.* at 696). Despite evidence clearly showing there would be pedestrians passing in front of the alley at that hour, plaintiff did not make any reasonable attempt to attract aid and climbed over the gate after waiting just 10-15 minutes, sustaining injuries to his finger (*id.*). The Appellate Division held that defendant was not liable for plaintiff's injuries where his conduct was not reasonably foreseeable (*id.*). The court found, "Plaintiff was not in an emergent situation. He was in a position of absolute safety, although subjected to inconvenience" (*id.*).

Here, Plaintiff waited just 15-30 minutes before putting himself at risk by climbing the over the fence. Plaintiff does not dispute that there were pedestrians on the street he could have asked for aid. Moreover, either plaintiff or his wife had a cell phone they could have used to call for assistance. While likely subject to inconvenience, plaintiff was not in an emergency situation; he had other courses

[1] Defendant Block Association cited to the similar case *Negin v New York Aquarium*, 4 AD3d 511 [2d Dept 2004], where the Appellate Division held that defendants did not owe a duty to a thirteen-year-old plaintiff who injured himself hopping over a two-and-a-half to three-foot chain where the chain was not defective and the risk of jumping over it was "readily perceivable."

of action available to him (*see Guida*, 13 AD2d at 696; *see also Quintana v New York City Hous. Auth.*, 91 AD3d 578 [1st Dept 2012]). Therefore, plaintiff's decision to move the bench and climb over the fence was the sole proximate cause of his injuries.

In opposition, plaintiff fails to raise a triable issue of fact. The cases relied upon by plaintiff are distinguishable from the case at bar. In *Niewojt v Nikko Const. Corp.*, 139 AD3d 1024 [2d Dept 2016], plaintiff, an employee of a subcontractor, was injured when he scaled a six-foot-high fence after being locked in a school's gated sports stadium at night (*id.* at 1024-1025). Before attempting to scale the fence, plaintiff allegedly walked the perimeter of the fence looking for an exit and called out for help (*id.* at 1025). The Appellate Division held that there was a question of fact as to whether scaling the fence was a "natural and foreseeable response" to defendant's negligence (*id.* at 1026). The facts here are distinguishable. Unlike the plaintiff in *Niewojt*, here plaintiff did not take any reasonable steps available to him before attempting to climb the fence. He did not seek assistance from any passersby or attempt to contact nearby buildings, and he did not use a cellphone to call for help. As in *Guida*, plaintiff was in a position of absolute safety. Defendant could not reasonably foresee that someone in such a position would climb the fence to get out of the Park.

Plaintiff's reliance on *Feeley v Citizens Telecom. Co. of New York, Inc.*, 298 AD2d 745 [3d Dept 2002] is also unavailing. In *Feeley*, the plaintiff, a delivery driver, sustained injuries when he was catapulted from the top of a tractor-trailer while attempting to disentangle it from low-hanging wires (*id.* at 746). The Appellate Division, in reversing the trial court's grant of summary judgment, noted that plaintiff "spent a substantial period of time trying other methods to solve the problem and only when all other attempts failed did he climb atop the tractor-trailer" (*id.* at 747 [distinguishing from *Egan v A.J. Const. Corp.*, 94 NY2d 839 [1999] where the Court of Appeals held that plaintiff jumping out of a stalled elevator after waiting only 10-15 minutes was the superseding cause of his injuries]). Thus, the court held that there was a question of fact as to whether plaintiff's conduct was a superseding

cause (*id.*). Here, it cannot be said that plaintiff spent a substantial amount of time trying to find other means to get out of the Park. He waited just 15-30 minutes and did not exhaust the reasonable courses of action.

The affidavit of plaintiff's expert, Robert T. Fuchs, also fails to raise an issue of fact. The affidavit does not dispute that the risk of climbing the fence was readily apparent and that it was plaintiff's actions which caused his injuries.

Accordingly, it is

ORDERED that defendant Block Association's motion for summary judgment (motion seq. 001) is granted; and it is further

ORDERED that defendant Trustees' motion for summary judgment (motion seq. 002) is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

7/26/2022
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE