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| <b>McCarren v Troser Aerial Park, LLC</b>                                                                                                                                                                                      |
| 2022 NY Slip Op 35243(U)                                                                                                                                                                                                       |
| October 20, 2022                                                                                                                                                                                                               |
| Supreme Court, Monroe County                                                                                                                                                                                                   |
| Docket Number: Index No. E2020000253                                                                                                                                                                                           |
| Judge: Sam L. Valleriani                                                                                                                                                                                                       |
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At a Term of the Supreme Court, in  
and for the County of Monroe, Hall  
of Justice, Rochester, New York.

PRESENT: HON. SAM L. VALLERIANI  
Supreme Court Justice

SUPREME COURT  
STATE OF NEW YORK MONROE COUNTY

MARY KATE MCCARREN,  
*Plaintiff,*

-VS-

TROSER AERIAL PARK, LLC  
D/B/S BRISTOL MOUNTAIN AERIAL  
ADVENTURES,  
*Defendant.*

DECISION

INDEX No.: E2020000253

APPEARANCES:

Attorney for Plaintiff : *Kristen A. Merrick, Esq.*  
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Attorney for Defendant *Steven M. Zweig, Esq.*  
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Sam L. Valleriani, J.

Defendant filed a motion for summary judgment dismissing plaintiff's complaint with prejudice on the basis that the base of the fence erected around an aerial mobile park rope course was open and obvious and did not present an unsafe or dangerous condition as a matter of law.

Plaintiff opposes the motion contending that defendants have not met their burden on a motion for summary judgment. Mainly, plaintiff submits that defendant has failed to establish a prima facie case that the fence bases are open, obvious and not inherently dangerous, and in consideration of the circumstances, issues of fact exist whether the bases constitute a dangerous

condition.

Defendant operates a mobile aerial playground for children ages 4 to 12 which consists of nets, bridges, ropes and swings requiring participants to wear a full body harness (affidavit of S. Fuller, NYSCEF dkt 13 ¶1). The aerial playground is regulated, inspected and licensed by the State which State regulations require fencing around the park (*id.* ¶¶2,3). The aerial playground was in full compliance with its licensing requirements while set up at the Strong Museum of Play from June 15, 2018 through June 25, 2018 (*id.* ¶¶4,5).

Plaintiff testified that she brought her seven year old granddaughter to the aerial playground at Strong Museum of Play (McCarren EBT pp 26-30). Plaintiff testified that she and her granddaughter attempted to alert a worker that her granddaughter required assistance, but the employee was busy with another child and did not hear their pleas for help (*see id.*). Plaintiff claims that she overheard the employees discussing being short an employee since the employee did not show up as scheduled (*see id.* p 13). Plaintiff testified while looking up at her granddaughter to ensure she would not remove the harness and fall, she briskly walked along the fence to get the employees attention to assist when she tripped over a 4x4 block of wood constituting the foot of the fence causing severe injuries (*see id.* pp 26-30). The foot of the fence was protruding out perpendicular to the fence causing a tripping hazard (*see id.*).

#### Summary Judgment

It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Oddo v City of Buffalo*, 159 AD3d 1519, 1520 [4<sup>th</sup> Dept 2018]; *Wingrad v NY Univ. Med. Ctr.*, 64 NY2d 851,

853[1985]). The failure of the movant to make the prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; CPLR 3212[b]). The evidence must be viewed as true in a light most favorable to the non-moving party (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Dix v Pines Hotel, Inc.*, 188 AD2d 1007 [4<sup>th</sup> Dept 1992]). Once the prima facie showing has been met, the burden shifts to the non-moving opposing party to submit evidentiary proof in admissible form sufficient to raise a triable issue of fact (*Alvarez*, 68 NY2d at 324). The court's function on a summary judgment motion is issue finding not issue determination (*see Patton v Matusik*, 16 AD3d 1072 [4<sup>th</sup> Dept 2005]). The court must carefully consider the material facts to determine whether any facts are genuinely in dispute (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to warrant denial of summary judgment (*see Zuckerman*, 49 NY2d at 562; *see also Christina v Erbsmehl*, 233 AD2d 909, 910 [4<sup>th</sup> Dept 1996]).

The owner or occupier of property has a nondelegable duty to maintain a reasonably safe premises (*see DiPonzio v Riordan*, 89 NY2d 578, 582 [1997]; *Atkinson v. Golub Cop. Co.*, 278 AD2d 905, 906 [4<sup>th</sup> Dept 2000]; *see also Mills v Niagara Frontier Transportation Auth.*, 163 AD3d 1435 [4<sup>th</sup> Dept 2018]). Defendant in support of their motion have submitted evidence that the aerial playground was in compliance with state regulations, and the state inspection was current (Fuller affidavit). Fuller also provide a picture of the fencing including the 4"x4"foot of the fence which protruded out from the fence line (*see id.*).

In a factually similar case where plaintiff tripped over a curb, the Fourth Department held

that the defendant failed to establish as a matter of law that the curb was not inherently dangerous (*see Hayes v Texas Roadhouse*, 100 AD3d 1532, 1533 [4<sup>th</sup> Dept 2012]). In that case, plaintiff testified that she did not see the curb nor look for the curb as she was following two friends into the restaurant (*see id.*). Here, plaintiff testified, concerned that her granddaughter may fall, she was walking quickly to get an employee to assist while looking up at the child causing her to trip over the protruding 4"x4" foot. The evidence including the pictures submitted by defendant establish that it was conceivable that a parent would look up to monitor their young child while traversing along the fence where the protruding feet were located. It was also conceivable due to the age of the children, height above the ground and the nature of the activity that a parent may not see the large protruding feet. Defendants admit that there were no warning signs nor were parents warned about the subject feet (Fuller EBT, p 42-42; Clark EBT, p. 47-49; Warfle EBT, p. 13,29). "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances ... A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Hayes*, 100 AD3d 1533, [internal citations and quotation marks omitted]). Additionally as the *Hayes* Court determined and similar to this case, compliance with applicable regulations and inspections is not dispositive of defendant's negligence and liability (*see id.*, 1532).

Since defendant has failed to meet its initial burden, the court is not required to consider plaintiff's opposition papers, however, even assuming defendant met its burden, plaintiff's papers raise a triable issues of fact. Plaintiff has submitted the affidavit of Daniel E. Mossien, RA, NCARB, the CEO and President of Mossien Associates Architects, P.C. who opines that

“the subject fence footers in the area around the fence fail to meet any industry standard as it constitutes a hazardous condition and specifically a tripping hazard for spectators walking around the exhibit” (Mossien affidavit ¶G). Mossien admits that neither the American Society of Testing Materials or the New York State Code provide industry standards regarding the footers, but the International Property Maintenance Code §302.3 provides that all walkways must be “maintained free from hazardous conditions (*see id.* ¶¶C,D,E). He opines that the feet measuring 3.5" x 3.5" protruding out approximately 10 inches without warning signs constitute an inherent tripping hazard (*see id.*).

Lastly, actual or constructive notice is not required since defendant constructed the fence with the protruding feet (*Hayes* p. 1534).

Accordingly, defendants motion for summary judgment is denied.

Statement of Material Facts

The court will not deem any of the parties’ statements of material facts admitted as the parties have disagreed and submitted their own counter statements (*see generally In the Matter of Crouse Health v. City of Syracuse*, 126 AD3d 1336 [4<sup>th</sup> Dept 2015]). In the light of this court’s determination and for trial purposes the parties are encouraged to stipulate to a statement of undisputed facts.

This constitutes the decision of the court. Any relief requested but not specifically granted is denied. Plaintiff shall submit the order within on notice within 10 days.

Dated: 10/20/22

  
HON. SAM L. VALLERIANI  
Supreme Court Justice