

McCarren v Troser Aerial Park, LLC
2023 NY Slip Op 35215(U)
November 30, 2023
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(s),

DECISION

-vs-

INDEX No.: E2020000253

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

Defendant(s).

APPEARANCES:

Attorney for Plaintiff : *Kristin A. Merrick, Esq.*
1882 South Winton Road, Suite 1
Rochester, NY 14618

Attorney for Defendant: *Steven M. Zweig, Esq.*
5872 Camp Road
Hamburg, NY 14075

Plaintiffs' motion in limine

Plaintiff has filed a motion in limine seeking to preclude defendants from questioning plaintiff about "any instances of unrelated falls and any medical information related to the same" as not relevant or admissible; precluding testimony of any lack of prior safety complaints or injuries; and precluding defendants from asserting an architectural expert defense without an expert as they failed to produce any expert disclosure.

Defendant opposes the motion and submit that plaintiff's history of prior and subsequent

falls is directly relevant to the cause of plaintiff's stumble and fall in this case; the lack of prior incidences and complaints is relevant as proof that the fence was reasonably safe; and plaintiff's objection to defendants' potential proof regarding its adherence to codes and regulations is not a proper request for a motion in limine.

Unrelated Falls

Defendant contends that plaintiff's history of prior and post accident falls is relevant regarding whether plaintiff actually tripped on the fence or fell due to the lack of motor control and dexterity. The evidence is also relevant on the question of whether the fence as constructed constituted a dangerous condition. Defendant further argues that plaintiff opened the door when counsel questioned the treating surgeon regarding post-accident falls. Lastly, defendant asserts that the evidence is relevant on plaintiff's claim for "loss of enjoyment of life."

Plaintiff disagrees, asserting that the prior and post accident falls were not similar, did not involve a tripping hazard over a fence stabilizer nor involve her left shoulder except the July 2023 fall which did result in some bruising to the shoulder but no other injuries.

Upon review of the submissions, the court finds that since the prior and post accident falls were not similar to the subject fall defendants are precluded from questioning plaintiff or her treating physicians regarding those falls (*see Lukas v Trump*, 281 AD2d 400 [2d Dept 2001]; *Togut v Riverbay Corporation*, 114 AD3d 535 [1st Dept 2014]).

However, since plaintiff has made a claim for future "loss of enjoyment" defendant may illicit testimony regarding plaintiff's health conditions without involving the prior and post accident falls (*see id.*; *see also Nourse v Welsh*, 23 AD2d 628 [4th Dept 1965])[limited questioning may be proper]..

Lack of prior complaints or injuries

Plaintiff asserts that defendants should be precluded from offering any evidence or the lack of evidence of prior complaints and/or accidents. Here, defendant admits through stipulation that they “operated, created, maintained, inspected and controlled the subject area and subject condition (*see* stipulation dated July 6, 2020). Plaintiff asserts that she must prove (1) that the subject condition was unsafe; (2) that the unsafe condition was a substantial factor in causing accident and injury; and/or (3) that the defendant failed to warn plaintiff of the unsafe condition and that such failure was a substantial factor in causing plaintiff’s injuries; and (4) the amount of damages. Plaintiff submits that she does not have to prove that defendant knew of or had notice of the alleged dangerous condition since they “created the dangerous condition” (*see* PJI 2:91). Here, based upon the language of stipulation which appears to have been drafted by plaintiff’s counsel, defendant admits that they created the condition, but there is no admission that the condition was a dangerous condition. Defendant disputes that it was a dangerous condition.

Although the court generally agrees that the prior complaints or accidents are relevant to show notice which is not an element where a defendant creates the condition, “a lack of prior accidents is some evidence that a condition is not dangerous or unsafe” (*see Petronic v City of New York*, 211 AD3d 862,865 [2d Dept 2022] [internal citations and quotation marks omitted]). It is only a factor to be considered by the trier of fact which does not negate the possibility of negligence, and the court must give a limiting charge that it is only a factor for consideration, but not conclusive (*see id.*; *see also Zeigler v Wolfert’s Roost Country Club*, 291 AD2d 609,610 [3d Dept 2002]). The parties shall provide language regarding the limiting charge.

Accordingly, plaintiff’s motion is denied in this regard, subject to defendant laying a proper foundation for admission of such evidence.

Architectural Expert Defense without Expert Testimony

Plaintiff submits that since defendant did not provide expert disclosure nor produce any expert opinions, they should be precluded from offering any medical causation defense or architectural expert defense.

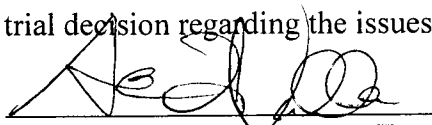
Defendant submits that this is not a proper request on a motion in limine.

The court has already ruled on the issue of plaintiff's prior and post accident falls, and potential health issues relevant to her future claim for loss of enjoyment which both parties must abide. The additional issue regarding an architectural expert defense is not proper on a motion in limine under the facts presented. Defendant is permitted to cross examine plaintiff's expert and present other relevant admissible proof. If its anticipated by either side that potentially inadmissible evidence will be offered, either party can request an offer of proof at that time.

This constitutes the motion in limine trial decision regarding the issues discussed herein.

Dated:

11/30/23


HON. SAM L. VALLERIANI
Supreme Court Justice