

Harrington v City of New York

2024 NY Slip Op 30680(U)

March 5, 2024

Supreme Court, New York County

Docket Number: Index No. 151597/2020

Judge: Hasa A. Kingo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. HASA A. KINGO PART 05M
Justice

JEREMIAH HARRINGTON, ANN HARRINGTON,
Plaintiff,

INDEX NO. 151597/2020
MOTION DATE 07/18/2023
MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF TRANSPORTATION, NEW YORK CITY DEPARTMENT
OF PARKS AND RECREATION

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31,
32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56
were read on this motion for SUMMARY JUDGMENT.

Defendants CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION
(hereinafter collectively "City") move for an order, pursuant to CPLR §3212, granting City
summary judgment dismissing the complaint. Plaintiffs JEREMIAH HARRINGTON ("plaintiff")
and ANN HARRINGTON ("spouse") (collectively "plaintiffs") oppose the motion. For the
reasons stated herein, the motion is granted.

BACKGROUND AND ARGUMENTS

On December 11, 2018, plaintiff was walking along the sidewalk, and tripped and fell when
he walked into the rear kickstand of a motorized scooter¹ that was affixed to a bike rack located
on Worth Street adjacent to Columbus Park in the City and County of New York. Plaintiff alleges
that plaintiff sustained personal injuries because of the fall, and that City was negligent in the
ownership, operation, maintenance, and placement of the bike rack. Spouse alleges loss of society,
services, and consortium as a result of the accident. It is undisputed that the motorized scooter was
not a City-owned motorized scooter, but rather was affixed to a City bike rack.

In support of the instant motion, City contends that the dismissal of the complaint is
justified because the subject bicycle rack was not defective and did not hinder the use of the

¹ In the submitted papers, the "motorized scooter" is also referred to as a "moped" and "scooter," among other things.
For purposes of this decision, reference to the "motorized scooter" encompasses reference to all the various names
attributed within the papers to the machine at issue in this litigation.

sidewalk. Additionally, City argues that the bike rack was open and obvious, easily observed by those using their senses reasonably, and thus, was not inherently dangerous (*Tagle v. Jakob*, 97 NY2d 165,169 [2001]; *Boyd v. New York City Housing Authority*, 105 AD3d 542, 543 [1st Dept 2013]; *Jimenez v. City of New York*, 191 AD3d 603 [1st Dept 2021]). In opposition, plaintiffs assert primarily that City is responsible for creating a dangerous condition by installing the bike rack and allowing a non-City motorized scooter to be attached to it. Furthermore, plaintiffs argue that City had constructive notice of the perilous situation, given that the same motorized scooter had been parked at the location for several months before plaintiff's accident. Plaintiffs also take umbrage with City's contention that the motorized scooter kickstand was open and obvious, and likewise aver that City failed to provide signage regarding the alleged illegality of the motorized scooter remaining annexed to the bike rack.

DISCUSSION

The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v. New York Univ. Med., Ctr.*, 64 NY2d 851 [1985]). “The proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once the movant has satisfied this standard, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Kaufman V. Silver*, 90 NY2d 204 [1997]).

It is well settled that “a landowner has no duty to warn of an open and obvious danger” (*Taele v. Jakob*, 97 NY2d 165, 169 [2001]). In accordance with this principle, a judgment as a matter of law is justified when “the condition in question was not inherently dangerous and could be easily observed through the reasonable use of one’s senses” (*Philips v. Paco*, 106 AD3d 631 [1st Dept 2013]; *Villanti v. BJ's Wholesale Club, Inc.*, 106 AD3d 556 [1st Dept 2013]). Moreover, “a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion” (*Tagle*, 97 NY2d at 169, *supra*). To this end, courts may consider photographs in analyzing whether an alleged condition is open and obvious (*see Zhao v. Brookfield Off. Props., Inc.*, 128 AD3d 623, 623 [1st Dept 2015][finding that submitted photographs demonstrated that alleged condition was open and obvious]). A complaint should be dismissed where the facts provide the claimed condition is open and obvious, not inherently dangerous, and photographs confirm that the condition is “plainly observable and did not pose any danger to someone making reasonable use of his or her senses” (*Boyd*, 105 AD3d at 543, *supra*; *Jimenez*, 191 AD3d 603, *supra*).

Here, the testimony and photographs of the bike rack compel a conclusion that the subject barrier was open and obvious and not inherently dangerous (*see Wachspress v. Central Parking Sys. of N.Y., Inc.*, 111 AD3d 499, 499 [1st Dept 2013]). The bike rack over which plaintiff tripped was neither a defective condition nor an inherently dangerous condition. Rather, it had a purpose and was used for that purpose on the date of accident. Thus, it was not a trap that ordinarily imposes liability. Plaintiff tripped over the rear kickstand of the motorized scooter, placed within the bicycle rack, because he moved to the left as a man was passing by. Moreover, plaintiff observed

the bicycle rack prior to the incident. As demonstrated by record before the court, which includes photographs and ample testimony, the condition that could have been readily observed (the bicycle rack and bicycles therein) was in fact observed by plaintiff prior to the incident. This supports the argument that it was open and obvious. Plaintiff's testimony and photographs further establish that the subject "bike rack" was a structure highly visible, readily observable to those employing the reasonable use of their senses, and thus open and obvious and not inherently dangerous. Lastly, the City did not own, operate, manage or place the motorized scooter within the bicycle rack. As such, City has established a prima facie entitlement to judgment in its favor.

To the extent that plaintiffs are alleging the subject condition to be the illegally parked motorized scooter kickstand, it is undisputed that City did not own, operate, manage or place the motorized scooter within the bicycle rack. As such, City must have undertaken an affirmative act of negligence – not merely engaged in nonfeasance to impart liability to City (*Zizzo v. New York*, 176 AD2d 722 [2d Dept 1991]). Plaintiffs' argument that City failed to remove the illegally parked motorized scooter, or failed to place signage regarding the illegality of same, as the cause of the accident, is an argument of City's nonfeasance, and therefore is unavailing. Even if City failed to remove the illegally parked motorized scooter, or place signage, that would not be an act of affirmative negligence by City that caused or created the condition (the motorized scooter kickstand). Rather, it would be mere nonfeasance, which is insufficient to confer liability upon City (*see Poirer v. City of Schenectady*, 85 NY2d 310, 313 [1995]).

Plaintiffs further attempt to rebut City's prima facie showing by contending that "the City has set forth no evidence that it didn't have notice of the moped parked illegally at the subject bike rack with the kickstand protruding into the sidewalk." Contrary to plaintiffs' assertions, a review of all relevant agency records exchanged in this matter reveals that City did not have notice of the alleged condition. Plaintiff also fails to come forth with any evidence raising a triable issue of fact that City received notice of the condition alleged. Likewise, the expert affidavit submitted by plaintiff is speculative, and wholly improper in that it renders multiple legal conclusions that are completely unrelated to the experts' area of expertise. Moreover, the assertions contained within the affidavit are unsupported by the evidence, and therefore insufficient to raise a triable issue of fact.

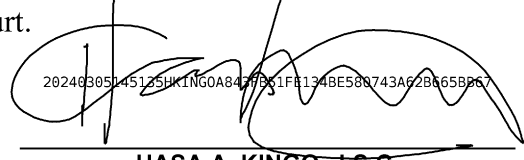
In sum, the facts and record evidence presented, including plaintiff's sworn testimony and photographs, establish that subject bicycle rack was a structure clearly visible, readily observable by those employing the reasonable use of their senses, and thus open and obvious and not inherently dangerous. Likewise, the motorized scooter kickstand was not owned, operated, managed or placed by City. Even if City failed to remove the motorized scooter or provide signage, that would not be an act of affirmative negligence by City. Rather, it would be mere nonfeasance, which is insufficient to impose liability City. In response to City's prima facie showing, plaintiff has failed to raise any triable issues of fact that would warrant determination by a finder-of-fact.

Accordingly, it is hereby,

ORDERED that City's motion for summary judgment is granted and the case against City is therefore dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.



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HASA A. KINGO, J.S.C.

3/5/2024

DATE

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE