M.R. v New York City Hous. Auth.
2024 NY Slip Op 34945(U)
December 4, 2024
Supreme Court, Bronx County
Docket Number: Index No. 25758/2020E
Judge: Alison Y. Tuitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART:5

M.R., an infant, by her mother and natural guardian MIGDALIA BARRIOS and MIGDALIA BARRIOS, Individually,

Plaintiffs,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

Index №.: 25758/2020E

Present:
Hon. Alison Y. Tuitt
Justice

HON. ALISON Y. TUITT

The following papers were considered on Defendant NEW YORK CITY HOUSING AUTHORITY's motion for summary judgment:

Papers	Numbered
Notice of Motion, Affirmation in Support and Exhibits, Statement of Material Facts	No. 1
Affirmation in Opposition and Exhibits, Statement of Material Facts	No. 2
Affirmation in Reply and Exhibits	No. 3

Upon the foregoing papers, the Defendant New York City Housing Authority moves for an order granting summary judgment pursuant to CPLR § 3212. Plaintiffs oppose the motion.

Plaintiff, M.R., an infant, by her mother and natural guardian MIGDALIA BARRIOS ("the infant" or "M.R.") and MIGDALIA BARRIOS in her individual capacity,

commenced this personal injury action on June 15, 2020. This is an action to recover for injuries M.R. sustained while playing on a gate located at the Defendant's playground. Defendant now moves for summary judgment arguing: 1) it had no notice of the defective condition; 2) it was not negligent in the maintenance of an unsecured, swinging gate that caused the amputation of the infant-Plaintiff's finger; and 3) the Defendant asserts that the gate was not an attractive nuisance. Defendant has also moved to dismiss any "loss of society" claims that have been alleged. Plaintiff in turn does not oppose the dismissal of the "loss of society" claim. Accordingly, the only issue for the court to decide is Defendant's motion for summary judgment.

BACKGROUND

On July 1, 2019, at approximately 6:20 p.m. at the St. Mary's Park Housing Complex located at 550 Cauldwell Avenue, Bronx, New York, infant M.R. was injured while playing on the gate of a fence adjacent to the playground at the housing Complex. In that regard, the gate slammed suddenly and forcefully which caused part of her finger to be amputated.

The inspection of the gate completed days before the incident by the Supervisor of the Grounds, on June 27, 2019, found that the gate's locks were missing and marked the inspection of the gate "Unsatisfactory" and added: "locks needed".

In support of its motion for summary judgment, Defendant argues that there is no evidence that the gate in question was broken, defective or in disrepair, and therefore the Plaintiffs' claims should be dismissed as a matter of law. In support of their contention, the Defendant submits the affidavit of its expert witness, professional engineer Mark I. Marpet. Defendant's expert asserts in his written report:

> At the time of my site inspection on November 4, 2020, I found the gate assembly, hinges, cane bolts and locking ears serviceable and in good condition. It is my professional opinion that the subject fence and gate is not negligently or defectively designed, constructed or in a defective condition needing repair.

(Defendant's Exhibit M at ¶ 2; NYSCEF Doc. No. 69).

In opposition to the Defendant's motion, Plaintiff submits the testimony of its expert, consulting engineer Anthony Mellusi. Mellusi inspected the subject gate, reviewed deposition transcripts, the discovery produced in this action, photographs, and the report of Defendant's expert witness.

Plaintiffs' expert concluded, "within a reasonable degree of engineering certainty, a door stop or finger guard on the hinge side of the gate could have been easily installed at a very minimal cost which would have prevented the accident from occurring on the above referenced date." (Plaintiff's Exhibit 1; NYSCEF Doc. No. 75).

Plaintiff's expert further opined, "Defendant's failure to either keep the gate locked or secured in a manner as noted above, or by placing an easily installed fingerguard to prevent a pinch point was negligent and this negligence was a substantial factor in causing the infant-Plaintiff's traumatic injury and subsequent amputation." (*See id*).

DISCUSSION

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk. In order to recover damages, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). "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's employees to discover and remedy it." (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]). Here, the Defendant's own inspection report prepared days before the incident found the gate to be in an unsatisfactory condition.

The party opposing a motion for summary judgment is entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of

the parties. *(See People v. Greenbere*, 95 AD3d 474, 484 [1st Dept. 2012]; *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2nd Dept. 2003]). This is because summary judgment is a drastic remedy, the procedural equivalent of a trial; it should not be granted if there is any doubt about the issue. (*See Vee.a v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Tadmor v. N.Y. Jiu Jitsu Inc.*, 109 AD3d 440, 443 [1st Dept. 2013]).

Here, based upon the foregoing, the court finds that there is an issue of fact as to whether the gate in controversy was negligently maintained by the Defendant. (*See Roberts v New York City Hous. Auth.*, 257 AD2d 550, 550 [1st Dept 1999]; *Charles v. Village of Mohawk* 128 A.D.3d 1477 (4th Dep't 2015). In that regard, in a similar case, the first Department held:

> It was a natural and foreseeable consequence of defendant's failure to effectively secure the lawn against access that young children would play there, and, as a matter of law, roughhousing is not such an "extraordinary" form of play as to break the causal connection between the dangerous condition on the lawn and plaintiff's injuries (*see Kush v. City of Buffalo*, 59 N.Y.2d 26, 33 [1983]).

(*Roberts v New York City Hous. Auth.*, 257 AD2d 550, 550 [1st Dept 1999]).

Here, it was a natural and foreseeable consequence of Defendant New York City Housing Authority's decision not to secure the gate adjacent to the playground that young children would play on the gate. (*See id.*) As a matter of law, roughhousing is not such an extraordinary form of play for young children. The court in *Charles v. Village of Mohawk* reached a similar conclusion regarding children playing on an unlocked gate. In that regard, the court held:

> Here, although we agree with defendant that there is nothing inherently dangerous about a gate that has no lock, defendant's own submissions raise triable issues of fact whether it was foreseeable that children such as plaintiff would misuse the gate in the manner giving rise to the accident.

(*Charles v. Village of Mohawk* 128 A.D.3d 1477 [4th Dep't 2015]). Here, the Defendant New York City Housing Authority's own witness, the supervisor of the grounds, testified at his deposition that he frequently saw children playing on the gate.

Accordingly, contrary to the defendant's contention, viewing the evidence in the light most favorable to the plaintiff as the nonmovant, the evidence relied upon by the defendants in support of their motion, which included a transcript of the plaintiff's deposition and the report of an expert witness, failed to establish the defendant's entitlement to judgment as a matter of law dismissing the complaint on the grounds that it was not negligent in its maintenance of the gate in controversy. *(Roberts v New York City Hous. Auth.*, 257 AD2d 550, 550 [1st Dept 1999]; *Charles v. Village of Mohawk*, 128 A.D.3d 1477 [4th Dep't 2015]).

Accordingly, it is:

ORDERED that the branch of the Defendant's motion seeking summary judgment is denied, and it is further

ORDERED that the branch of Defendant's motion to dismiss the loss of services claim is granted on consent.

This constitutes the Decision and Order of the court.

Dated: December 4, 2024

Hon.
ALISON Y. TUITT, J.S.C.