

Terlizzi v Town of Oyster Bay
2024 NY Slip Op 35532(U)
March 27, 2024
Supreme Court, Nassau County
Docket Number: Index No. 612541/2021
Judge: Conrad D. Singer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,

Justice

TRIAL PART: 21

-----X
ROBERT TERLIZZI and LISA TERLIZZI,

Plaintiff,

Index No.: 612541/2021

Motion Seq. No.: 001

Motions Submitted: 02/01/2024

-against-

DECISION AND ORDER
ON MOTION

TOWN OF OYSTER BAY,

Defendants,

-----X

The following papers were read on this motion:

Notice of Motion for Summary Judgment and Supporting Papers [Seq. 001]X

Affirmation in Opposition to Motion and Supporting Papers [Seq. 001].....X

Reply Affirmation [Seq. 001].....X

Upon the foregoing e-filed documents, the motion of the defendant, Town of Oyster Bay, for an Order pursuant to CPLR § 3212 and CPLR § 3126, granting summary judgment and dismissing the Plaintiffs' complaint, is determined as provided herein:

The Plaintiffs, Robert Terlizzi ["Plaintiff"] and Lisa Terlizzi ["Mrs. Terlizzi"] and when referred to collectively with the Plaintiff, "Plaintiffs"], commenced this premises liability action by filing a Summons and Verified Complaint on October 1, 2021. Issue was joined by the Defendant, Town of Oyster Bay ["Defendant" or "the Town"] serving its Verified Answer on or about October 26, 2021.

This action arose out of a trip and fall that allegedly occurred on March 6, 2021, at approximately 2:30 PM in Massapequa, New York, while the Plaintiff was playing roller hockey at the Marjorie R. Post Community Park with his son. The weather was nice and sunny with no precipitation on the ground. The accident occurred while the Plaintiff was skating backwards coming from the goal towards the faceoff circle. He was looking up and down while stick-handling

the ball when the rear wheel of his left skate allegedly got stuck in a crack in the pavement causing him to fall.

At the time of the accident, there was another group of individuals on the opposite side of the rink who were not playing with the Plaintiff or his son. The Plaintiff testified that he would usually go to the rink every weekend with his son. While skating, the Plaintiff was wearing hockey gloves but no other protective gear. The Plaintiff owned his incline skates for approximately a year and a half and they were in good condition at the time of the accident.

The Plaintiff testified that when he hit the crack, his right shoulder first hit the surface, followed by his whole body. He fell backwards and twisted at the same time, and landed on his right side on his shoulder. He did not hit his head on the ground, and did not lose consciousness. He testified that he last fell while playing hockey when he was younger. He got up on his own after his fall, but it took him a while to get up. He got up on his skates and slowly rolled to the net, and he used the net and the goal to lean on while he was in pain. He immediately felt pain in his lower back, and was a little uncomfortable in his shoulder but the pain was mostly in his lower back.

The Plaintiff did not observe the crack at any time before his fall, including during the prior times that he had used the rink. After his fall, he observed a triangular crack in the pavement, which he estimated measured 3.5-4 inches wide by 1.5 inches deep. He testified that he would not have skated backward if he had known about the crack in the pavement and that he would have been able to see the surface more if he had been skating forward.

The Town contends that it is entitled to an Order granting summary judgment and dismissing the Plaintiffs' Complaint, on the following grounds: 1) the alleged condition did not possess characteristics of a trap or nuisance, amounted to no more than a trivial defect, and no

dangerous or defective condition existed; 2) there was no prior written notice to the Town for any dangerous or defective condition relating to the surface of the hockey rink prior to the date of the Plaintiff's fall; 3) the Plaintiff was the sole proximate cause of his injuries through his own careless and incautious actions leading up to and causing his fall; and 4) Plaintiff voluntarily assumed the risks inherent in and arising out of the nature of the activity he was engaged in.

The proponent of a summary judgment motion must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*See, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Orellana v. Mendez*, 208 AD3d 888, 888 [2d Dept. 2022]). “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Cach, LLC v. Khan*, 188 AD3d 1135, 1136 [2d Dept. 2020]). “Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the court against summary judgment.” (*Cach, LLC.*, 188 AD3d at 1136). However, once the movant has made the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (*Alvarez*, 68 NY2d at 324). The opponent's mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a summary judgment motion. (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

The Town first argues that the subject crack amounted to a trivial defect and is not a condition as a matter of law. “A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to

establish an issue of fact.” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]).

“In determining whether a defect is trivial, the court must examine all of the facts presented, including the ‘width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury’ ... There is no ‘minimal dimension test’ or ‘per se rule’ that the condition must be of a certain height or depth in order to be actionable”. (*Simos v. Vic-Armen Realty, LLC*, 161 AD3d 1023, 1024 [internal citations omitted, citations omitted]). “Physically small defects may be actionable ‘when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or identify as hazards or difficult to traverse safely on foot’”. (*Id.*; citation omitted).

While the Defendant argues that the Plaintiff’s evidence fails to demonstrate that the crack is an actionable dangerous or defective condition, it is the Defendant, as the movant, who bears the initial burden of establishing that the subject crack is, “under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses”. (*Hutchinson*, 26 NY3d at 79). In this case, the Court finds that the Defendant failed to satisfy its *prima facie* obligation. The Town’s motion includes the transcripts from the Plaintiff’s deposition and 50-h hearing, as well as the transcript from the deposition of Sean Gardner, who testified on behalf of the Town and who works for the Town as a Laborer Supervisor. The Town also submitted photographs of the subject defect.

The evidence relied upon by the Town, when construed in the light most favorable to the non-moving Plaintiffs, fails to establish, as a matter of law, that the subject crack was a trivial defect. As pointed out by the Plaintiffs in their opposition paper, the Town’s witness Mr. Gardner examined photographs depicting the subject crack and testified that such a crack or hole would be repaired because it was a safety hazard. Such testimony, together with the Plaintiff’s testimony

and the photographs of the subject crack, fails to establish that the subject crack was a “trivial defect”. (*See Simos*, 161 AD3d at 1024-25).

The Defendant also argues that the Plaintiff’s Complaint should be dismissed due to lack of prior written notice. Where “...a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a defect or dangerous condition which comes within the ambit of the law unless it has received written notice of the alleged defect or dangerous condition, or an exception to the written notice requirement applies”. (*Morreale v Town of Smithtown*, 153 AD3d 917, 918 [2d Dept 2017][citations omitted]). “Prior written notice laws are in derogation of the common law and must be strictly construed.” (*Lagrasta v Town of Oyster Bay*, 88 AD3d 658, 930 NYS2d 254 [2d Dept 2011][citations omitted]).

The Defendant contends that prior written notice is required pursuant to Town Law § 65(a)(1), and Oyster Bay Town Code Section 160-1.

Town Law § 65(a)(1) provides as follows:

“1. No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the town clerk or town superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence; but no such action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge or culvert, unless written notice thereof, specifying the particular place, was actually given to the town clerk or town superintendent of highways and there was a failure or neglect to cause such snow

or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.” (Town Law § 65-a).

The Town cites to Oyster Bay Town Code Section 160-1, which provides as follows:

“No civil action shall be maintained against the Town of Oyster Bay for injuries or damages to persons or property sustained by reason of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out-of-repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, out-of-repair, dangerous or obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually served upon the Town Clerk or the Commissioner of Highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defective, out-of-repair, unsafe, dangerous or obstructed condition complained of. Under no circumstances shall the Town of Oyster Bay be liable for injuries or damages caused to persons or property due to the defective, out-of-repair, unsafe, dangerous or obstructed conditions of Town streets, highways, bridges, culverts, sidewalks or crosswalks in the absence of prior written notice, to the Town Clerk or the Commissioner of Highways, of the existence of such condition.” (Oyster Bay Town Code Section 160-1).

The Defendant has failed to demonstrate, *prima facie*, that the Plaintiff’s accident, which occurred due to an alleged crack in the surface of a roller rink, falls within the ambit of either the Town Law prior written notice provision or the Town of Oyster Bay’s prior written notice statute. (*See Lagrasta v Town of Oyster Bay*, 88 AD3d 658, 658-59 [2d Dept 2011])[location of accident which occurred on floating wooden dock at marina does not fall within ambit of Town’s prior written notice statute, which applies to any alleged defects on any “street, highway, bridge, culvert, sidewalk, or crosswalk”]). Therefore, the Plaintiff’s Complaint will not be dismissed due to lack of prior written notice.

The Town also argues that the Complaint should be dismissed because they did not have actual or constructive notice of the alleged defect. “A defendant in a trip-and-fall case who moves for summary judgment based on lack of notice has the initial burden of making a *prima facie*

showing that it neither created nor had actual notice of the alleged hazardous condition, and that it did not have constructive notice of the condition for a length of time sufficient to discover and remedy it”. (*Green v Albemarle, LLC*, 107 AD3d 948, 948 [2d Dept 2013] [citations omitted]). ““To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell’”. (*Green*, 107 AD3d at 948; citations omitted).

In this case, the Defendant failed to satisfy its *prima facie* burden on the issue of constructive notice, as they failed to demonstrate conclusively when the area in question was last cleaned or inspected relative to the time of the Plaintiff’s incident. As the Plaintiff points out from the deposition of the Town’s witness Mr. Gardner, the Town lost all of its log books for the years 2021 and earlier where information concerning daily inspections and repairs were logged. The Town submitted no other evidence establishing, *prima facie*, when the area in question was last inspected relative to the Plaintiff’s incident. (*Green*, 107 AD3d at 948).

The Defendant argues that the Plaintiff was the sole proximate cause of his accident due to his own careless actions, due to his skating backwards while stick handling a hockey ball and not looking where he was going and allowing the wheel of his skate to get stuck in a crack or seam. The Defendant relies upon the testimony of the Plaintiff in which he testified that if he was skating forward he would have been able to avoid a crack in the surface of the rink and avoid it.

“A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident”. (*Yang v Sanacore*, 202 AD3d 1120, 1121 [2d Dept 2022] [citations omitted]). “There can be more than one proximate cause of an accident’...and ‘generally, it is for the trier of fact to determine the issue of proximate cause’”. (*Yang*, 202 AD3d at 1121 [citations omitted]). The issue of proximate

cause may, however, be decided as a matter of law “where only one conclusion may be drawn from the established facts”. (*Elusma v. Jackson*, 186 AD3d 1326, 1328 [2d Dept 2020]).

In this case, the Defendant has failed to eliminate all issues of fact regarding the issue of whether the Plaintiff was the sole proximate cause of his accident. The Plaintiff’s opposition papers include an expert report from Peter Glismann, P.E., in which Mr. Glismann opines, having reviewed the parties’ deposition transcripts, and conducting an inspection of the accident site, and having reviewed the photographs reflecting the outdoor rink at Marjorie Post Park, and based on his experience, training, and education in the field of engineering, including his familiarity with relevant engineering standards regarding the appropriate design, structure, and maintenance of outdoor roller rinks in New York, that “it is known and expected that some skaters will change speed and momentum rapidly on a roller rink surface”, and that it is further “known and expected that some skaters will skate backwards at a roller rink, as Mr. Terlizzi was doing at the time of his accident”. According to Mr. Glismann, “part of the purpose of a roller rink is to allow skaters freedom to skate in manners that he or she cannot while skating on sidewalks or a roadway, such as by skating backwards”.

The expert’s opinions concerning the foreseeability of an individual like Mr. Terlizzi skating backwards are unrefuted by the Defendant. Additionally, the Plaintiff testified at his deposition and 50-h hearing that, *inter alia*, he was an experienced skater who regularly skated at the rink and that he was skating backwards when his accident occurred because he was practicing hockey with his son. Furthermore, the Defendant’s witness testified that the subject crack which caused the Plaintiff’s accident was a “safety hazard” that would be repaired. Construing the evidence in the light favorable to the non-moving Plaintiff, the Court finds that the Defendant has failed to establish that the Plaintiff was the sole proximate cause of his accident.

The Court also finds that the Defendant has failed to establish, as a matter of law, that it is free from liability because the Plaintiff assumed the risks inherent in and arising out of the nature of the activity in which he was engaged. “When a person voluntarily participates in certain sporting events or athletic activities, an action to recover damages for injuries resulting from conduct or conditions that are inherent in the sport or activity is barred by the doctrine of primary assumption of risk.” (*Cotty v Town of Southampton*, 64 AD3d 251, 252 [2d Dept 2009]). “[W]hen a plaintiff assumes the risk of participating in a sporting event, ‘the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence’”. (*Id.* at 254; citation omitted).

“The policy underlying the doctrine of primary assumption of risk is ‘to facilitate free and vigorous participation in athletic activities’...Without the doctrine, athletes may be reluctant to play aggressively, for fear of being sued by an opposing player. As long as the defendant's conduct does not unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk.” (*Id.*; citations omitted).

“The doctrine also has been extended to the condition of the playing surface. If an athlete is injured as a result of a defect in, or feature of, the field, court, track, or course upon which the sport is being played, the owner of the premises will be protected by the doctrine of primary assumption of risk as long as risk presented by the condition is inherent in the sport.” (*Id.*; citations omitted). “If the playing surface is as safe as it appears to be, and the condition in question is not concealed such that it unreasonably increases risk assumed by the players, the doctrine applies”. (*Id.*; citations omitted).

Based on the Second Department’s decision in *Cotty*, a threshold issue is whether the Plaintiff is “engaged in a sporting activity,” such that the assumption of risk doctrine may apply,

or engaged in “some form of leisure activity”, in which case the assumption of risk doctrine would not apply. (*See id.* at 254-255). As discussed in *Cotty*, a professional jockey injured while riding in a horse race at a track owned and operated by the New York Racing Association was clearly an athlete to which the assumption of risk doctrine applied. In contrast, it was a much closer question for the Second Department as to whether the Plaintiff in *Cotty* was injured while engaged in a “sporting activity”. The Plaintiff in *Cotty* was a member of a bicycle club which engaged in long-distance rides, and was injured while participating in a group ride where they were cycling on a public road during a 72-mile ride. After examining the policy behind the assumption of risk doctrine, and prior case law concerning when it did and did not apply in the context of various activities, the Court held that the Defendant failed to establish, *prima facie*, that the assumption of risk doctrine applied to the activity in which the Plaintiff was engaged.

In this case, it is also a close question as to whether the Plaintiff’s injury occurred while he was involved in a “sporting activity for purposes of applying the primary assumption of risk doctrine”. As the Defendant points out, the Plaintiff testified that his accident occurred when he was “playing hockey” with his son. However, the Plaintiff also testified that they were not playing as part of any organized League, they would just go to the rink “and practice casually”. It was just the two of them, they were not in full hockey uniforms or gear, and they were not playing in an organized game. Interpreting the evidence in the light most favorable to the non-moving Plaintiff, the Court finds that the Defendant in this case failed to eliminate all issues of fact with respect to the issue of whether the Plaintiff was engaged in a “sporting activity” when his accident occurred.

As the Court finds that the Defendant failed to eliminate all issues of fact with respect to whether it is liable for the Plaintiff’s accident, the Defendant’s motion for summary judgment is **DENIED**, in its entirety.

The Court further notes that while the Defendant's notice of motion referenced an application pursuant to CPLR 3126, the Defendant's motion papers did not include any arguments concerning such relief.

Accordingly, it is hereby:

ORDERED, that the Defendant's motion for an Order pursuant to CPLR § 3212, granting it summary judgement and dismissing the Plaintiff's Complaint, is **DENIED [Seq. 001]**, in its entirety; and it is further,

ORDERED, that all other requests for relief not specifically addressed herein shall be deemed **DENIED**.

This constitutes the decision and Order of this Court.

Dated: March 27, 2024
Mineola, New York



HON. CONRAD D. SINGER, J.S.C.

ENTERED

Apr 01 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE