

McKay v Savenello
2025 NY Slip Op 35400(U)
March 10, 2025
Supreme Court, Westchester County
Docket Number: Index No. 63294/2020
Judge: Christie L. D'Alessio
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

MATTHEW GEORGE MCKAY, JR., as
Administrator of the Estate of MATTHEW
GEORGE MCKAY, SR., Decedent,

Plaintiff,

-against-

PETER SAVENELLO and GRACE FERRI,

Defendants.

DECISION & ORDER

No. 63294/2020

Mot. Seq. No. 003

D'ALESSIO, J.S.C.

Matthew George McKay, Jr. ("Plaintiff"), as Administrator of the Estate of Matthew George McKay, Sr., Decedent ("Decedent"), proceeds on five causes of action sounding in negligence against Peter Savenello ("Savenello") and Grace Ferri ("Ferri," and with Savenello, "Defendants") in connection with an injury Decedent sustained while riding an all-terrain vehicle ("ATV") on Defendants' property on February 26, 2019. (*See* Doc. 1; Doc. 4). Defendants seek summary judgment under CPLR 3212(b); Plaintiff opposes same. (*See* Docs. 67-75, 80-95).

CPLR 3212(b) instructs, *inter alia*, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." This standard requires that a movant "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 N.Y.2d 320, 324 (1986). Failure to carry this burden "requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993) (internal quotation marks omitted). Should the movant make this initial showing, "the burden shifts to the party opposing the motion to demonstrate the existence

of a triable issue of fact.” *Metz v. Peconic Bay Med. Ctr.*, 203 A.D.3d 1040, 1041 (2d Dep’t 2022). Both the movant and opponent must, to meet their respective burdens, submit evidence in admissible form. *Moscatiello v. Wyde True Value Lumber & Supply Corp.*, 168 A.D.3d 833, 834 (2d Dep’t 2019); *Midfirst Bank v. Agho*, 121 A.D.3d 343, 347 (2d Dep’t 2014).

“In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party.” *Derise v. Jaak 773, Inc.*, 127 A.D.3d 1011, 1011 (2d Dep’t 2015). This perspective does not, however, relieve the motion’s opponent from their burden. “Material proffered in opposition . . . is insufficient if it constitutes mere surmise, suspicion, speculation, or conjecture.” *Agulnick v. Agulnick*, 191 A.D.3d 12, 16 (2d Dep’t 2020). Indeed, simply raising the specter of metaphysical doubt will not refute a *prima facie* showing. The Court’s role is one of issue-spotting, not issue-determining. *See Suffolk Cty. Dep’t of Soc. Servs. v. James M.*, 83 N.Y.2d 178, 182 (1994); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957).

Decedent was injured while driving one provided by Savenello on the latter’s property on February 26, 2019. (Doc. 72 at 73:24-74:23; Doc. 73 at 110:18-114:6). Defendants argue, *inter alia*, that they are immune from liability by operation of N.Y. General Obligations Law § 9-103. (See Doc. 71 ¶¶ 43-65). That law, “the recreational use statute, grants immunity for ordinary negligence to landowners who permit members of the public to enter their property to engage in certain recreational activities, including” driving an ATV. *Fleming v. Jenna’s Forest Homeowners’ Assoc., Inc.*, 228 A.D.3d 1101, 1103 (3d Dep’t 2024) (quoting *McCleary v. City of Glens Falls*, 32 A.D.3d 605, 607 (3d Dep’t 2006)).¹ Immunity exists “when (1) the plaintiff is

¹ Plaintiff argues that this statute does not apply because Decedent was *invited* onto the property. (Doc. 71 ¶ 44). The statute’s application is not so confined. *See King v. Cornell Univ.*, 41 Misc.3d 451, 454 (Sup. Ct. 2013).

engaged in one of the activities identified . . . and (2) the . . . land [is] suitable for that activity.”

Bragg v. Genesee Cty. Agr. Soc’y, 84 N.Y.2d 544, 551-52 (1994).

That Decedent was engaged in a covered recreational activity (i.e., riding an ATV) is undisputed; the issue is whether the land was suitable for that activity. In determining this point:

[t]he question is whether . . . the property is the sort which the Legislature would have envisioned as being opened up to the public . . . as a result of the inducement offered in the statute. In other words, is it a type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation?

Iannotti v. Consol. Rail Corp., 74 N.Y.2d 39, 45 (1989). The Court assesses the property’s suitability according to the “general suitability” thereof. *Albright v. Metz*, 88 N.Y.2d 656, 663-64 (1996); *see also Morales v. Coram Materials Corp.*, 51 A.D.3d 86, 96-97 (2d Dep’t 2008). “A substantial indicator . . . is whether recreationists have used the property for that activity in the past; such past use . . . manifests the fact that the property is physically conducive to it.” *Albright*, 88 N.Y.2d at 662 (internal quotation marks omitted).

Defendants, with respect to the property’s suitability, rely on Savenello’s testimony that the property spanned twenty-five acres, was generally comparable to a golf course, had trails professionally cut for ATV use, and Decedent had driven an ATV on the property days prior. (Doc. 71 ¶¶ 49-56). Plaintiff responds with the sworn statement of an expert who concludes, *inter alia*, that the property was unsuitable for ATV use. (*See* Doc. 90 ¶¶ 20-21). The expert explains that:

[t]he subject property crash scene was private and not open to the public; had not been professionally created; was not professionally marked/outlined for recreational ATV usage; and was not professionally laid out with any safety barriers or anti-crash protection which exist in the recreational ATV industry.

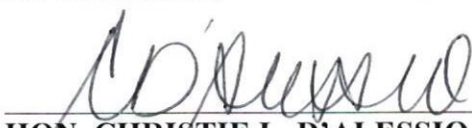
(*Id.* ¶ 21 (emphasis in original)).

Upon review, Plaintiff's expert fails to explain the basis for these conclusions—he cites no regulation, statute, or other source for these alleged failings that render the property unsuitable for driving ATVs. (*See generally id.*). The Court, therefore, disregards his opinion. *See generally Rybek v. New York City Health & Hosps. Corp.*, 228 A.D.3d 968, 969 (2d Dep't 2024) (“[E]xpert opinions . . . should . . . set[] forth an explanation of the reasoning”); *Matveieva v. Metro. Transp. Auth.*, 212 A.D.3d 726, 726 (2d Dep't 2023).² Savenello's testimony, coupled with the photos Plaintiff's expert submitted—which depict a clear, level, swath of land—establishes that the land was ideal for ATV use. (Doc. 92 at 11-13); *see also McKown v. Town of Waterford*, 94 A.D.3d 1182, 1184 (3d Dep't 2012) (noting that “unimproved land that contained large, open grassy areas” was “appropriate for riding ATVs”); *Morales v. Coram Materials Corp.*, 64 A.D.3d 756, 758 (2d Dep't 2009) (“As the name implies, all-terrain vehicle riders are no doubt attracted to the irregular nature of the terrain inherent in a sand and gravel mine as opposed to the experience of riding on a paved surface”); *Bryant v. Smith*, 278 A.D.2d 576, 576-77 (3d Dep't 2000) (finding that “vacant, level and grassy” land was “physical conducive” to ATV use). Defendants are, therefore, entitled to the protection afforded by N.Y. General Obligations Law § 9-103(a).³

The Clerk of the Court is respectfully directed to terminate Motion Sequence No. 003 (GRANTED) and close this case.

SO ORDERED.

Dated: March 10, 2025
White Plains, New York


HON. CHRISTIE L. D'ALESSIO, J.S.C.

² Even if the Court did not disregard the opinion, the question presented—the land's suitability for driving ATVs—is not of a vintage that requires an expert analysis. *See Zeppetelli v. 1372 Broadway, LLC*, 222 A.D.3d 813, 814 (2d Dep't 2023) (“[E]xpert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge . . . beyond the ken of the typical juror.”). However, even if the Court considered the opinion, the issues raised therein are irrelevant because they do not alter the land's general suitability for driving ATVs.

³ Given this conclusion, the Court need not and does not reach Defendants' alternate argument regarding Decedent's assumption of the risk.