

DePinto v County of Suffolk

2011 NY Slip Op 33566(U)

December 30, 2011

Sup Ct, Suffolk County

Docket Number: 06-23949

Judge: W. Gerard Asher

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which was denied, is granted as to renewal, and upon renewal, summary judgment is granted, and the complaint and any cross claims are dismissed as asserted against Town of Babylon.

This is an action sounding in negligence arising out of an accident which occurred on August 6, 2005, when the plaintiff, Jenine DePinto, sustained serious and permanent injuries including traumatic amputation of the second through fifth fingers of her left hand while riding as a passenger on a motorcycle. The motorcycle was operated by the defendant Ronald Giovelli of Reality Racing 631 while they were performing motorcycle stunts at a public event at Tanner Park in Copaigue, New York. It is claimed that the defendants created the defective and/or dangerous condition, an unsafe surface of the parking lot, that they had actual and constructive notice of it, and that they permitted a hazardous activity without supervision and without compliance with applicable local state laws.

A third-party action was commenced by the Town of Babylon (the Town) against the third-party defendant Hurricane Watersports, Inc. (Hurricane) wherein the Town seeks indemnification and/or contribution from Hurricane. It is noted that Stipulations of Discontinuance of the Action as against the Town and against the County of Suffolk have been signed only by the plaintiff but not by the co-defendants. It is further noted that a default judgment was granted to the third-party plaintiff against the third-party defendant Hurricane Watersports, Inc., and that third-party action was severed from the main action by order dated September 2, 2008 (Kerins, J.).

In motion (005), the Town previously moved for summary judgment dismissing the complaint and any and all cross claims asserted against it on the bases that it did not proximately cause the plaintiff's injuries, that it owed no duty to the plaintiff whom they claim was performing unauthorized, spontaneous, and unexpected motorcycle stunts at a town park, and that it did not create the defect which caused the injury to the plaintiff. Said motion was denied as the copies of the transcripts of the examinations before trial of Jenine DePinto dated February 12, 2009, Ronald Giovelli dated February 12, 2009, and Michael Cuniglio dated February 12, 2009 were unsigned and were not in admissible form as required by CPLR 3212. Additionally, the moving defendant did not submit a copy of the answer served by the County of Suffolk. It was determined that the motion failed to comport with CPLR 3212 and was deemed insufficient as a matter of law. The Town now seeks to renew and reargue motion (005).

Pursuant to CPLR 2221(e)(2) a motion for leave to renew shall be based upon new facts not offered on the prior motion that would have changed the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. Pursuant to CPLR 2221(e)(3) a motion for leave to renew shall contain reasonable justification for the failure to present such facts on the prior motion. "A motion for renewal is properly made to the motion court...to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court. Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Beiny v Trustees of the Trust Created by Elizabeth N.F. Weinberg, as Grantor*, 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987]). Here, the Town represents that it did not submit an answer from the County of Suffolk with its prior application, as the

County of Suffolk did not interpose an answer. The Town has now provided the signature page for the depositions transcripts of Michael Cuniglio who testified on behalf of the Town on February 12, 2009 and for Jenine DePinto, also dated February 12, 2009. Counsel affirms that these signature pages were inadvertently omitted from motion (005) due to law office failure. The motion is now supported with the deposition transcript of a person with knowledge on behalf of the Town.

Accordingly, the application for renewal is granted.

It is noted that the signature page for the deposition transcript of Ronald Giovelli has not been submitted with this motion, and, thus, the transcript is not in admissible form pursuant to CPLR 3212. Further, it is not accompanied by proof of mailing of the transcript for signature pursuant to CPLR 3116. Thus, the Giovelli transcript is not considered upon renewal.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]).

Jenine DePinto testified at her examination before trial to the effect that the accident occurred on August 6, 2005 while she was riding as a passenger on a motorcycle operated by Ronald Giovelli. She was seventeen years of age at the time. She met Giovelli the week before the accident at a 7-Eleven Store. She stated that he told her that he did bike stunts and that he wanted to know if she would work for him at his booth while he performed stunts. About three or four days after she met Giovelli, he picked her up from her home and took her to an empty parking lot for about four hours while she watched him practice stunts on his motorcycle. She also rode as a passenger behind him on his motorcycle that day and performed stunts with him (endos, wheelies, and others). She stated that Giovelli taught her to stand on the motorcycle while he did a maneuver, called the rodeo, in which he spun the bike around in a circle on the ground so that the motorcycle was on its side. On that date, he also taught her the stunt which they were performing when she was injured. They practiced it twice. The following day they went to the Riverhead Raceway and performed stunts together on the motorcycle. While there, she also ran the booth which was operated under the name Reality Racing 631.

She testified that the accident occurred at Tanner Park in Babylon where a skateboard competition was being held. Giovelli took her to Tanner Park where they set up the vendor booth, and

she described the weather as sunny. She testified that they had not made definite plans for her to do stunts that day, but then decided to do so. Giovelli performed some stunts before they performed together. At the time of the accident, she was wearing gloves, a helmet, and a back brace. She started from a seated position as a passenger on the motorcycle, then got into a position wherein her knees were over the handlebars and she was lying on her back while Giovelli was operating the motorcycle. Her hands were over her head, holding onto the two parallel scraper bars situated on top of each other, located at the rear of the motorcycle. Giovelli was in the straddle position, standing on the left side of the motorcycle. Both wheels of the motorcycle were on the ground; the motorcycle was standing still, then it was put into motion. Giovelli put his right leg on the peg, and his left leg on the peg, and straddled on top, facing forward. She stated that Giovelli looked back to see if everything was good, and proceeded to perform a wheelie. At the 12 o'clock position, when the bike was standing on the scraper bar, Giovelli dropped his legs and held onto the handlebars. He then jumped back on the bike and brought the bike back down on both tires.

When asked during her deposition what went wrong, Jenine DePinto responded that she grabbed the wrong scraper bar with her left hand, as she grabbed the furthest bar that hit the ground instead of grabbing the scraper bar closest to her which does not hit the ground. She testified that Giovelli had instructed her to grab the scraper bar that was closest to her, which she did with her right hand at the time of the accident, but not with her left hand. Her left hand and the furthest scraper bar made contact with the pavement when Giovelli went into the wheelie. She testified that she tried to signal Giovelli as soon as she realized her left hand made contact with the pavement when the bike dropped, but she couldn't say anything and just grabbed onto her left hand with her right hand. She received no pay or paperwork, releases, or contracts concerning the event at Tanner Park.

Michael Cuniglio testified on behalf of the Town to the extent that in 2008, he retired from the Town as a recreation specialist, a position which he held for twenty years. His immediate supervisor was the commissioner of parks and recreation from the Town. In August 2005, he was responsible for many special events, such as holiday events and parades, firework shows and things like that. He testified that in 2004, the Town coordinated an event known as the Skate Jam, which was to promote the new skate facility the Town built for public use in Tanner Park, Copaigue. Tom Happich from Hurricane Water Sports contacted the Town about sponsoring the event. The event was a tournament type of competition for kids of various levels and ages, beginners to advanced, in which awards were to be presented. There were professional skate boarders who were compensated, but not by the Town.

Cuniglio continued that Hurricane Water Sports, a small surfboard and skateboard shop, promoted and coordinated the event in 2005. The Town, via the commissioner of parks and recreation, gave permission to Hurricane Water Sports to have vendors at the event. He did not know if Happich or Hurricane Water Sports charged a fee for the vendors to set up booths at the event. The Town initially placed an ad in the newspaper and placed the event in the summer directory, which had town-wide mailing to each household, inviting vendors to apply to set up booths. Cuniglio believed that Hurricane Water Sport's telephone number was provided in the ad and circular for registration for the event. Cuniglio further stated that Tom Happich and Hurricane Water Sports also provided the professional skateboarders.

Cuniglio continued that the Town did not approve the vendors, but a permit from the County of Suffolk was necessary for food to be served at the event. The Town did not require the vendors to have certificates of insurance and did not require proof of insurance from Hurricane Water Sports relative to the 2005 event. The Town provided no releases for participants or professionals who performed in the event. He stated that he did not know if Hurricane Water Sports required a release from the professionals. Cuniglio testified that BMS, motorbikes, motocross or motorcycles were not permitted at the event.

Cuniglio created separate files for both the 2004 and 2005 events. No additional events were held after 2005. Cuniglio testified that Hurricane Water Sports gave the Town a preliminary list of vendor participants which was approved by the commissioner of parks and recreation. He did not have a copy of that list. Prior to the event, the Town was also provided with the agenda for the event. Cuniglio testified that the agenda did not include a motorcycle exhibition, or mention Reality Racing 631 and Ronald Giovelli. Cuniglio continued that the vendor booth maintained by Ronald Giovelli, or Reality Racing 631, adjacent to the beach pavilion, was there on Hurricane's consent. He did not see a motorcycle until approximately 5:00 p.m. Cuniglio continued that the motorcycle was not in the skateboard park where motorcycles, bicycles, scooters and motorized vehicles of any kind were not permitted, but rather in a parking lot. It was beginning to perform stunts when he first saw it. He was unaware that anyone was going to perform stunts on a motorcycle prior to this.

Cuniglio testified that both he and Happich were present at the event and witnessed the incident in which the plaintiff was injured. He stated that he did not tell Happich that he should stop the demonstration when he learned of it, and no public safety officers tried to stop the demonstration either. He watched the demonstration for about ten minutes prior to the incident involving the plaintiff. During 90 % of that performance, the rider performed solo wheelies, spins, and all kinds of motorcycle tricks. When the second rider got onto the motorcycle, there were about several hundred people watching the demonstration. It was not until the motorcyclists brought their motorcycle to a stop, and the young lady stepped off the bike, that it was obvious that she was in some discomfort as she walked briskly from the bike. A woman helped her and immediately packed her hand in ice. Other people were trying to pack the plaintiff's fingers in ice for transport. The Suffolk County police responded to the scene very quickly and provided reports to the Town public safety officers. Cuniglio stated he also filled out a report for the commissioner that following Monday.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup Ct Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 724 NYS2d 893 [2d Dept 2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 717 NYS2d 546 [2001]). Generally, liability for an allegedly defective condition

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on property must be based on occupancy, ownership, control or special use of the premises (*Schwalb et al v Kulaski et al*, 29 AD3d 563, 814 NYS2d 696 [2d Dept 2006]).

The defendant Town has demonstrated prima facie entitlement to summary judgment dismissing the complaint based upon the adduced testimonies establishing that there was nothing that the Town did nor did not do which proximately caused the plaintiff to sustain the injury claimed in this action.

The Town has demonstrated that it owned the property where the subject accident occurred, and that it had control of the premises at the time of the accident, as Michael Cuniglio and two or three safety officers from the Town were present overseeing the event sponsored by Tom Happich and Hurricane Water Sports. Thus, it is determined that the Town owed a duty to the plaintiff and members of the public present at the event. Although it is argued that the Town failed to ascertain that a motorcycle performance was going to occur at the event, it is determined as a matter of law that such failure by the Town was not the proximate cause of the plaintiff's injury. There was no dangerous condition caused or created by the Town. The motorcycle did not slide on a slippery, uneven surface, and there was no debris or dangerous condition of the Town which caused the plaintiff to sustain injury to her left hand. By her own admission, Jenine DePinto stated that she grabbed the wrong scraper bar with her left hand. She testified that instead of grabbing the scraper bar closest to her, as instructed by Giovelli, she grabbed the scraper bar furthest from her with her left hand, and that she grabbed the scraper bar closest to her with her right hand. It was when Giovelli performed the wheelie that the furthest scraper bar, which she was holding with her left hand, made contact with the pavement, causing her injury.

The plaintiff, although opposing this motion, has failed to raise a factual issue to preclude summary judgment being granted to the Town. The plaintiff argues that the park was not reasonably safe under the circumstances and that the Town failed to properly supervise that event. However, the plaintiff has failed to support that claim or demonstrate that negligence by the Town, either in maintaining the premises or supervising the event, was a substantial factor in causing the injury to the plaintiff. Because the Town has demonstrated as a matter of law that it did not proximately cause the accident and the injuries claimed by the plaintiff, the plaintiff's allegations asserted against the Town of Babylon must fail.

Dated: Dec 30, 2011

W. Gerard Asher
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION