

**Ruiz v New York City Hous. Auth.**

2013 NY Slip Op 33274(U)

December 16, 2013

Supreme Court, New York County

Docket Number: 104940/09

Judge: Jeffrey K. Oing

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING  
J.S.C. Justice

PART 48

Index Number : 104940/2009  
RUIZ, SAMANTHA  
vs.  
NEW YORK CITY HOUSING  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*Mtn decided in accordance of the accompanying memorandum decision/order of the court.*

## FILED

DEC 17 2013

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/16/13

JEFFREY K. OING, J.S.C.  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

FILED

NEW YORK  
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 48

-----X

SAMANTHA RUIZ, as mother and natural  
guardian of ARACELIS RUIZ, individually,

Plaintiffs,

-against-

NEW YORK CITY HOUSING AUTHORITY and  
GKC INDUSTRIES, INC.,

Defendants.

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004

**FILED**

DEC 17 2013

JEFFREY K. OING, J.:

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Plaintiff, Samantha Ruiz ("Ruiz"), commenced this personal injury action on behalf of her daughter, Aracelis Ruiz ("Aracelis"), who tripped and fell in a playground owned, operated, and maintained by defendant The New York City Housing Authority ("NYCHA"). Defendant GKC Industries, Inc. ("GKC") was the contractor who refurbished the subject playground. The complaint alleges that defendants' "negligent design and construction" of the playground "caused and created the tripping hazard on which the infant plaintiff was severely injured" (Verified Complaint, ¶¶ 25-26).

In motion sequence no. 003, NYCHA moves for an order granting it summary judgment dismissing the complaint. In motion sequence no. 004, GKC also moves for the same relief for itself. Motion sequence nos. 003 and 004 are consolidated for disposition.

### Background

On November 5, 2008, Samantha Ruiz testified at her 50-h hearing that on August 2, 2008, between 6:00 pm and 6:30 p.m., Aracelis was playing with a soccer ball in the playground in front of 10 Catherine Slip. At one point, the ball traveled into a nearby planter. Aracelis went into the planter to retrieve the ball and, in attempting to exit the planter, tripped over one of the metal wickets in the wicket fence surrounding the planter and fell, injuring her right arm (Ruiz 50-h Hearing Tr., at pp. 12-14).

Jose Crespo ("Crespo"), the supervising groundskeeper for the Alfred Smith Houses Development, testified at his Examination Before Trial ("EBT") that the planter's wicket fence was erected between 2003 and 2006 during the refurbishment by GKC (Crespo 9/17/2010 EBT at pp. 12-13, 16-17).

Jay Shah ("Shah"), the project manager for GKC's refurbishment of the Alfred Smith Houses Development, stated in his affidavit, dated May 1, 2012, that all of the plans, drawings, and specifications for the refurbishment -- including the wicket fence -- were supplied by NYCHA, and that GKC did not prepare any of them or participate in their creation (Shah Aff., ¶¶ 3-4). Furthermore, all of the work by GKC was performed in strict compliance with the plans and specifications supplied by

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NYCHA, and NYCHA inspectors inspected the work, including the installation of the wicket fencing, to ensure it was in compliance with these plans and specifications (Shah Aff., ¶6).

The contract between GKC and NYCHA for this refurbishment required GKC to notify NYCHA of any variance between NYCHA's refurbishment plans and any applicable laws or regulations (Green Affirm., Ex. 1, § 27).

At a January 10, 2012 EBT, Keith Marshall ("Marshall"), a landscape architect employed by NYCHA, testified that he drew or supervised the drawing of the blueprints for the playground where plaintiff fell (Marshall 1/10/2012 EBT at pp. 14-15, 25-28). In an affidavit dated May 16, 2012, Marshall additionally stated that, due to his education and experience in designing playgrounds and landscaped areas in NYCHA's developments, he was familiar with "industry and government standards for playground and landscape design", that he either personally drew the plans or approved the drawings of the other designers, and that "the location of the planted area adjacent to the play area" and the "installation of a wicket fence around the planted area" were "standard landscape design feature[s]" that did not "violate any known safety standards, rule or guidelines related to landscape or playground design" (Marshall 5/16/12 Aff., ¶¶ 2, 5, 8).

In Ruiz's CPLR 3101(d) exchange, her expert witness on industry standards for playground design, Ernest J. Gailor, asserted that the design and location of the wicket fence deviated from industry standards by violating section 1104.2 of the New York State Building Code (Polacco Affirm., Ex. V).

#### Discussion

NYCHA and GKC as proponents of their respective summary judgment motions 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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

To establish a prima facie case for negligence, a plaintiff must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached this duty, and (3) the breach was the proximate cause of the plaintiff's injury (Friedman v Anderson, 23 AD3d 163, 164-165 [1st Dept 2005]). Whether the defendant owed a duty of care to the injured party is a question of law (Espinal v Melville Snow Contrs., 98 NY2d 136, 138-139 [2002] [citations omitted]).

### I. NYCHA's Motion for Summary Judgment

The principle is well established that "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 a third party, the potential that such injury would be of a serious nature, and the burden of avoiding such risk" (Alexander v New York City Tr., 34 AD3d 312, 313 [1st Dept 2006]).

NYCHA argues that it did not breach its duty of care to Aracelis because the wicket fence on which she tripped conformed to safe and accepted standards of playground and landscape design. In support of this claim, NYCHA offers only the affidavit of Keith Marshall, the principal designer of the Smith Houses Project, who asserts that "the location of the planted area ... and the installation of a wicket fence around the planted area" are "standard landscape design feature[s] ... in conformity with good and accepted landscape and playground design practices and [do] not violate any known safety standards, rules or guidelines related to landscape or playground design" (Marshall Aff., ¶ 8). Such self-serving and "[b]old conclusory assertions, even if believable, are not enough" to establish grounds to grant a summary judgment motion (Hendries, Inc. v American Express Co., 35 AD2d 412, 415 [1st Dept 1970]). Indeed,



rather than stating that no safety standards have been violated, Marshall himself states that the design do not violate any "known" safety standards. That coupled with plaintiff's expert's, Ernest J. Gailor, assertion that there was a deviation from industry standards creates a factual issue as to whether NYCHA breached its duty of care to the infant plaintiff.

Next, NYCHA argues that it had no duty to protect Aracelis from, or warn her about, the wicket fence, because the fence was an open and obvious condition that was not inherently dangerous. While a property owner has no duty to warn of an open and obvious hazard or dangerous condition (Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69, 71 [1st Dept 2004]), Ruiz is not claiming a breach of the duty to warn, but rather a breach of the "analytically distinct" duty to "maintain the premises in a reasonably safe condition" (Id. at 72-73). Because "liability may be premised on a breach of the duty to maintain reasonably safe conditions even where the obviousness of the risk negates any duty to warn" (id. at 73), "finding a hazardous condition to be open and obvious [is] not fatal to a plaintiff's negligence claim" (Saretsky v 85 Kenmare Realty Corp., 85 AD3d 89, 92 [1st Dept 2011]).

Accordingly, NYCHA's motion for summary judgment is denied.

## II. GKC's Motion for Summary Judgment

GKC argues that summary judgment is appropriate because it was a contractor hired by NYCHA with no involvement in the design of the playground or wickets, and, as a result, owed no duty of care to Aracelis.

Under New York law, a contractual obligation, "standing alone, will generally not give rise to tort liability in favor of a third party" (Espinal v Melville Snow Contrs., 98 NY2d 136, 138-139 [2002]). As a result, GKC's alleged breach of its contractual duty to advise NYCHA if NYCHA's designs or specifications for the renovations were "at variance" with applicable laws or regulations does not create a cause of action for Ruiz.

There are, however, "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care -- and thus be potentially liable in tort -- to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Id. at 140).

The second and third exceptions are inapplicable as Ruiz does not allege that NYCHA detrimentally relied on any continued performance by GKC or that GKC in any way displaced NYCHA's duty to maintain the premises safely.

The first exception presents a more difficult question. Given that GKC was following plans created by NYCHA and "a contractor is justified in relying upon the plans and specifications which he has contracted to follow unless [the plans] are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (Diaz v Vasques, 17 AD3d 134, 135 [1st Dept 2005]), it follows that GKC will have failed to exercise "reasonable care" in performing its duties only if NYCHA's plans were so "apparently defective" that GKC was on notice that they were likely to cause injury.

Here, GKC has the burden to establish that it relied on the plans and specifications of the contract and that such plans were not apparently defective. While GKC has demonstrated that it relied on plans created by NYCHA, it has introduced no evidence that such plans were not apparently defective. Indeed, plaintiff's expert's statements indicates the contrary. As such, its motion for summary judgment is denied.

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Accordingly, it is

ORDERED that NYCHA's motion for summary judgment is denied;  
and it is further

ORDERED that GKC's motion for summary judgment is denied;  
and it is further

ORDERED that counsel shall call the Clerk of Part 48 at  
646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order  
of the Court.

Dated: 12/16/13



HON. JEFFREY K. OING, J.S.C.

**FILED**

DEC 17 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**