Hunewill v Golf NYC
2011 NY Slip Op 33960(U)
December 7, 2011
Supreme Court, Bronx County
Docket Number: 303867/09
Judge: Mark Friedlander
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12/19/11

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

JOHN HUNEWILL,

Plaintiffs,

-against-

GOLF NYC and VAN CORTLANDT, LTD.,

Defendants.

DECISION/ORDER
Index No. 303867/09

Present:
HON. MARK FRIEDLANDER
J.S.C.

The following papers numbered 1 to 5 read on this motion on the calendar of June 27, 2011

Papers Numbered

Notice of Motion, Order to Show Cause, Affidavits and Exhibits Annexed + Cross Motion 1-2, 3-4
Answering Affidavits and Exhibits Annexed .....
Replying Affidavits and Exhibits Annexed 5

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision.

Dated: 12/7/11

MARK FRIEDLANDER, J.S.C.

FILED Dec 19 2011 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

JOHN HUNEWILL,

Plaintiffs,

-against-

GOLF NYC and VAN CORTLANDT, LTD.,

Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 303867/09

HON. MARK FRIEDLANDER:

Defendant Van Cortlandt Golf, LLC, i/s/h/a Van Cortlandt Ltd. (hereinafter "VCG"), moves for summary judgment dismissing all claims against it. Plaintiff cross-moves to compel disclosure of certain documents. As set forth hereinafter, the motion is granted in all respects and the cross-motion is denied.

VCG leases from The City of New York ("NYC") the property which is used as a golf course in Van Cortlandt Park, Bronx. NYC is the property owner, and VCG operates the golf course. An entity denominated "Golf NYC" ("GN") is also listed as a defendant in the caption, but these motion papers do not establish who or what such entity is, or whether it exists. It does not seem from movant's narrative that GN was ever served, and the copy of the answer attached to the moving papers shows no answer on the part of GN. Nevertheless, the counsel submitting moving papers identifies itself as counsel for both VCG and GN. For purposes of this motion, the Court will assume that no service has ever been accomplished on GN, if it even exists as a separate entity.

Plaintiff brings this action to recover damages for injuries he sustained on July 4, 2008, when the golf cart he had been driving fell over onto his arm. VCG maintains that the action should be dismissed because plaintiff chose to drive his golf cart off the golf cart path and down a steep hill, where the terrain caused it to tip

over.

The parties dispute whether there was a sign at the approach to the area, warning cart drivers not to depart from the path. Defendant's general manager stated, at his deposition, that the warning sign had been present for many years. Plaintiff and several friends of his maintain that they did not see a sign. Plaintiff's expert states that a view of the area gleaned from VCG's website shows the absence of a sign, but the Court's review of the photograph(s) allegedly downloaded from the website, by the expert, does not persuade the Court that the entire area can be visualized sufficiently to draw conclusions as to this matter. Further, the photograph of the sign, attached to the moving papers, shows a sign that does not appear to be of a style or composition that would reflect recent design, manufacture or emplacement.

Certainly, summary judgment motions are meant to identify issues of fact, rather than resolve them. Therefore, the Court is reluctant to draw conclusions as to the existence or non-existence of the sign as of the date of the accident. However, it should be noted that issues raised in motion papers have frequently been laid to rest by court examination of photographs appended to such papers. Here, the photos appended by plaintiff's expert do not show conclusively what the expert claims, while the photo of the warning sign identified by movant shows a sign that appears like it was in place for many years.

Further, a firm statement of fact that is opposed by a more questionable one may be the basis for a court finding that the opposition to summary judgment is based on speculation. Here, the general manager of the golf course, who has had years of exposure to the subject area, testified that the sign was present there since he was a child. By contrast, plaintiff and his friends all state, in effect, that they did not notice any sign. Claiming that they failed to see a sign which was not particularly important to them until after the accident may constitute nothing more than a confession that they were not paying attention to safety issues. It would be more persuasive to be sure if at least one of them had gone back to the location after the accident to see if there was a warning (either that day or even within the next few days) and had reported back that they could not find one. As it is,

the statements of plaintiff and his friends seem tailored to defeat an element of testimony set forth with certainty through the use of testimony which is inherently speculative.

Nevertheless, this Court does not need to determine whether, in fact, there was, or was not, a warning sign present at the time of the accident, because the resolution of this motion would be the same either way. Simply put, plaintiff was engaged in the sport of golfing when he chose to drive his golf cart down a steep incline, rather than keep it on the pathway which had been prepared for it. By engaging in such activity, plaintiff assumed the risk, since it is totally obvious that taking a vehicle like a golf cart down a steep, "rough" (i.e. unpaved) area can cause it to topple. Because the danger of such behavior is open and obvious, no warning is needed.

Movant cites much precedent to this effect, but the proposition is sufficiently well established that the citations need not be repeated here. Although plaintiff attempts to distinguish the many decisions cited by movant, that effort is unavailing, and seems more like hair-splitting. Whether or not the facts are exactly the same from case to case, the general rule does not change. The general nature of the conduct in which plaintiff engaged is sufficient to support the principle that he cannot recover damages for his decision to embark on such conduct.

Nor is there any proof that VCG created the danger to which plaintiff succumbed. The undisputed testimony is that this golf course was created in 1895, long before VCG had any role in managing it. Further, there is no evidence of any actual or constructive notice to VCG as to any problem that would require redress by VCG. VCG's general manager testified that there had been no previous accidents or injuries. His statement that it was a "rough" area does not rise to an admission that he had notice of a problem, because there is no indication that he had reason to expect anyone to attempt to drive down there. Thus, the premise for liability remains unestablished.

The proffered testimony of plaintiff's "expert" does not add to the argument that VCG should have done

something to prevent golf carts from leaving the path. The "expert," although an experienced golfer with long employment in the sport, is not a professional with technical training, such as an architect or engineer, whose admission into a recognized professional status carries with it an implied responsibility to convey accurate technical judgments supported by accepted research. Here, the comments he offers represent nothing more than an individual opinion which can easily be deflected by the application of common sense.

Plaintiff's cross-motion is without merit. Plaintiff purportedly seeks production of plans, blueprints and schematic drawings of the layout of the golf course. VCG had already responded that these were no longer in existence, which response is reasonable, considering that the golf course was created 116 years ago. Plaintiff also seeks production of the accident report relating to this event, which VCG has stated it can no longer locate. While this latter response by VCG may raise questions, the fact remains that any such questions are now belatedly raised.

Attached to the moving papers is a copy of the Compliance Conference Order, prepared on June 30, 2010, which document would normally set forth any outstanding items of discovery. That conference would have been a good time for plaintiff to cite the documents which he now claims he needs for his expert to make out a prima facie case as to VCG's liability. According to plaintiff, the documents were among items demanded in September 2009, and, when VCG responded in October 2009, it failed to produce the subject documents. Yet, there is no indication that plaintiff took action to elicit court intervention then, or later, or during the compliance conference, since the Order issued on June 30, 2010 makes no reference to outstanding document production, or, in fact, to any outstanding discovery. Under such circumstances, the claim at this point that summary judgment cannot be decided until these documents are produced is tantamount to submitting, as opposition to this motion, an affidavit contradicting earlier testimony which is transparently tailored to defeat summary judgment. Here, the contradiction lies not in the conflicting testimony, but in the conflicting attitude toward the importance or relevancy of supposedly withheld documents.

By reason of the foregoing, plaintiff's cross-motion is denied in all respects, and defendant's motion for summary judgment is granted. The claims against defendant are therefore dismissed.

This constitutes the Decision and Order of the Court.

Dated: 12/7/11

MARK FRIEDLANDER, J.S.C.