Rose v Tee-Bird Golf Club, Inc.
2012 NY Slip Op 33754(U)
December 7, 2012
Supreme Court, Saratoga County
Docket Number: 2010-3051
Judge: Robert J. Chauvin

[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

ORIGINAL

LARRY ROSE,

Plaintiff,

-against-

TEE-BIRD GOLF CLUB, INC.

Defendant.

DECISION AND ORDER

Index No: 2010-3051
RJI No: 45-1-2011-0836

Appearances:

For Plaintiff: Kevin P. Burke, Esq.
Burke, Scolamiero, Mortati & Hurd LLP
7 Washington Square, First Floor
P.O. Box 15085
Albany, NY 12212

For Defendant: Maureen G. Fatcheric, Esq.
Costello, Cooney & Fearon, P.C.
5701 West Genesee Street
Camillus, New York, 13031

Before: Hon. Robert J. Chauvin, J.S.C.

By Notice of Motion dated June 27, 2012 the Defendant, Tee Bird Golf Club Inc., seeks summary judgment pursuant to CPLR Section 3212 dismissing the Plaintiff's Complaint. In support of such motion the Defendant has submitted the Affidavit of counsel Maureen G. Fatcheric Esq. dated June 28, 2012, with attached exhibits including a copy of the Summons With Notice and Complaint, a copy of the Amended Answer, a copy of a Demand for Verified Bill of Particulars, a copy of a Verified Bill of Particulars, a copy of a golf cart rental agreement; and various pictures of the premises and golf cart involved in the underlying incident. The Defendant further submitted an appendix of materials in support of such motion, including a copy of the examination before trial of Plaintiff, Larry Rose taken September 21, 2011; a copy of the examination before trial of Brett S. Belden, employee of Defendant, taken September 21, 2011, a copy of the examination before trial of David A. Langworthy, employee of Defendant,

taken September 21, 2012, a copy of the examination before trial of Michelle Hoffman, employee of Defendant, taken April 30, 2012 and a copy of the examination before trial of Dennis Misnick, nonparty witness, taken April 30, 2012. Finally the Defendant also submitted the Affidavit of Brett Belden dated June 5, 2012, the Affidavit of Tom Heyda dated June 4, 2012 and a Memorandum of Law dated June 28, 2012.

In opposition to the Motion, the Plaintiff has submitted the Affirmation in Opposition to Defendant's Motion for Summary Judgment of counsel Kevin P. Burke, Esq. dated September 10, 2012 with attached exhibits, including a copy of a Supplemental Verified Bill of Particulars, a copy of a Notice for Discovery and Inspection, and two letters requesting further discovery. Plaintiff also submitted a Memorandum of Law dated September 10, 2012.

Thereafter the Defendant submitted the Reply and Answering Affidavit of Kristin L. Walker, Esq.,dated September 19, 2012, together with a June 18, 2012 letter concerning a prior discovery response and a copy of a Response to Plaintiff's Notice for Discovery and Inspection dated December 15, 2011.

The motion was initially returnable August 23, 2012. However upon consent of all parties the return date was adjourned until September 21, 2012. Following submission of all papers, and in accordance with the initial request of counsel for the Defendant, the Court heard oral argument on December 6, 2012.

UNDERLYING ACTION

The action herein was commenced by the filing of a Summons With Notice on August 2, 2010. As set forth in the Complaint dated November 5, 2010 the Plaintiff seeks to recover for injuries sustained as a result of an accident which occurred on the premises of the Tee-Bird Golf Club located in the Saratoga/Lake George area of upstate New York.

Specifically this action involves an incident wherein the plaintiff was a participant in a round of golf at the Tee-Bird Golf Club on October 6, 2008. Plaintiff was driving a golf cart between the 14th and 15th holes with non-party witness, Dennis Misnick, who was a passenger in

the cart. At that time the Plaintiff was operating the golf cart on a paved path utilized and maintained by the golf course. Plaintiff alleges that the path which has a steep, winding grade, was, at the time, wet and covered with leaves. Plaintiff further alleges, by way of a Supplemental Bill of Particulars, that the golf cart was equipped with bald tires. As a result of all of these circumstances, Plaintiff alleges that the golf cart skidded and flipped over onto Plaintiff. As a result Plaintiff sustained significant personal injuries.

More particularly, deposition testimony established that as Plaintiff was traversing the cart path between the 14th and 15th holes, in a wooded area with a steep downhill decline for a distance of approximately 100' - 125' feet, he applied the brake, but the cart rotated and flipped. By way of physical structure, the path was approximately five (5') foot wide, paved, with a 12 to 18 inch shoulder.

Further it should be noted that although the Plaintiff was a fairly experienced golfer and had operated a golf cart numerous times in the past, this was the first time that he had played the Tee-Bird course.

Defendant contends that the accident was not due to any negligence on their part and was an inherent risk in the sport of golfing. Notwithstanding, Defendant contends that they had no notice of the alleged dangerous condition upon which the Plaintiff's action is based. In this regard the Defendant presented testimony that each and every morning the area where the accident occurred is cleared of leaves and that on the morning of, and before the accident, the path was cleared. Further testimony established that as of about 9:30 AM there were no leaves upon the path and that there had been no complaints about any such condition prior to the Plaintiff's accident. In fact, employees of the Defendant testified that following the accident the path was either clear of leaves or, at most, was approximately 25% covered by leaves. But in either event not disproportionately. Further the Defendant presented testimony that, although the area is in fact one of the steepest and hilliest areas of the course, it has appropriate signs indicating the steep grade and turn and that they had not had any prior complaints of accidents

in the area. In addition, the Defendant presented the testimony of the employee who removed the golf cart following the accident who indicated that immediately following the accident the cart involved was in proper working order.

Based upon the foregoing the Defendant contends that the dangerous condition of which the Plaintiff complains was open and obvious and an inherent risk in playing golf. Based upon such assumption of risk Defendant asserts the motion should be granted. Further Defendant contends that, notwithstanding, they had no notice of the dangerous condition complained of and thus the motion should otherwise be granted. The Defendant also submits that the Plaintiff's reliance upon the allegation that the tires of the golf cart were bald should not be considered by the Court as it was submitted within a Supplemental Bill of Particulars, as opposed to an Amended Bill of Particulars, and that it calls for an opinion.

INSTANT MOTION

As set forth above the Defendant seeks summary judgment dismissing the Plaintiff's Complaint pursuant to CPLR Section 3212. In this regard, it is well settled that in order to be entitled to summary judgment, movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment as a matter of law. Winegard v New York University Medical Center, 64 N.Y.2d 851 (Feb., 1985); Moskowitz v Garlock , 23 A.D.2d 943 (Third Dept., May, 1965); Crowley's Milk Co. v Klein, 24 A.D.2d 920 (Third Dept., November, 1965). In other words the proof must be such that it eliminates any material issues of fact. Sillman v Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (July, 1957).

In this particular action the Defendant's motion is premised upon two grounds. First such argument is based upon assumption of risk, that the dangerous condition complained of was open and obvious and an inherent risk in playing golf. Second such argument is based upon the Defendant's lack of notice, either actual or constructive, of the dangerous condition. Based upon both arguments the Defendant submits that it is entitled to summary judgment and dismissal of the Plaintiff's Complaint. In addition, the Defendant argues that the Court should not consider

and/or base its decision upon the allegation that the underlying dangerous condition included or was facilitated by bald tires upon the golf cart as it is a new theory of liability submitted by way of a Supplemental Bill of Particulars, as opposed to an Amended Bill of Particulars, and that such calls for an opinion. Each issue will be addressed below.

However, as an initial issue the Court notes that although there is significant factual divergence of the various observations of the condition of the subject cart path at the time of and immediately following the incident herein, vis a vis, moisture and amount of leaf cover, the Court, upon the instant motion, is bound to accept as true the evidence submitted by the nonmoving party or the Plaintiff herein. Weiss v Garfield, 21 A.D.2d 156 (Third Dept., May, 1964); Hourigan v McGarry, 106 A.D.2d 845 (Third Dept., Dec., 1984). Further the Court notes that there does not appear to be a factual dispute concerning the fact that the area of the subject cart path where the accident occurred was utilized and maintained by the Defendant as part of the golf course; that it was the steepest grade upon the course; that it did involve a sharp turn; that it did traverse a wooded area; that carts were directed to traverse the area by use of the path and that the Defendant cleared the path of leaves on a daily basis.

A. Assumption of Risk

As submitted by the Defendant it is well settled that the assumption of risk doctrine "applies to any facet of the activity inherent in it and to any open and obvious condition of the place where it is carried on." Maddox v City of New York, 66 N.Y.2d 270, 277 (Nov., 1985), citing Diderou v Pinecrest Dunes, 34 A.D.2d 672 (Second Dept., April, 1970). As concerns the activity of golf in particular, such doctrine has been applied to preclude an action wherein the golfer caught a spike upon a protrusion, which was fairly obvious, in a natural timber step leading to a tee box. Galski v State of New York, 289 A.D.2d 195 (Third Dept., Dec., 2001). More specifically such doctrine has been applied to preclude an action wherein a golfer parked a golf cart upon a hill on a fairway, in contravention of certain signs, and was injured when the cart rolled back down the hill striking the golfer. Brust v Town of Caroga, 287 A.D.2d 923 (Third

Dept., Oct., 2001). In both situations such conditions were found to be open and obvious and part of the inherent risk of participation in the activity of golf.

However, it has also been held that while a participant, specifically in golf, may assume the risks which are open and obvious and inherent in the sport, participants are not deemed to have assumed risks that result from a defendant creating a dangerous condition over and above the usual dangers that are inherent in the sport. Shapiro v City of Amsterdam, 96 A.D.3d 1211 (Third Dept., June, 2012). Likewise, it has been held that "the assumption of risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury." Maddox, 66 N.Y.2d 270, 279, citing Stevens v Central School Dist. No. 1, 21 N.Y.2d 780 (1968), and Jackson v Livingston Country Club, 55 A.D.2d 1045 (Fourth Dept., Jan., 1977). In fact, the issue of whether premises are reasonably safe and/or whether there was a dangerous condition, is typically a question of fact for a jury. McDonald v City of Schenectady, 308 A.D.2d 125 (Third Dept, July, 2003).

In this case, the dangerous condition complained of is a steep, winding, wet and leaf covered cart path, through hilly and wooded terrain, which is utilized and maintained by the Defendant golf course. Further, although the fact that the Defendants had signs warning of such grade and turn may mitigate their liability, at the same time such signs certainly reflect the fact that the Defendant directed the Plaintiff to utilize such path. In other words, the Plaintiff was following the directions of the Defendant. Further there is nothing in the record which indicates that the cart path was observable, by way of grade, turn or leaf cover, prior to traversing the path. In addition, there remain questions concerning the condition of the tires of the cart which was provided to the Plaintiff by the Defendant.

Moreover, this is not a case where the plaintiff had traversed this area before, as in Bockelman v. New Paltz Golf Course , 284 AD2 783. It was the first time that he had played the course.

As such the Court finds that, at the very least, there remain questions of fact as to whether the alleged dangerous condition herein was open and obvious and/or an inherent risk in the activity of golf and whether the defendant created and/or maintained the dangerous condition which caused the accident. In accordance therewith Defendant's motion premised upon assumption of risk is denied.

B. Lack of Notice

Next the Defendant argues that notwithstanding the argument of assumption of risk that there has been no showing that the Defendant had any actual or constructive notice of the dangerous condition herein. Such is premised upon the contention that the path was cleared of leaves in the morning and that no other complaints were received concerning the cart path prior to the accident that day.

Quite the contrary, such argument is belied by the very foundation upon which it is premised. In fact, the circumstances presented actually serve to establish as a matter of law that the Defendants had actual knowledge of the condition. The fact that the Defendant made sure that the cart path was cleared each and every morning, clearly reflects that the Defendant was aware of the dangerous condition and/or potentially dangerous condition, caused by leaf cover and wetness. Further, the warning and steep grade signs approaching the subject cart path also clearly reflect that the Defendant had knowledge and/or notice of the dangerous condition and/or potentially dangerous condition.

In addition, as indicated before, the course expressly utilized and maintained the path and, as such, had both actual and constructive knowledge. To have constructive notice of the condition, it requires that the condition be visible and apparent and in existence for a sufficient period of time so as to allow the defendant an opportunity to take corrective actions. Saunderes v. Bryant's Towing, 27 AD3d 992 (Third Dept., Mar., 2006).

In accordance with such the Defendant's motion premised upon a lack of notice is denied.

Finally, as concerns Defendant's contention that the Plaintiff be precluded from relying

upon and/or that the Court not consider the issue of the nature of the tread of the tires on the golf cart, the Court notes that such has been submitted herein by way of a Supplemental Bill of Particulars and simply because it is not labeled an Amended Bill of Particulars is of no moment. Defendant has been provided notice of such contention and such obviates the necessity of the manner of how it has been interposed. Specifically, the nonparty witness, Dennis Misnick, testified as to the existence and observation of the bald tires. Further the Court specifically finds that the condition and/or general status of the tread of a tire is not an opinion requiring any particular expertise and, rather, is an observation well within the ken of the ordinary person. In both respects the Court finds the reliance upon such theory of liability and/or consideration of such observation is appropriate herein.

This Memorandum shall constitute the Decision and Order of the Court. The original Decision and Order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this Decision and Order and the delivery of this Decision and Order to the Saratoga County Clerk shall not constitute Notice of Entry under CPLR Section 2220, and the parties are not relieved from the applicable provisions of that Rule regarding service of Notice of Entry.

DATED: December 7, 2012
Ballston Spa, NY

HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

SARATOGA COUNTY CLERK'S OFFICE BALLSTON SPA, NY
2012 DEC 19 AM 9:44

ENTERED

The following papers were read and considered:

1. Defendant's Notice of Motion for Summary Judgment dated June 27, 2012;
2. Supporting Affidavit of Maureen G. Fatcheric Esq. dated June 28, 2012 with exhibits "A" through "H" attached thereto;
3. Supporting Affidavit of Brett Belden dated June 5, 2012;
4. Supporting Affidavit of Todd Heyda dated June 4, 2012;
5. Memorandum of Law dated June 28, 2012;

ENTERED
Kathleen A. Marchione
Saratoga County Clerk