Sanchez v State of New York
2013 NY Slip Op 33970(U)
September 25, 2013
Court of Claims
Docket Number: 118987
Judge: James H. Ferreira

[* 1]

STATE OF NEW YORK COURT OF CLAIMS

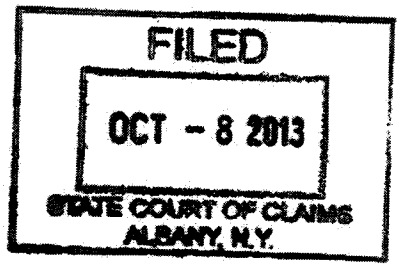
LUIS ALVAREZ SANCHEZ,

Claimant, DECISION

-v-

STATE OF NEW YORK, Claim No. 118987

Defendant.



BEFORE: HON. JAMES H. FERREIRA
Judge of the Court of Claims

APPEARANCES: For Claimant:
Franzblau Dratch, P.C.
By: Elizabeth Delahunty, Esq.

For Defendant:
Hon. Eric T. Schneiderman
Attorney General of the State of New York
By: Michael Krenrich
Assistant Attorney General

Claimant Luis Alvarez Sanchez filed this claim with the Chief Clerk of the Court of Claims on September 27, 2010. In it, claimant seeks damages arising from an injury he allegedly suffered on June 6, 2009 while playing soccer in the Eastern Yard at the Eastern Correctional Facility (hereinafter CF) in Napanoch, New York. Claimant specifically alleges that "his foot went into a hole, approximately one-half foot in depth," resulting in an injury to his right leg (Claim ¶ 2). Claimant alleges that defendant State of New York was negligent in causing, permitting and/or allowing the existence of a dangerous condition on its property, failing to remedy the dangerous

condition despite actual and constructive notice thereof and failing to conduct adequate and timely inspection of the yard where the hole existed.

A trial on the issue of liability was held on February 13, 2013 at the New York State Court of Claims in Albany, New York. Claimant testified and called one additional witness, David Holmes, an inmate at Woodbourne CF, to testify. Defendant called two witnesses, Nina Clark, a registered nurse employed by the Department of Corrections and Community Supervision (hereinafter DOCCS) and Hope Brown, the Recreation Program Supervisor at Eastern CF, to testify. Both parties offered documentary evidence, which was received into evidence without objection. Defendant also submitted a post-trial memorandum.[1]

FACTS

Claimant, who speaks Spanish, testified through an interpreter. He testified that he was born on December 26, 1982. He is currently incarcerated at Woodbourne CF and is serving a 13-year sentence. He initially was incarcerated for this sentence at Coxsackie CF and later was transferred to Eastern CF. Claimant could not recall when he was transferred to Eastern CF, but stated that "it was before 2009" (Tr. 9).[2] Claimant affirmed that he had spent approximately three years at Eastern CF before his accident. While at Eastern CF, claimant participated in several activities including weightlifting. He had not played soccer at Eastern CF before the date of his injury; his injury occurred during his first soccer practice at Eastern CF. However, he had played soccer during his

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[1] By letter dated May 1, 2013, the Court ordered that post-trial briefs in this matter be filed on or before July 12, 2013. By letter dated July 11, 2013, the Court granted the request of claimant's counsel for an extension of time to file her post-trial brief, until July 19, 2013. To date, the Court has not received any post-trial submissions on claimant's behalf.

[2] References to the trial transcript are delineated herein as (Tr. __).

childhood "all the time" and had played soccer at Coxsackie CF (Tr. 19). Claimant affirmed that the soccer season at Eastern CF runs from June until August.

On June 6, 2009, the weather was sunny. Claimant started getting ready for practice around 1:30 p.m. He was dressed in "proper clothing to play" soccer, and was wearing his "own soccer cleats" that he had brought into the facility (Tr. 17-18). Before playing, he stretched and massaged his legs and feet. With respect to his injury, claimant testified:

> "I remember that I was running behind the ball. And suddenly, I feel like my leg went to a vacuum. And that moment . . . I fell. . . . I realize[d] that my leg was inside a hole that was covered by grass[.] . . . I couldn't see it, and it happened all of a sudden" (Tr. 19-20).

Claimant testified that the hole was about 12 inches wide and about 8 inches deep and "all that was covered kind of with grass" (Tr. 20). He affirmed that he had not seen the hole before he fell in it. After his fall, claimant's leg was "in the position of a letter L," and he received medical care for his injury (Tr. 24).

Claimant testified that he had not spent time in that field area before June 6, 2009, but, during his time at Eastern CF, he had watched other players playing different sports from the sidelines of the field. He had seen holes on the field before. Claimant explained that "the officers were doing those holes, looking for weapons that . . . perhaps some of the inmates were hiding . . . there. And those holes never were covered" (Tr. 21). He affirmed that he had seen inmates filling in holes on the field. He had also seen trucks come in every year with dirt to cover the holes in the field. When asked whether any staff directed anyone to fill the holes, claimant stated that he "remember[ed] an official, a female official, [who brought] a wheelbarrow and a shovel. . . . [S]he gave that shovel to

the inmates. So they pick up dirt from the wheelbarrow, and they cover the holes that they find" (Tr. 26). Claimant also testified that he had seen "many accidents" happen on the field (Tr. 22). He recalled "about four that happened similar to his own injury" where inmates were running after a ball and fell into a hole in other areas of the field "[b]ecause the field is in [a] bad condition[]" (Tr. 22). Claimant testified that the field is used for other sports, not just soccer. He was shown a copy of an inmate injury report dated June 6, 2009. Claimant acknowledged that he had signed it. Under inmate's statement, the injury report states: "Running during soccer game, planted foot & twisted. Felt a lot of bad pain in Rt foot" (Claimant's Ex. 5). Claimant testified that he "didn't write that" (Tr. 25).

On cross-examination, claimant acknowledged that he testified in a prior deposition, in April 2012, that he was not paying attention to the way that he fell and did not know if he was going forward, backward or to the side when he fell. He testified: "[t]he only thing I remember [is] that the ball was almost in front of me. I almost reached the ball when the incident [occurred]" (Tr. 34). Claimant also acknowledged that he was unable to describe the dimensions of the hole during his deposition. Claimant testified that "that is pretty much the same that I'm saying right now" (Tr. 36). He explained that, "when someone is in that kind of pain, someone cannot concentrate on the dimensions of a hole" (Tr. 35). Claimant also acknowledged that he had played on outdoor soccer fields prior to June 6, 2009. On redirect, claimant affirmed that, during his deposition, he had also testified that the hole was approximately 12 inches deep, and that his whole foot fit into the hole.

Next, David Holmes testified that he is currently an inmate at Woodbourne CF, but was incarcerated at Eastern CF from the spring of 2005 until the summer of 2010. Eastern CF has "one large field" that is sectioned off depending on what time of the year it is and what particular sports

are being played (Tr. 42). The field has two baseball diamonds and a separate section where soccer and football are played. Holmes participated in tackle football while at Eastern CF. Tackle football was played every other year; he played in 2005, coached in 2007 and played in 2009. He also used to watch baseball and soccer games. Holmes testified that "[t]here [are] a few holes on the field" (Tr. 44). He further testified that the field was maintained by inmates and "they used to take the dirt, and take it over and put [it] into the holes in the field" (Tr. 45). Holmes personally filled some holes in 2009 after claimant's accident and had witnessed others fixing holes prior to claimant's accident. Holmes testified that an inmate named Brian "was always working on the field" (Tr. 45). According to Holmes, an officer named Lapp would use a metal detector to find and dig up weapons on the field. Holmes had never seen Lapp fix the holes that he dug and had not seen any correction officers "actually go out there to fix the field" (Tr. 45). He had not personally witnessed anyone falling in holes on the field. He was watching the soccer practice on June 6, 2009. He saw claimant "go down" and saw a crowd gather around him (Tr. 54). Holmes testified: "I can't say . . . that he actually went into the hole, I know he went down" (Tr. 46). Holmes walked over to claimant. Claimant was laying on the ground and his leg was "turned, going in the opposite direction" (Tr. 48). When asked whether he saw anything around claimant, Holmes responded: "Besides the officers. No" (Tr. 48). Holmes testified that claimant later came to see him at the law library where Holmes worked and asked Holmes about filing a notice of intention. At that time, claimant told Holmes that he "fell into the hole and . . . broke his ankle" (Tr. 49). On cross-examination, Holmes testified that

he was the one who filed the notice of intention to file a claim in this matter. He also testified that he does not speak Spanish.[3]

For defendant, Nina Clark, a registered nurse employed by DOCCS, testified that she worked at Eastern CF in June 2009. One of her responsibilities was to fill out inmate injury reports. These reports document any injuries received by inmates. Typically, the inmate is asked to write his statement and sign the report, although sometimes she would write the statement for the inmate if, for example, the inmate is in a lot of pain. Clark was shown Claimant's Exhibit 5, the inmate injury report generated as a result of claimant's accident. She affirmed that she recognized the document and had signed it. She acknowledged that she filled out the majority of the report and that the inmate's statement was in her handwriting. She testified that the words in the statement were claimant's, and not hers. She could not recall why she wrote the statement for claimant. She affirmed that the inmate statement was a fair and accurate transcription of what claimant described had happened to him.

On cross-examination, Clark testified that DOCCS "sometimes" had interpreters who came in to help her write inmate injury reports and stated that she did not remember whether she had a Spanish interpreter on the date she filled out claimant's report (Tr. 66). When asked whether it was common to have an interpreter speak with an inmate with respect to injury reports, she responded: "[i]f someone can't speak, or tell us what happened, we get someone who can tell us what happened" (Tr. 70). Clark acknowledged that "[s]ometimes we have [them] write [their statement] in Spanish"

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[3] Following the close of claimant's evidence, defendant moved to dismiss the claim based upon the doctrine of primary assumption of risk (Tr. 56). The Court reserved on the motion.

and could not recall why she would not have had claimant write his statement in Spanish (Tr. 67-68). She testified that she "wrote verbatim what the inmate . . . told [her]" (Tr. 68).

Hope Brown, the Recreation Program Supervisor at Eastern CF, also testified for defendant. Brown testified that she has been employed by DOCCS for almost 8 years. In October 2006, she became a Recreation Program Leader I. In April 2009, she became a Recreation Program Leader II and, at the time of the accident, was the Acting Recreation Program Supervisor at Eastern CF. Her job responsibilities in these positions included field maintenance. In this respect, she would do "[a]nything that needs to be done," including dealing with drainage issues and marking the fields (Tr. 74). Brown testified that there is one yard at Eastern CF. It has two softball fields, a soccer field, a football field, bocce courts, horseshoe courts and a volleyball court. There is also a walking track around the outside of the yard. She did daily rounds of the yard, which "entails going out and making sure that all playing fields are in the playing condition[, meaning that] it's not an environment where somebody's gonna be injured or hurt" (Tr. 75). The soccer field was inspected as part of her rounds. No records of her rounds were kept except if there was an issue that needed to be addressed. In addition to the daily rounds, the soccer field would be inspected on days when games were scheduled to be played. Brown was shown Claimant's Exhibit 1, a copy of the facility's June 2009 soccer schedule, and testified that she created that document. She testified that the schedule indicates that a game was played on June 3, 2009. She acknowledged that she worked that day and did inspect the soccer field. Her inspection on game days consisted of "tak[ing] a round around the field to make sure that it's in proper playing condition" (Tr. 81). Brown testified that she has cancelled football and softball games in the past and recalled that the June 3, 2009 game was not cancelled.

Brown acknowledged that, as a Recreation Program Leader I and II, she would be made aware of any complaints about the conditions of the fields. Such a complaint would likely be made by inmate grievance. Brown testified that they "didn't have any of those on file" (Tr. 77). She affirmed that, in her tenure as Recreation Program Leader, she did not recall receiving any grievances or being made aware of any complaint regarding the condition of the soccer field. She testified that she has "never seen a hole in the field" (Tr. 82). She was not working on June 6, 2009, and learned of claimant's accident when she returned to work. She spoke to claimant about the accident. She asked him what happened, and he "told [her] that he had twisted his leg playing soccer" (Tr. 84). He did not mention a hole during the course of that conversation. Brown was not aware of other injuries occurring on the soccer field prior to June 2009. When asked whether she was aware of any correction officers digging holes in the soccer field, she responded: "The only thing I've seen them do is dig in the bocce court and the horseshoe pit" (Tr. 85). Brown explained that they did so "[p]robably because the metal detector went off in the horseshoe pit" (Tr. 86). They would fill in the holes when they were done. She stated that the horseshoe pit is sand, the bocce court is clay and the field is "just regular ground" (Tr. 87).

DISCUSSION

As a preliminary matter, defendant argues that the Court should disregard Holmes' testimony on the ground that claimant failed to disclose this witness until approximately one week prior to trial. Defendant asserts that "such late notice constituted unfair surprise which severely limited the Defendant's ability to prepare for this witness" (Defendant's Post-trial Memorandum, at 2). Defendant raised this objection at a pretrial conference with the Court and at trial (Tr. 50). Claimant's counsel responded that claimant had not provided her with the names of any witnesses

during discovery and that "Mr. Holmes is the only ability for us to present another witness as to the events" (Tr. 51). The Court reserved on this objection during the trial and permitted Holmes to testify (Tr. 51).

CPLR 3101 provides that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]) "This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]). The Court agrees with defendant that this witness should have been disclosed during discovery. Moreover, claimant has failed to provide a reasonable excuse for his delay in disclosing the identity of this witness (see Crawford v Village of Millbrook, 94 AD3d 1036, 1037 [2d Dept 2012]; Mayorga v Jocarl & Ron Co., 41 AD3d 132, 134 [1st Dept 2007], appeal dismissed 9 NY3d 996 [2007]). However, the Court finds, as will be discussed further herein, that Holmes' testimony is only minimally relevant to the issues at hand and discerns no prejudice to defendant arising from the late notice. As such, the Court will admit this testimony.

Turning to the merits, "[t]o make out a prima facie case of property owner negligence, [a] plaintiff[] must show that defendant owner owed a duty to plaintiff, defendant breached such duty, and plaintiff's injuries resulted from defendant's breach (Savage v Desantis, 56 AD3d 1013, 1014 [3d Dept 2008], lv denied 12 NY3d 709 [2009]; see Akins v Glens Falls City School Dist., 53 NY2d 325, 333 [1981]; Keating v Town of Burke, 86 AD3d 660, 660-661 [3d Dept 2011]). The State, as a landowner, has a duty to maintain its " 'property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' " (Miller v State of New York, 62 NY2d 506, 513 [1984], quoting

Preston v State of New York, 59 NY2d 997, 998 [1983] [internal quotation marks omitted]; see Covington v State of New York, 54 AD3d 1137, 1137-1138 [3d Dept 2008]). The State, however, "is not an insurer against every injury that might occur on its property" (Covington v State of New York, 54 AD3d at 1137-1138), and "[n]egligence cannot be presumed from the mere happening of an accident" (Mochen v State of New York, 57 AD2d 719, 720 [4th Dept 1977]; see Melendez v State of New York, 283 AD2d 729, 729 [3d Dept 2001], appeal dismissed 97 NY2d 649 [2001]).

"In order to establish that the State is liable for a claimant's injuries, there must be proof that the State created a dangerous condition or had actual or constructive notice of a dangerous condition, that it failed to properly act to correct the problem or warn of the danger, and that such failure was a proximate cause of the claimant's injuries" (Dispenza v State of New York, 28 Misc 3d 1205 [A] [Ct Cl 2010]). "[W]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the [factfinder]' " (Trincere v County of Suffolk, 90 NY2d 976, 977 [1997], quoting Guerrieri v Summa, 193 AD2d 647, 647 [2d Dept 1993] [internal quotation marks omitted]; accord Grosskopf v 8320 Parkway Towers Corp., 88 AD3d 765, 765 [2d Dept 2011]).

Upon application of these principles to the facts presented here, and after weighing the evidence proffered at trial, including the exhibits received into evidence and considering the testimony and demeanor of the witnesses, the Court finds that claimant has failed to establish, by a preponderance of the credible evidence, his claim of negligence against defendant.

The Court finds that claimant has failed to establish that a dangerous condition existed on defendant's property on the date of the accident. In this regard, claimant testified that he fell into a hole that was covered by grass. Claimant estimated at trial that the hole was 12 inches wide and

8 inches deep.[4] Claimant provided no further description of the hole, such as its shape or its location on the field. Claimant also failed to explain how a hole that is 12 inches wide can be covered by grass. Claimant offered no other evidence, such as a map or a photograph, describing the appearance of the hole or its location on the field. Holmes' testimony is not particularly helpful to claimant, as he testified that he did not see claimant actually go into the hole and provided no testimony regarding a hole, even though he was present at the site of the accident shortly after it occurred. Claimant's and Holmes' vague testimony that they had seen holes on the soccer field is insufficient to establish that a dangerous condition existed on defendant's property on the date of claimant's accident. Moreover, this testimony was contradicted by that of Brown, who the Court found to be credible, that she had never seen holes in the field. Without more, the Court cannot find that a dangerous condition existed on defendant's property.

The Court also notes that claimant's testimony that he fell into a hole is contradicted by his inmate statement in the inmate injury report, which he acknowledged that he signed and which was generated shortly after the accident. There, claimant stated that he twisted his foot and did not mention a hole. Claimant failed to provide an explanation for this discrepancy, and Clark's testimony that she transposed exactly what claimant told her had happened to him was not significantly called into question during cross-examination. Claimant's testimony is also contradicted by the testimony of Brown that claimant told her that he twisted his foot while playing

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[4] Claimant's estimation of the depth of the hole varied from 6 inches deep (as stated in the claim), to 8 inches deep (as he testified to on direct examination), to 12 inches deep (as he testified during his April 2012 deposition).

soccer and did not report that he fell into a hole. The Court thus concludes that claimant has failed to prove that a dangerous condition existed on defendant's property on the date of his accident.

The Court also concludes that, even assuming that a dangerous condition existed, claimant has failed to establish that defendant either created the condition or had actual or constructive notice of it. On this point, claimant and Holmes both testified that they had seen holes in the field and that the holes had been dug – and left uncovered – by correction officers looking for buried weapons. Claimant also testified that inmates filled these holes at the direction of staff and that he knew of four prior similar accidents where an inmate had been injured on the field when he fell into a hole. However, this general testimony, uncorroborated by any documentary or photographic evidence, is insufficient to establish either that defendant's employees created the particular hole that claimant alleges that he fell into, or that defendant had actual or constructive notice of that particular hole. Conversely, Brown gave credible testimony establishing that defendant did not create the alleged condition and did not have actual or constructive notice of it. In particular, Brown's testimony established that the field was inspected on a daily basis and that no holes had been found and that no complaints have been made about holes on the field.

Therefore, based on the foregoing, the Court finds that claimant has failed to prove, by a preponderance of the credible evidence, his claim against defendant.[5] Accordingly, the claim is hereby dismissed in its entirety. Any motions upon which the Court had previously reserved or which remain undecided are hereby denied.

The Clerk of the Court is directed to enter judgment accordingly.

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[5] This finding obviates the need for the Court to address defendant's argument that the doctrine of primary assumption of risk bars claimant's recovery in this matter.

Albany, New York
September 25, 2013

JAMES H. FERREIRA
Judge of the Court of Claims