

Solomon v City of New York

2013 NY Slip Op 30270(U)

January 14, 2013

Supreme Court, New York County

Docket Number: 107941/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: How Joan A. Mader
Justice

PART 11

Index Number : 107941/2010
SOLOMON, NATALIE
vs.
GOVERNORS ISLAND PRESERVATION
SEQUENCE NUMBER : 002
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 decided in accordance with the attached Memorandum Decision and order.

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

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 14, 2013

[Signature], 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----- x
NATALIE SOLOMON, :

Plaintiff, :

- against - :

Index No.: 107941/10

THE CITY OF NEW YORK, THE GOVERNORS
ISLAND PRESERVATION AND EDUCATION
CORP., SPORTS AND RECREATION PROVIDERS
ASSOCIATION PURCHASING GROUP, ACTION
ARTS LEAGUE AND PURE PROJECT,

Defendants. :

----- x
JOAN A. MADDEN, J.:

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, defendants the City of New York, the Governors Island Preservation and Educational Corporation, and Action Arts League and Pure Project move for summary judgment dismissing the complaint filed against them by plaintiff. Plaintiff opposes the motion.

Background

In this personal injury, plaintiff seeks damages for injuries she allegedly sustained when she fell two stories off a piece of art called the "tear drop" that was being displayed on Governors Island as part of "the figment art festival." Defendant Action Art League and Pure Project ("Art League") is a non profit organization that put on the festival during the weekend of June 12 through June 14, 2009. On the date of the accident defendant Governors Island Preservation and Educational Corporation owned and operated Governors Island, which was subsequently dissolved.

The accident occurred on June 14, 2009 when the plaintiff, then 27 years-old, attempted

to climb the teardrop piece which was made of soft vinyl material and inflated with air. She was injured after she climbed to the top of the art work and fell after two other individuals attending the festival also climbed to the top of the art work, and begin to bounce. According to plaintiff, she was sitting on top of the drop for about two minutes before she fell. When asked what caused her to lose her balance and fall, plaintiff testified that “[t]he thing collapsed...I felt it shifting from underneath me, and it disappearing from underneath me.” (Plaintiff’s Dep. at 127-128). Plaintiff stated at her deposition that the two individuals who were bouncing on the art work may have contributed to her to fall.

The record shows that the art festival was advertised as participatory and interactive, and that there were exhibits there involving participation, including a metal dome with instruments on it on which children were playing. There was also music and dancing. According to plaintiff the festival “felt like a carnival, almost like the way you would go to an amusement park or a state fair. It wasn’t like going to an art museum.” *Id.*, at 61-62. Plaintiff also testified that she did not see any employees at the festival or guards or signs of any kind.

The moving defendants move for summary judgment on the ground that the danger of the art work was open and obvious thus negating the duty to warn, and that plaintiff assumed the risk of injury. In support of their position, they point to plaintiff’s deposition testimony that she was afraid of falling off the object and had trouble maintaining her balance after climbing the art work. The moving defendants also argue that the action should be dismissed against defendants Governors Island or the City of New York. In support of their position, the moving defendants submit an affidavit from a Senior Insurance Claim Specialist at the City’s Law Department stating that City had no involvement in the art festival and has no ownership interest, control or

responsibility over Governors Island, which was sold to defendant Governors Island Preservation and Educational Corporation by the United States in 2003, and that defendant Governors Island Preservation and Educational Corporation was dissolved after the accident and has no insurance.

Plaintiff opposes the motion, arguing, *inter alia*, that plaintiff failed to appreciate the latent danger of the art work, the promotion of the art festival as participatory and interactive created a dangerous condition, and that defendants owed plaintiff a duty to warn or at very least were negligent in the creation of a dangerous condition. As for the claims against the City of New York, plaintiff asserts that as the City issued a permit for the festival, it is liable for failing to restrict or prohibit the interaction with the exhibits by the visitors at the festival.

Discussion

On a motion for summary judgment, the proponent “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 face...” Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist and require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986). Pursuant to CPLR 3212(b), a summary judgment motion should be denied if any party shall show facts sufficient to require trial of any issues of fact. In order to reach this threshold and defeat a defendant’s motion for summary judgment, a plaintiff need only present evidentiary materials sufficient to create a material question of fact. Zuckerman v. City of New York, 49 NY2d 557 (1980).

Under this standard, the moving defendants are not entitled to summary judgment based

on their argument that the danger of climbing on the art exhibit was “open and obvious condition.” The issue of “whether a condition is open and obvious is generally a jury question and the court should only determine that a risk was open and obvious as a matter of law when the facts compel such conclusion.” Westbrook v. WR Activities-Cabrera Mkts., 5 AD3d 69, 72 (1st Dept 2004). As the First Department noted “the mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked” Id.; see also Thornhill v. Toys “R” Us NYTEX, Inc., 183 AD2d 1071 (3d Dept 1992)(finding that based on the surrounding circumstances it could not be determined as a matter of law that the raised platform over which plaintiff fell was an open and obvious condition even though plaintiff initially so the platform and avoided it).

Here, although the height and nature of the exhibit would arguable indicate its dangers and thus negate the duty to warn, the circumstances here, including that the festival was advertised as interactive and the plaintiff observed others interacting with exhibits there, are sufficient to raise issues of fact as to whether the danger of the exhibit was open and obvious such that defendants should have warned patrons about the dangers of interacting with certain exhibits, including the one at issue, and whether plaintiff assumed the risk of injury by climbing on the exhibit.

Next, even assuming *arguendo* that the danger of the art exhibit was open and obvious, such that the duty to warn were negated, such a finding would not eliminate a defendant’s duty to maintain the property in a reasonably safe condition. Westbrook v. WR Activities-Cabrera Mkts., 5 AD3d at 73. See generally, O’Connor-Miele v. Barhite & Holzinger, Inc., 234 AD2d 106 (1st

Dept 1996). In this case, the record raises issues of fact exist as to whether defendants breached their duty to maintain the property in a reasonably safe condition by permitting the two-story high exhibit to exist on the property. Furthermore, cases relied on by the moving defendants are not to the contrary, as they involved naturally occurring phenomena to which the courts have applied the open and obvious doctrine to preclude a plaintiff's recovery. See e.g. Melendez v. City of New York, 76 AD3d 442 (1st Dept 2010)(personal injury action involving fall from waterfall); Tarricone v. State of New York, 175 AD2d 308 (3d Dept 1991)(plaintiff injured after climbing over stone wall and falling from cliff).

That being said, however, while it appears that the City of New York may have issued a permit for the event it cannot be held liable here, as there is no evidence that the City had knowledge of any danger inherent in the festival. Compare Rhabb v. New York City Housing Authority, 41 NY2d 200 (1976)(a municipality may be held liable when it has notice that "its park or playground is being used as a site for patently dangerous activities and that such use is likely to be continued, the municipality may not ignore the foreseeable dangers, and continues to extend an invitation to the public to use the area"). Finally, the moving defendants have submitted evidence that Governors Island Preservation and Educational Corporation has been dissolved, and plaintiff does not oppose dismissing the claims against this defendant. Accordingly, that part of the moving defendants' motion seeking summary judgment as to the claims against the City of New York and Governors Island Preservation and Educational Corporation is granted.

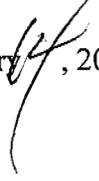
Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendants the City of New York, the Governors Island Preservation and Educational Corporation, and Action Arts League and Pure Project is granted only to the extent of dismissing the complaint against the City of New York, and the Governors Island Preservation and Educational Corporation; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the parties shall proceed to mediation and no appearance is required on the control date of February 14, 2013.

DATED: January , 2013



J.S.C.

FILED

FEB 06 2013

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