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

PRESENT : DONNA M. MILLS **PART 58**

Justice

JOSEPH ACEVEDO,

Plaintiff,

-v-

BARBARA HEIM and BRIAN HEIM,

Defendants.

INDEX NO. 112585/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 8/6/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

----------x

JOSEPH ACEVEDO,

Plaintiff,

-against-

BARBARA HEIM and BRIAN HEIM,

Defendant.

----------x

Index No.

112585/11

DONNA MILLS, J. :

In this personal injury action, defendants Barbara Heim and Brian Heim move for an order pursuant to CPLR 3212, granting summary judgment on the issue of liability dismissing the plaintiff Joseph Acevedo's complaint.

On the evening of August 21, 2011, at approximately 12:00 A.M., plaintiff accompanied two friends, Steven Bentz and Nicholas Mazzella who were personally invited to defendants' home by their son Matthew Heim. Defendant, Brian Heim, and his son, Matthew, assert that plaintiff was drunk and unsteady when he arrived at defendants' home. Defendant, Brian Heim, and son further claim that plaintiff's speech was slurred and he had difficulty walking without assistance. Defendant, Brian Heim, testified at his deposition that plaintiff's friend, Steven Bentz, had to physically assist plaintiff to a chair next to the fire pit. While plaintiff denies that he was drunk, he did admit, that he had two to three twelve ounce cans of beer while at the Heim premises in a relatively short period of time and that he had consumed approximately three of the same six cans of beer before arriving at the Heims' residence.

Plaintiff has testified that at approximately 1:30 A.M., he decided to go swimming in defendants' pool. He stated that as he began to walk towards the pool, he felt a

sharp pain in his right foot, looked down and observed a brown shard of broken glass. As a result of the pain, plaintiff states that he lost his balance and fell into the fire pit.

As a result of his injuries, plaintiff commenced this action alleging that defendants were negligent in, among other things, permitting a dangerous condition to exist around the fire pit. Pursuant to the plaintiff's summons and complaint, it is alleged that the defendants failed to maintain the subject premises in a safe and proper condition. The allegation of a dangerous condition consisting of the fire pit and broken glass that caused his fall into the fire pit.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be

summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

To impose liability upon a defendant in a slip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it (see Penn v. Fleet Bank, 12 A.D.3d 584 [2nd Dept 2004]; Christopher v. New York City Tr. Auth., 300 A.D.2d 336 [2nd Dept 2002]; see also Gordon v. American Museum of Natural History, 67 N.Y.2d 836 [1986]). A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected (see Gordon v. American Museum of Natural History, supra; Larsen v. Congregation B'Nai Jeshurun of Staten Is., 29 A.D.3d 643 [2nd Dept 2006]).

Defendants, in support of their motion for summary judgment, proffered the testimony set forth in the depositions of the parties and the affidavit of Matthew Heim, the son of the defendants, to describe the condition of the area where plaintiff was caused to fall into the fire pit. There was no evidence submitted that any particular broken bottle or piece of glass or any sharp object existed on the raised area surrounding the defendant's fire pit where the plaintiff had been sitting prior to the incident.

Here, the defendants established their entitlement to judgment as a matter of law by submitting proof that the length of time for which the purported broken glass existed was unknown (see Izrailova v Rego Relatu, 309 AD2d 902 [2003]. The evidence submitted by the plaintiff in opposition failed to raise a triable issue of fact as to whether the broken glass existed for a period of time sufficient to impute constructive notice to

the defendants (see Araujo v Brooklyn Martial Arts Academy, 304 AD2d 779 [200. Chemont v Pathmark Supermarkets, 279 AD2d 545 [2001]).

Finally, contrary to plaintiff's contention that the very existence of the fire pit constituted a dangerous condition, and that the defendants failed to warn him of it, this Court finds that the fire pit was open and obvious and known to plaintiff at the time of his accident. Plaintiff's own testimony was that he was seated approximately three feet from the fire pit, for more than ninety minutes before the accident. Moreover, the chairs were movable and plaintiff in his own words made a conscious decision to sit in a chair three feet away from the fire pit. The law is well settled that a defendant has no duty to warn of an open and obvious danger that is readily discernable by the use of one's own senses (Tagle v. Jakob, 97 N.Y.2d 165 [2001]; Cimino v. Town of Hempstead, 66 N.Y. 2d 709 [1985]).

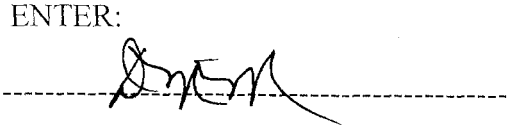
Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED:

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.