Mendelsohn v Kampfer
2014 NY Slip Op 30808(U)
March 24, 2014
Sup Ct, Suffolk County
Docket Number: 10-46429
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 10-46429
CAL. No. 13-00296OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 004 - MD
005 - MG

ALLAN B. MENDELSOHN as Trustee of the Estate of WILLIAM DUITS and HEATHER DUITS,

Plaintiffs,

- against -

CHRISTOPHER KAMPFER, MARIE KAMPFER a/k/a MARIE DEANGELO and CHRISTOPHER STRAIN,

Defendants.

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Upon the following papers numbered 1 to 24 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 20; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 21 - 22; Replying Affidavits and supporting papers 23 - 24; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Christopher Kampfer and Marie Kampfer for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against them and for an order pursuant to CPLR 3025 (b) granting them leave to amend their answer to include the affirmative defense of assumption of risk is denied; and it is further

ORDERED that the unopposed motion by defendant Christopher Strain for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims asserted against him is granted.

This is an action to recover damages for personal injuries allegedly sustained by William Duits on June 11, 2010 when he injured his arm while helping defendant Christopher Kampfer move a swing set from defendant Christopher Strain's backyard to the Kampfers' backyard.

In the complaint and bill of particulars, the plaintiff alleges that the defendants were negligent in, *inter alia*, creating a dangerous condition by failing to have and use proper mechanisms when moving the swing set.

In their answer, the Kampfers assert cross claims against Christopher Strain for contribution and common-law indemnification, and in his answer, Christopher Strain asserts cross claims against the Kampfers for contribution.

The Kampfers and Christopher Strain now separately move for summary judgment dismissing the complaint and all cross claims asserted against them. In addition, the Kampfers seek to amend their answer to include the affirmative defense of assumption of risk.

Leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or devoid of merit (see, Belus v Southside Hosp., 106 AD3d 765 [2d Dept 2013]; Sabatino v 425 Oser Ave., LLC, 87 AD3d 1127 [2d Dept 2011]).

Here, the Kampfers seek to amend their answer to include the affirmative defense of assumption of risk. The Court of Appeals has held that the "application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (Custodi v Town of Amherst, 20 NY3d 83, 89 [2012]; see also, Trupia v Lake George Cent. School Dist., 14 NY3d 392 [2010]). In light of the foregoing, the Court finds that the proposed amendment is devoid of merit as the doctrine of assumption of risk is inapplicable to this case (see, Trupia v Lake George Cent. School Dist., supra). Accordingly, the branch of the Kampfers' motion seeking leave to amend their answer to include this affirmative defense is denied.

Turning to the branch of the Kampfers' motion which is for summary judgment dismissing the complaint and Strain's motion for summary judgment dismissing the complaint, it is well settled that summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see, Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223 [1978]; Andre v Pomeroy, 35 NY2d 361

[1974]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (S.J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (Benincasa v Garrubbo, 141 AD2d 636, 637 [2d Dept 1988]). Once a prima facie showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see, Alvarez v Prospect Hosp., supra).

It is well settled that in order to establish a cause of action in negligence, a plaintiff must establish the existence of a duty on the defendant's part to the plaintiff, a breach of that duty, and damages (see, Greenberg, Trager & Herbst, LLP v HSBC Bank USA, 17 NY3d 565 [2011]).

With respect to Christopher Strain, it is axiomatic that "[a] landowner has a duty to maintain his or her premises in a reasonably safe condition to prevent foreseeable injuries" (Assefa v Bada Bam, 112 AD3d 657, 657 [2d Dept 2013]). Here, Mr. Strain established his entitlement to judgment as a matter of law by demonstrating, through his own deposition testimony as well as the deposition testimony of Mr. Kampfer and Mr. Duits, that the injury sustained by Mr. Duits was not the result of any defective condition on Mr. Strain's property, but was the result of the way in which Mr. Kampfer and Mr. Duits moved the swing set (see, Macey v Truman, 70 NY2d 918 [1987]; Stamatatos v Stamatatos, 95 AD3d 1297 [2d Dept 2012]; Captanian v Schramm, 33 AD3d 834 [2d Dept 2006]). Specifically, Mr. Strain testified at his deposition that he sold his swing set to his neighbor, Mr. Kampfer, and told him that he could pick it up whenever he wanted to. Mr. Strain further testified that the swing set was not defective, he was not home when Mr. Kampfer came over to move it, and he was not aware that Mr. Duits would be helping Mr. Kampfer move the swing set or the manner in which they were going to move it. He later learned that Mr. Kampfer and Mr. Duits lost control of the swing set while moving it and, as a result, Mr. Duits injured his arm. While Kampfer and Duits proffered different accounts of how they attempted to move the swing set, they both testified that the swing set was not defective and that Duits injured his arm while he was in the process of moving it.

The plaintiff does not oppose Christopher Strain's motion for summary judgment and, as a result, has failed to raise a triable issue of fact (see, Alvarez v Prospect Hosp., supra). Accordingly, the motion for summary judgment by Christopher Strain is granted. Since this finding defeats any cross claims for common-law indemnification and contribution against Christopher Strain, they are dismissed (see, Stone v Williams, 64 NY2d 639 [1984]).

As for the branch of the Kampfers' motion seeking summary judgment dismissing the complaint, the Court finds that the Kampfers have failed to establish their prima facie entitlement to judgment as a matter of law. The Kampfers assert that they owed no duty of care to Duits as Duits was aware of how they were going to move the swing set, he was not on their property at the time of the incident, and he was not their employee. The Kampfers also assert that even if they owed Duits a duty of care, they did

not breach their duty. In addition, they assert that the plaintiff's claim is barred by the doctrine of assumption of risk. Contrary to the Kampfers contentions, the Court finds that the Kampfers owed a duty of care to Duits. In the somewhat analogous case of Sammis v Nassau/Suffolk Football League (95 NY2d 809 [2000]), the plaintiff was injured while voluntarily assisting defendant Caruana remove a box from an elevated shelf in a shed located at the premises owned by defendant North Babylon Athletic Club. In modifying the Appellate Divison's order by denying the defendants' motions for summary judgment, the Court of Appeals held that the plaintiff's act of voluntarily helping defendant Caruana move the box from the shelf did not relieve the defendants of any duty they owed to the plaintiff (id. at 810). Thus, the Court finds that the Kampfers, like defendant Caruana in Sammis, owed Duits a duty of care.

Furthermore, the Kampfers have failed to establish that they did not breach their duty of care to Duits. Specifically, Mr. Duits and his wife testified at their depositions that Mr. Duits told Mr. Kampfer before they started to move the tower of the swing set that they should first disassemble the roof of the tower to make it lighter to move. However, Mr. Kampfer insisted on moving it all in one piece and told Mr. Duits to push it towards him while he tried to place his hand truck underneath it. Mr. Duits also testified that while he was pushing it towards Mr. Kampfer, the tower started to fall and in an attempt to pull it back towards himself, to prevent Mr. Kampfer from getting injured, he ruptured the tendon in his bicep. Mr. Kampfer testified at his deposition that he asked Mr. Duits to help him lower the tower down to the ground so that he could disassemble the roof of the tower before moving it with his hand truck over to his backyard. He told Mr. Duits to push the tower towards him and then run over to his side so that they could both place it slowly onto the ground. Mr. Kampfer testified that Mr. Duits injured his arm while he was helping him lower the tower to the ground. He denied using the hand truck at that point and testified that the tower did not almost fall on top of him. After reviewing the testimony, the Court finds that an issue of fact exists as to whether the Kampfers breached their duty of care to Duits by failing to use the safest means to move the swing set (Heard v City of New York, 82NY2d 66; Hilts v Board of Educ. Of Gloversville Enlarged School Dist., 50 AD3d 1419).

Finally, as noted above, the doctrine of assumption of risk is inapplicable to this case (see, Custodi v Town of Amherst, supra; Trupia v Lake George Cent. School Dist.,supra). Thus, the plaintiff's claim is not barred by the doctrine of assumption of risk.

Accordingly, the motion by the Kampfers is denied and the motion by Christopher Strain is granted.

Dated: March 24, 2014

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION