Garone v Hicks Nurseries
2016 NY Slip Op 33188(U)
November 22, 2016
Supreme Court, Nassau County
Docket Number: Index No. 605993/14
Judge: James P. McCormack

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____x

TRIAL/IAS, PART 29
NASSAU COUNTY

LYNN GARONE

Plaintiff,

Index No.: 605993/14

-against-

Motion Seq. No.: 001 & 002
Motion Submitted: 9/15/16

HICKS NURSERIES,

Defendant(s).

_____x

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX
Affirmations in Opposition.....XX[1]

Plaintiff, Lynn Garone (Garone), moves this court for an order, pursuant to CPLR §3212, granting her summary judgment on the issue of liability. Defendant, Hicks Nurseries, Inc. (Hicks) opposes the motion. Hicks also moves for summary judgment against Garone on the issue of liability. Garone opposes Hicks' motion. The two motions will be decided in this one order.

[1]Hicks Nurseries submitted a reply affirmation that was served and filed after the motions were marked fully submitted. The reply was therefore not considered by the court.

Plaintiff commenced this action by service of a summons and complaint dated October 28, 2014. Issue was joined by service of an answer dated December 2, 2014. The case was certified ready for trial on February 29, 2016 and a note of issue was timely filed.

Garone alleges that on April 4, 2014 at approximately 3:45 p.m. she was leading a troop of Girl Scout Brownies on Hicks' premises. The troop was there to purchase a tree, and a Hicks employee was summoned to assist them. The Hicks employee, Elizabeth Stanwycks, directed the troop to follow her, and she began walking. Garone and the troop followed Ms. Stanwycks from the interior nursery to the exterior nursery. After passing between two large, fixed flower beds, Garone alleges she fell after her foot got caught in a crack in the pavement. As a result of her fall, she sustained injuries to, *inter alia*, her face and hand. Garone alleges she should be granted summary judgment because the crack was a dangerous condition of which Hicks had notice. Hicks claims they should be granted summary judgment as the alleged crack was trivial in nature and was therefore not actionable.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 [1979]; *Zuckerman v.*

City of New York, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, 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 (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980, *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of

avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]).

"To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

A defendant who moves for summary judgment in a slip-and-fall-action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (*see Manning v. Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006].

Herein, Plaintiff presents a number of pictures of the crack in question to establish Hicks' liability. Hicks relies on these same pictures to establish that the crack in question was trivial and not actionable. The court finds, based upon the evidence presented, including a review the pictures, that neither party has established *prima facie* entitlement to summary judgment as matter of law.

The crack is actually a seam in the cement that appears to run at least thirty feet long. Of the pictures of the crack, only one is a close-up, but it cannot be determined

from that picture how wide or deep the crack is. While Garone alleges the crack is one inch deep and two inches wide, there is no ruler or other measuring device in the picture to provide some scale. To the naked eye, based upon the picture alone, the portion of the crack where Garone alleges she fell could be less than a quarter-inch deep. While there no minimum or maximum depth as to what would be considered a dangerous or defective condition, under these circumstances, a quarter inch deep would be too trivial to be actionable. (*Trinecere v. County of Suffolk,* 90 N.Y.2d 976 [1997]).

As for Hicks, notice is not an issue as the seam runs right through the middle of their property and there is no allegation that it only recently sprouted up. Nor does Hicks allege they did not create the seam, or cause it to be created. Further, Hicks relied on Garone's pictures, and therefore did not provide a ruler either. As previously stated, without a measuring device, the court cannot tell the scale of the close-up picture, and while it is possible the crack is a quarter inch deep or less, it might also been deeper than that, potentially up to an inch or more. If it were, then there is a strong argument it is not trivial in nature. (*See Gotay v. New York Hous. Auth.*, 127 A.D.3d 693 [2nd Dept. 2015]; *Maxson v. Brentwood Union Free School Dist.*, 31 A.D.3d 506 [2nd Dept. 2006]). If so, it would be enough evidence to defeat summary judgment.

As neither party established entitlement to summary judgment as matter of law, the court need not consider either party's opposition papers. (*Winegard v. New York University Medical Center*, *supra*).

Accordingly, it is hereby

ORDERED, that Garone's motion for summary judgment is DENIED in its entirety; and it is further

ORDERED, that Hicks's motion for summary judgment in DENIED in its entirety.

This foregoing constitutes the Decision and Order of the Court.

Dated: November 22, 2016
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE