Spinella v Fink's Country Farm, Inc.
2017 NY Slip Op 31134(U)
May 24, 2017
Supreme Court, Suffolk County
Docket Number: 15-1548
Judge: Thomas F. Whelan
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SHORT FORM ORDER

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INDEX No. 15-1548
CAL. No. 16-01138OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS WHELAN
Justice of the Supreme Court

MOTION DATE 11-17-16
ADJ. DATE 1-9-17
Mot. Seq. # 001 - MG;CASEDISP

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GLENN SPINELLA, an Infant by His Mother and Natural Guardian, ELENA SPINELLA and ELENA SPINELLA, Individually,

Plaintiffs,

- against -

FINK'S COUNTRY FARM, INC.,

Defendant.

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PONTISAKOS & BRANDMAN, P.C.
Attorney for Plaintiffs
600 Old Country Road, Suite 323
Garden City, New York 11530

MAZZARA & SMALL, P.C.
Attorney for Defendant
1698 Roosevelt Avenue
Bohemia, New York 11716

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15 - 16 ; Replying Affidavits and supporting papers 17 - 18 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This action was commenced to recover damages, personally and derivatively, for personal injuries allegedly sustained by the infant plaintiff, Glenn Spinella (Glenn), on October 25, 2014 when he tripped and fell on a corn stalk at the farm operated by the defendant Fink's Country Farm, Inc. (the defendant or the farm). It is undisputed that, in September and October each year, the defendant conducts a fall festival at its farm which features rides, games, and family attractions including a corn maze designed and created by the principal officers of the corporate defendant. The complaint alleges, among other things, that the defendant is liable for the infant plaintiff's injuries on the grounds that its property "was in a dangerous, defective, hazardous and unsafe condition." The complaint further sets forth a cause of action for loss of services and comfort on behalf of Glenn's mother, the plaintiff Elena Spinella (Spinella).

The defendant now moves for summary judgment dismissing the complaint on the grounds, among other things, that it did not have actual or constructive notice of the allegedly defective condition, and that "the presence of a corn stalk ... on the ground in the maze does not constitute an unreasonably unsafe condition." In support of its motion, the defendant submits the pleadings, the deposition transcripts of the parties, a copy of a written report by a worker at the farm, and an excerpt from the hospital records for Glenn's treatment after this incident. The infant plaintiff's emergency room records relied on by the defendant are not certified, are plainly inadmissible, and have not been considered by the Court in making this determination (*see* CPLR 4518; ***Husbands v Levine***, 79 AD3d 1098, 913 NYS2d 773 [2d Dept 2010]; ***Iusmen v Konopka***, 38 AD3d 608, 831 NYS2d 530 [2d Dept 2007]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At her deposition, Spinella testified that she arrived at the farm with her children and boyfriend approximately four hours before they entered the corn maze together, that she had been in a corn maze two times previously, and that a corn maze is generally a dirt pathway with corn stalks on both sides of the path. She stated that this incident happened approximately six minutes into their walk through the maze, that she observed approximately six fallen corn stalks during that time, and that she did not make any complaints about the conditions at the farm before this incident. She indicated that her daughter and Glenn were out of sight around a bend in the maze when she heard a scream, that Glenn walked backed to her holding his arm, and that he told her that he had "tripped and fell on a corn stalk." Spinella further testified that they then exited the maze, that she met Michelle Fink (Mrs. Fink) after this incident, that she did not tell Mrs. Fink what had happened to Glenn, and that Glenn and she traveled to St. Charles Hospital in an ambulance. She acknowledged that she did not see Glenn fall, that she did not recall if she told Mrs. Fink that Glenn had been running to catch up to his sister before his fall, or if she told the hospital staff that Glenn had been running when he fell.

Glenn, who was eight years old at the time of his deposition, testified that he knew the difference between telling a lie and telling the truth, that he entered the maze with his family, and that the only instructions his mother gave him before going into the maze was to "stay close." He stated that his accident happened approximately five or six minutes after he entered the maze, that he tripped when he went to "catch up to his sister," and that he went back to where his mother was after his fall. He indicated that he told his mother that he "tripped over a piece of corn stalk that was lying on the ground," that he did not see the corn stalk before he fell, and that he saw the stalk after his fall. Glenn further

testified that he told his mother that he was "speed walking" or "walking like fastly (*sic*)" to catch up to his sister when he fell.

At her deposition, Mrs. Fink testified that she is the president of the corporate defendant, that the defendant holds a fall festival with many family activities each year, and that she and her husband, David Fink (Mr. Fink) design and create the corn maze which is a feature of each festival. She stated that the maze is approximately five acres in size, that they begin the process of design and creation of the maze in July each year including the planting of the corn, and that the corn grows to between eight and ten feet tall by the time the festival opens in September each year. She indicated that she or her husband would walk though the maze each day before the opening of the festival to the public, and during the day while it is open, to remove garbage or debris and check for "holes" in the pathway, and that the definition of debris includes corn stalks, which they would pick up and remove from the maze. Mrs. Fink further testified that she learned of this incident at approximately 4:00 p.m. when a volunteer announced it over the two-way radios they used, that she contacted the volunteer emergency medical technician on the site, and that she called for an ambulance to transport Glenn to the hospital. She stated that Spinella did not complain of any unsafe conditions on the day in question, and that the defendant does not maintain any records or logs of their walkthroughs of the corn maze.

Mr. Fink testified that he is the vice president of the corporate defendant, that the defendant uses employees and volunteers to staff the fall festival, and that he prepared, maintained, and checked the subject corn maze. He stated that he walks through the corn maze approximately five times each day of the festival, that he does so every one and one-half hours to one hour and forty-five minutes, and that he picks up any garbage and keeps the maze "neat and presentable." He indicated that he noticed one corn stalk had fallen down in the pathway of the maze at approximately 11:00 a.m. on the day of Glenn's accident, and that he picked up that stalk and carried it out of the maze. Mr. Fink further testified that he had occasionally seen as many as six corn stalks down in a given walk through of the maze, and that he would encounter fallen stalks "one or two" times in every five times he would walk through the maze. He indicated that this was the first time anyone had fallen in one of the defendant's mazes, that he was stationed in a tower located in the center of the maze to help visitors on the day of Glenn's fall, and that he did not see the fall occur.

The defendant submits a handwritten report of the medical services rendered to Glenn by its emergency medical technician. For the purposes of this motion only, the undersigned will consider the content of said report and the notation that Glenn and Spinella indicated to him that Glenn "was running in corn maze tripped and fell." However, the defendant does not, and possibly cannot, contend that Glenn was the sole proximate cause of his accident on this basis. It is well settled that the "culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages" (CPLR 1411). In addition, the issue of comparative negligence is generally one for the jury to decide (***Todd v Godek***, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]). Thus, the submission of the report does not establish the defendant's entitlement to summary judgment herein.

The undersigned now turns to address the merits of the defendant's motion. A landowner has no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses (*see* ***Mullen v Helen Keller Servs. for the Blind***, 135 AD3d 837, 23 NYS3d 350 [2d Dept 2016]; ***Mathew v A.J. Richard & Sons***, 84 AD3d 1038, 1039, 923 NYS2d 218 [2d Dept 2011]; ***Tyz v First St. Holding Co., Inc.***, 78 AD3d 818, 910 NYS 2d 179 [2d Dept 2010]). Based upon the deposition testimony, the defendants have demonstrated, as a matter of law, that the condition was open and obvious and not inherently dangerous (*see* ***Seelig v Burger King Corp.***, 66 AD3d 986, 888 NYS2d 123 [2d Dept 2009]; ***DiGeorgio v Morotta***, 47 AD3d 752, 850 NYS2d 556 [2d Dept 2008]; ***Errett v Great Neck Park Dist.***, 40 AD3d 1029, 837 NYS2d 701 [2d Dept 2007]). A condition is deemed open and obvious as a matter of law when it could not be overlooked by anyone making reasonable uses of his senses (***Arsenault v State***, 96 AD3d 97, 946 NYS2d 276 [3d Dept 2012]; ***Garrido v City of New York***, 9 AD3d 267, 779 NYS2d 208 [1st Dept 2004]). Here, the plaintiffs were aware of their presence in a recreational corn maze surrounded by corn stalks. The presence of corn stalk, possibly eight to ten feet tall, in the middle of a dirt path in a corn maze cannot be overlooked by anyone making reasonable use of his senses.

In addition, "landowners will not be held liable for injuries arising from a condition on the property that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it" (***Torres v State of New York***, 18 AD3d 739, 795 NYS2d 710 [2d Dept 2005]; *see also* ***Progressive Northeastern Ins. Co. v Town of Oyster Bay***, 40 AD3d 612, 835 NYS2d 406 [2d Dept 2007]; ***Stanton v Town of Oyster Bay***, 2 AD3d 835, 769 NYS2d 383 [2d Dept 2003]). Here, a fallen corn stalk in the middle of a corn maze is inherent in or incidental to the maze, and could be reasonably anticipated by the plaintiffs (*see* ***Maldonado v City of New York***, 29 Misc 3d 1072, 908 NYS2d 841 [Sup Ct, Kings County 2010][summary judgment granted when plaintiff tripped on fallen tree branch in city park]).

Finally, to the extent that the plaintiffs contend that the defendant has failed to establish that it did not have constructive notice of the condition which caused Glenn's fall, requiring the denial of its motion, it is without merit. Generally, owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 519, 824 NYS2d 166 [2d Dept 2006]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see* ***Herman v Lifeplex, LLC***, 106 AD3d 1050, 966 NYS2d 473 [2d Dept 2013]; ***Petersel v Good Samaritan Hosp. of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]). In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Chianese v Meier***, 98 NY2d 270, 746 NYS2d 657 [2002], citing ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986], citing ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]).

On a motion for summary judgment to dismiss the complaint, the defendant seeking judgment in his or her favor in a trip-and-fall action has the burden of submitting evidence sufficient to make a prima

facie showing that he or she neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient period of time to discover and remedy it (*see* ***Levine v G.F. Holding, Inc.***, 139 AD3d 910, 32 NYS3d 588 [2d Dept 2016]; ***Marchese v St. Martha's R.C. Church, Inc.***, 106 AD3d 881, 965 NYS2d 557 [2d Dept 2013]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Marchese v St. Martha's R.C. Church, Inc.***, *id.*; ***Oliveri v Vassar Bros. Hosp.***, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; ***Santos v 786 Flatbush Food Corp.***, 89 AD3d 828, 932 NYS2d 525 [2d Dept 2011]). Here, the defendant has met its initial burden by establishing that the maze was inspected prior to Glenn's accident.

Thus, the defendant has established their prima facie entitlement to summary judgment dismissing the complaint. In opposition to the motion, the plaintiffs submit the affirmation of their attorney who contends that the fallen corn stalk was a hazardous condition, that the defendant has failed to "prove its claimed lack of notice," and that the defendant's regular inspections of the maze were not "superfluous" as claimed by counsel for the defendant. The affidavit of an attorney who has no personal knowledge of the facts herein is insufficient to defeat a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]). Here, the plaintiffs have failed to submit admissible evidence sufficient to raise issues of fact requiring a trial of this action. Accordingly, the defendant's motion for summary judgment is granted.

Dated: 5/24/17

J.S.C.
Thomas F. Whelan

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**