Preston v Northport-East Northport Union Free Sch. Dist.
2014 NY Slip Op 31026(U)
April 15, 2014
Sup Ct, Suffolk County
Docket Number: 11-32182
Judge: Arthur G. Pitts

[* 1]

SHORT FORM ORDER

INDEX No. 11-32182
CAL. No. 13-01623OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-15-13
ADJ. DATE 12-18-13
Mot. Seq. # 004 - MG

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MICHAEL PRESTON, an infant by his Mother and Natural guardian, KRISTEN PRESTON and KRISTEN PRESTON, Individually,

Plaintiffs,

- against -

NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT, NORTHPORT LACROSS CLUB, INC. and NORTHPORT YOUTH CENTER SOCCER LEAGUE,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 18; 19 - 23 ; Replying Affidavits and supporting papers 24 - 25; 26 - 27 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Northport Lacrosse Club, Inc., for an order granting summary judgment dismissing the complaint and the cross claims against it is granted.

This action was commenced to recover damages for personal injuries allegedly sustained by infant plaintiff Michael Preston on September 20, 2009, while playing on a field at the William J. Brosnan School,

which is owned and operated by defendant Northport-East Northport Union Free School District (hereinafter the School District). The accident allegedly happened on a Sunday afternoon, as infant plaintiff and his family were at the school to watch his sister play a soccer game organized by defendant Northport Youth Center Soccer Club. According to testimony provided by infant plaintiff at a 50-h hearing and at a deposition, prior to the accident he and his brothers had been kicking a soccer ball into a metal lacrosse goal that had been left out on the field while his sister was playing soccer. Infant plaintiff testified that his older brother, Patrick, then grabbed on to the cross bar that runs across the top of the lacrosse goal and used it to support his weight as he dangled his body down into the open part of the net. He testified that he decided to try the same maneuver after his brother performed it without incident. Infant plaintiff, who was 9 years old at the time of the accident and had played on a lacrosse team earlier in the year, testified that, after hanging from the cross bar, the lacrosse goal tipped over and fell on top of him, striking the front of his head. Plaintiff Kristin Preston, infant plaintiff's mother, also brought a derivative claim for loss of services and medical expenses incurred in connection with the accident.

In addition to alleging the School District and Northport Youth Soccer Club are liable for infant plaintiff's injuries, the complaint alleges defendant Northport Lacrosse Club, Inc., is liable, among other things, for breaching a duty to maintain the lacrosse goal in a reasonably safe condition. Northport Lacrosse Club (hereinafter Northport Lax) operates a seasonal youth lacrosse league during the period from March 1 through June 15. Six months prior to infant plaintiff's accident, in March 2009, the School District granted Northport Lax a field use permit allowing it to conduct lacrosse practices and games at the William J. Brosnan School, also referred to as the Laurel Avenue School. By their bill of particulars, plaintiffs allege, in part, that Northport Lax was negligent in failing to keep the premises, "including the lacrosse equipment and goals/cages thereat in a reasonably safe condition," "in failing to properly secure the lacrosse equipment and goal/cage so as to avoid a known danger of the equipment/goal falling and/or tipping over," "in failing to utilize ground anchors when installing and/or erecting the aforementioned lacrosse goal/cage," "in failing to remove and/or restrict access to the aforesaid unsecured and unanchored lacrosse goal . . . knowing same was not safe and had a propensity to tip over," and "in failing to barricade or block off the lacrosse goal or take it out of the play area." Plaintiffs also allege that Northport Lax was negligent for "failing to heed" the recommendations of the National Federation of High School Association that an in-ground lacrosse goal, with 7½ foot vertical posts inserted into a 1½ foot by 2 inch sleeve, be used on natural surfaces or, if a flat iron goal is used, that such goal be attached to the ground with anchors.

Northport Lax now moves for an order granting summary judgment in its favor on the ground that it did not owe a duty of care to infant plaintiff, since it did not own, place, repair or have control over the lacrosse goal involved in the accident. It further argues that a decision by the School District's Athletic Director to leave the lacrosse goal on the field at the William J. Brosnan School (hereinafter the Brosnan School) after the lacrosse season, so that lacrosse players could use it in the off season, did not create a duty on its part to insure the safety of people who came in contact with the goal. In support of its motion, Northport Lax submits copies of the pleadings and the bill of particulars, transcripts of plaintiffs' 50-h hearing testimony, and transcripts of the parties' deposition testimony. Plaintiffs oppose the motion, arguing that Northport Lax, having been granted permission by the School District to use the field at the Brosnan School for lacrosse practice, had a duty to keep the lacrosse goal, which they describe as "an attractive nuisance to young children," in a reasonably safe condition. The School District also opposes the motion,

arguing that its act of granting permission to Northport Lax to use the School District's lacrosse goals "inherently gives rise to a concomitant duty of care," and that a jury must determine whether Northport Lax breached such duty.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a 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 (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

A property owner or possessor has a duty to maintain its property in a reasonably safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). To impose liability based on a failure to keep premises in a reasonably safe condition, a plaintiff must show the existence of a dangerous or defective condition on the property, that such condition caused his or her injuries, and that the defendant created the condition or had actual or constructive notice of it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Sama v Sama***, 92 AD3d 862, 939 NYS2d 113 [2d Dept 2012]; ***Winder v Executive Cleaning Serv., LLC***, 91 AD3d 865, 936 NYS2d 687 [2d Dept], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]; ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept], *lv denied* 84 AD3d 947, 621 NYS2d 511 [1994]). To constitute constructive notice, the dangerous or defective condition must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc***., 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]; ***Deveau v CF Galleria at White Plains, LLP***, 18 AD3d 695, 796 NYS2d 119 [2d Dept 2005]). Furthermore, as a general rule, liability for a dangerous or defective condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). "Where none of these factors are present, a party cannot be liable for injuries caused by the alleged defective condition" (***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 730, 869 NYS2d 593 [2d Dept 2008]).

The owner or possessor of real property, however, is not an insurer of the safety of people on its property (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]). Thus, a property owner or possessor has no duty to warn or to protect against an open or obvious condition on the property which, as a matter of law, is not inherently

dangerous (*see* ***Brande v City of White Plains***, 107 AD3d 926, 966 NYS2d 911 [2d Dept 2013]; ***Gallub v Popei's Clam Bar, Ltd., of Deer Park***, 98 AD3d 559, 949 NYS2d 467 [2d Dept 2012]; ***Schiavone v Bayside Fuel Oil Depot Corp.***, 94 AD3d 970, 942 NYS2d 585 [2d Dept], *lv denied* 20 NY3d 852, 956 NYS2d 485 [2012]; ***Atehortua v Lewin***, 90 AD3d 794, 935 NYS2d 102 [2d Dept 2011], *lv denied* 18 NY3d 811, 945 NYS2d 645 [2012]; ***McGrath v Oyster Bay Visiting Nurse Assn., Inc.***, 84 AD3d 894, 923 NYS2d 162 [2d Dept 2011]).

Northport Lax made a prima facie showing of entitlement to summary judgment in its favor on the ground that it did not owe a duty of care to infant plaintiff, since it did not own, possess or control the school property on which infant plaintiff's accident occurred, but merely had a license to use it for lacrosse practices and games (*see* ***Irizzary v Heller***, 95 AD3d 951, 943 NYS2d 606 [2d Dept 2012]; ***Keating v Town of Burke***, 86 AD3d 660, 927 NYS2d 411 [3d Dept 2011]; ***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 869 NYS2d 593; ***Millman v Citibank, NA***, 216 AD2d 278, 627 NYS2d 451; *see also* ***Gibbs v Port Auth. of N.Y.***, 17 AD3d 252, 794 NYS2d 320 [1st Dept 2005]). Furthermore, Northport Lax demonstrated that it did not owe a duty to keep the lacrosse goal, which was owned by the School District and left out on the fields by school personnel, in a reasonably safe condition (*see* ***Nielsen v Town of Amhest***, 193 AD2d 1073, 598 NYS2d 878 [4th Dept 1993]; *cf.* ***Lynch v Sports, Leisure & Entertainment RPG***, 71 AD3d 641, 896 NYS2d 413 [2d Dept 2010). The deposition testimony of Drew Cronin, the School District's Athletic Director, reveals that the School District provides two metal lacrosse goals for use on site at the Brosnan School, and that such goals are used during the lacrosse season by the School District's lacrosse teams and by Northport Lax. Cronin testified that, at his direction, the lacrosse goals used at the Brosnan School are brought to and from the school by the School District's maintenance personnel, that the goals generally stay out on the field until late July or early August, and that the goals are stored at the Northport High School when the season ends. He further testified that the building called the Brosnan School is not used by the School District for teaching, but to house its administrative offices, and that he left the lacrosse goals out in September 2009, even though the lacrosse season had ended, so that lacrosse players in the youth league could use them to practice.

The burden of proof, therefore, shifted to plaintiffs and the School District to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923). Neither plaintiffs' nor the School District's submissions in opposition to the motion demonstrated a triable issue of fact as to whether Northport Lax breached a duty of care owed to infant plaintiff. Contrary to the conclusory assertion by the School District's attorney, permission to use the field and the lacrosse goals placed on the field by the School District did not give rise to an "inherent" duty on the part of Northport Lax to secure such goals from misuse by individuals on the field at the Brosnan School. While Northport Lax had been granted permission by the School District to use a lacrosse field on the premises of the Brosnan School, there is no evidence it assumed a contractual obligation to maintain the premises in a reasonably safe condition (*see* ***Rosen v Long Is. Greenbelt Trail Conference, Inc.***, 19 AD3d 400, 796 NYS2d 130 [2d Dept 2005], *lv denied* 6 NY3d 703, 811 NYS2d 335 [2006]; *see also* ***Keating v Town of Burke***, 86 AD3d 660, 927 NYS2d 411). In fact, the undisputed evidence shows the goals were used by the School District's lacrosse teams, as well as by Northport Lax, during the spring lacrosse season, and that the School District's Athletic Director directed where such goals would be placed and when they would be returned to storage. Finally, the conclusory statement by plaintiffs' attorney that Northport Lax had a duty to keep the lacrosse goal owned by the School

District in a reasonably safe condition, and that it's failure to remove such goal from the playing field at the Brosnan School after the youth lacrosse season ended, ignores the evidence in the record that the School District retained control over the lacrosse goals and is insufficient to defeat summary judgment.

Accordingly, the motion by Northport Lax for summary judgment in its favor on the complaint and the cross claims against it is granted.

Dated: April 15, 2014

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION