2012 NY Slip Op 51409(U)

ANNEKA DAALHUYZEN, A MINOR, BY HER MOTHER AND NATURAL GUARDIAN, MARY DAALHUYZEN, Plaintiff,
v.
REY BERN ENTERPRISES, LLC, AND REY BERN ENTERPRISES, LLC D/B/A CURVES FOR WOMEN, Defendants.

5524/10.

Supreme Court, Dutchess County.

Decided July 31, 2012.

JONATHAN M. KANUCK, ESQ., MILLER, EISENMAN & KANUCK, LLP, 450 Seventh Avenue, Suite 1400, New York, New York 10123, Attorneys for Plaintiffs.

FRANK J. KEENAN, ESQ., **METHFESSEL** & **WERBEL**, ESQS., 450 Seventh Avenue, Suite 1400, New York, New York 10123, Attorneys for Defendants.

JAMES D. PAGONES, J.

The defendants move for an order granting summary judgment dismissing the plaintiff's complaint in its entirety. The plaintiff opposes the instant application.

The underlying facts are not in dispute. On January 3, 2008, at approximately 4:00 p.m., plaintiff Anneka Daalhuyzen, a minor, accompanied her mother, Mary Daalhuyzen, to Curves for Women, a health club. The plaintiff and her mother proceeded to the locker room area, at which point the plaintiff's mother proceeded into the bathroom. The plaintiff sat down on a bench situated in the locker room and began to change her sneakers. The subject bench has a rounded top, thin legs and is approximately three feet in length. The plaintiff successfully changed into her left sneaker by lifting her left foot up and placing her heel on the subject bench. The plaintiff then changed into her right sneaker by placing her right heal on the subject bench. The plaintiff testified that as she began to move her right foot from the bench to the ground, the bench tipped backwards causing the plaintiff to fall and sustain multiple fractures to her right wrist. There is no dispute that defendants Rey Bern maintain the locker room and placed the subject bench therein in approximately 2003. There is also no dispute that the bench was not secured to the floor. The defendants assert that there were no prior incidents or complaints involving the use of the bench.

The defendants assert entitlement to summary judgment because there is no evidence to indicate that the plaintiff's injuries were caused by a defective or dangerous condition on the premises or that the defendants had notice of any dangerous or defective condition on the premises.

In order "to obtain summary judgment, it is necessary that the movant establish his or her cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment' in his or her favor (CPLR 3212[b]), and he or she must do so by tender of evidentiary proof in admissible form." (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.,* 46 NY2d 1065, 1067 [1979].) Parties opposing a motion for summary judgment are obliged to lay bare their evidentiary proof in admissible form in order to show that their allegations are capable of being established at a trial. (*Albouyeh v. County of Suffolk,* 96 AD2d 543 [2d Dept. 1983] *aff'd* 62 NY2d 681 [1984].) Bare conclusory allegations, expressions of hope or unsubstantiated assertions are insufficient. (*Zuckerman v. City of New York,* 49 NY2d 557, 562 [1980].)

"A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property." (*Groom v. Village of Sea Cliff,* 50 AD3d 1094 [2nd Dept. 2008] [internal citations omitted].) To impose liability on a landowner, evidence must exist tending to show the presence of a dangerous of defective condition and that the defendants either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time. (*Bonilla v. Starrett City at Spring Creek,* 270 AD2d 377 [2nd Dept. 2000].)

In support of their motion for summary judgment, the defendants have submitted the affidavit of Scott Cameron, a professional architect. Mr. Cameron professes to have extensive experience in the development, supervision and design of building, premises and spaces relating to retail multi-family offices and warehouses. Mr. Cameron opines with a reasonable degree of architectural certainty, in rather conclusory fashion, that the dimensions and geometry of the subject bench did not contribute or cause the plaintiff's fall and injuries. This opinion appears to be based primarily on Mr. Cameron's attempts to tip the bench over while seated on it and rocking back and forth.

The qualifications of Scott Cameron as set forth in this application do not render him qualified to offer an expert opinion regarding the stability or suitability of the subject bench. As such, the court rejects this expert's opinion. The defendant has failed to establish prima facie entitlement to judgment as a matter of law dismissing the plaintiff's complaint. As such, the court need not consider the sufficiency of the plaintiff's opposition. (*Reyes v. Marchese,* 946 NYS2d 500 [2nd Dept. 2012].)

Moreover, even if the court were to consider the defendants' expert's opinion, the plaintiff has submitted an affidavit of Robert John Anders, an industrial designer, who opines to a reasonable degree of professional certainty that, inter alia, the use of the subject bench is inappropriate in a commercial setting and is hazardous in that it was not affixed to the floor, was too high, consisted of a convex shape permitting users to freely pivot and alter their center of gravity beyond the vertical plane of the rear legs, was constructed with supporting leg structures that were too narrow and failed to provide adequate stability and tipped over with minimal force. As such, the conflicting expert opinions present a credibility issue that requires resolution by a jury. (*Espinal v. Jamaica Hosp. Med. Ctr.,* 71 AD3d 723 [2nd Dept. 2010].)

Therefore, it is ordered that the defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

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