Thomas Alexson, Jr.

v.

White Memorial Foundation, Inc.

CV 07 5002299

Superior Court of Connecticut, Litchfield

March 5, 2008

Caption Date: March 5, 2008

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Marano, Richard M., J.

Opinion Title: MEMORANDUM OF DECISION RE MOTION FOR SUMMARY JUDGMENT #110

The issue presented by this motion is whether the court should grant the defendant's motion for summary judgment, submitted on the ground that there is no genuine issue of material fact concerning the applicability of General Statutes §52-557g, otherwise known as the recreational land use statute, and therefore the defendant is entitled to judgment as a matter of law. For the reasons below, the motion for summary judgment is granted.

Facts

On June 6, 2007 the plaintiff, Thomas Alexson, Jr., commenced this action by service of process against the defendant, White Memorial Foundation. The plaintiff filed a single-count complaint in which he alleges the following facts. At some time prior to July 24, 2006, workmen for the defendant were notified that a tree had fallen across a roadway on the defendant's property. The workmen subsequently attended to the obstruction and began to cut up fallen tree, but failed to complete the task prior to the date on which the defendant collided with the obstruction. On July 24, 2006, the plaintiff was riding his bicycle on the defendant's property and, after seeing the portion of the tree which still blocked the roadway, decided that he could push the obstruction aside as he passed. The plaintiff alleges that the collision with the branch while on his bicycle resulted in serious injury to his person. The plaintiff alleges that the defendant was careless and negligent in only partially removing the branch from a portion of roadway on the defendant's property and that the failure of the defendant to warn or guard against the obstruction was wilful and intentional.

The defendant filed a motion for summary judgment on December 12, 2007 and simultaneously filed a memorandum of law in support. The plaintiff filed a memorandum in opposition on January 9, 2008.

Discussion

"Practice Book §17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Johnson v. Atkinson*, 283 Conn. 243, 253, 926 A.2d 756 (2007). "[T]he 'genuine issue' aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002).

The defendant moves for summary judgment on the ground that there are no genuine issues of material fact and it is entitled to judgment as a matter of law because the defendant is immune from liability pursuant to General Statutes §52-557g(a)[1] otherwise known as the Recreational Use Act. The defendant argues that it is undisputed that the defendant is: (1) the owner of the land in question; (2) that the defendant made all or part of the land where the plaintiff was injured available for use to the public free of charge; and (3) that the plaintiff, at the time that he was injured, was using the land for a recreational purpose.

In support of its motion for summary judgment, the defendant submits the following evidence: (1) the signed and sworn affidavit of Keith Cudworth, executive director of the White Memorial Foundation; (2) the deposition testimony of the plaintiff; and (3) the deposition of the plaintiff's companion, Ray Messenger, who witnessed the plaintiff's injuries.

The plaintiff argues that there is a genuine issue of material fact as to whether the defendant made the land available to the public free of charge, as required by §52-557g. In addition, the plaintiff argues that there is a genuine issue of material fact as to whether the exception to the recreational land use immunity statute, codified in §52-557h,[2] applies to the defendant because, as alleged by the plaintiff, the defendant wilfully and maliciously failed to warn against a dangerous and defective condition.

In support of his memorandum in opposition the plaintiff submits the following evidence: (1) a printed version of information from the defendant's website,

indicating the services that the defendant provides; (2) the signed, sworn affidavit of Thomas Alexson, Jr.; and (3) the signed, sworn affidavit of Stephen Alexson, the plaintiff's uncle who witnessed the accident.

"In order to fall within the purview of §52-557g(a), the defendant . . . must establish only that it is the possessor of the fee interest in land available to the public without charge for recreational purposes." *Manning v. Barenz*, 221 Conn. 256, 260, 603 A.2d 399 (1992). In essence, three separate prongs must be proven in order for a defendant to qualify for immunity under §52-557(a); the defendant must: (1) qualify as an owner; and (2) all or part of the land must be available to the public free of charge; and (3) the land must be available for recreational purposes.

The first prong of the statute requires the defendant to be the owner of the land in question. Pursuant to §52-557f(3),[3] "owner" means, *inter alia*, "the possessor of a fee interest . . . or [a] person in control of the premises." In the present case, it is undisputed that the defendant was the owner of the land in question. Therefore, the defendant satisfies the first prong of the statute.

The second prong of the statute requires that the defendant make all or part of the land where the plaintiff was injured, available for use by the public, free of charge. Pursuant to §52-557f(1), "[c]harge" means "the admission price or fee asked in return for invitation or permission to enter or go upon the land." The defendant has submitted the affidavit of Keith Cudworth, the executive director of the White Memorial Foundation, wherein he states that the land on which the plaintiff was injured was always available for recreational use to the public, without charge. The plaintiff does not dispute that on the day he was injured, he was not charged by the defendant. In addition, the plaintiff indicates, in his deposition testimony, that the only time he has been charged a fee was when he was admitted into the museum. The plaintiff admits he was never charged to ride his bicycle on the land surrounding the museum. There is no genuine issue of material fact as to the defendant making the land upon which the plaintiff was injured available, free of charge, to the public. Thus, the defendant satisfies the second prong of the test.

The last prong of the statute requires that the land be available for recreational purposes. Section 52-557f(4)(a) provides: "'recreational purpose' includes, but is not limited to, any of the following, or any combination thereof: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, snow skiing, ice skating, sledding, hang gliding, sport parachuting, hot air ballooning and viewing or enjoying historical, archaeological, scenic or scientific sites." It is noted, however, that, "this statute clearly states that [r]ecreational purpose includes, but is *not limited to*, any of the following . . . It is evident that the enumerated activities set forth in the statute are not exclusive." (Internal quotation marks omitted, emphasis in original.) *Manning v. Barenz*, *supra*, 221 Conn. 263-64. Riding a bicycle falls within the penumbra of activities that are considered "recreational" for the purpose of §52-557g(a). Therefore the defendant satisfies the third prong of the statute. Thus, the defendant is entitled to statutory immunity, unless the exception in General Statutes §52-557h applies.

Section 52-557h states "Nothing in sections 52-557f to 52-557i, inclusive, limits in any way the liability of any owner of land which otherwise exists: (1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that, in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section."

"The courts have not yet interpreted 'wilful or malicious' failure to warn with respect to §52-557h. However, the phrase 'wilful or malicious,' has been interpreted under a companion recreational immunity statute, §52-557j, to mean conduct which 'must encompass both the physical act proscribed by the statute and its injurious consequences.' . . . Additionally, Connecticut law is replete with interpretations of the phrase 'wilful misconduct' in other contexts . . . Wilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. Its characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. Not only the action producing the injury but the resulting injury also must be intentional." (Citations omitted.) *Lopes v. Post*, Superior Court, judicial district of New Haven, Docket No. CV 90 0301492 (Mar. 16, 1994, Martin, J.) (9 C.S.C.R. 438).

A party's conclusory statements, "in the affidavit and elsewhere . . . do not constitute evidence sufficient to establish the existence of disputed material facts." *Gupta v. New Britain General Hospital*, 239 Conn. 574, 583, 687 A.2d 111 (1996). In the present case, the plaintiff alleges that on or about July 24, 2006, the workmen of the defendant began cutting a tree; failed to complete the job; and left the tree in the road without any warning. The plaintiff argues that this constitutes a wilful failure to guard or warn against a danger sufficient to fall within the purview of 52-557h.

The plaintiff's conclusory statements in his complaint, coupled with the conclusory statements in the affidavit of Stephen Alexson (the admissibility of which are dubious at best) do not raise a genuine issue of material fact. The complaint is bereft of the factual

predicate necessary to lead a reasonable person to infer that the workmen intended to injure passers by, and this plaintiff in particular, by their actions.

Conclusion

For the foregoing reasons, the evidence submitted by both parties shows that there is no genuine issue of material fact and that the defendant is entitled to statutory immunity under §52-557g(a). Therefore the defendant's motion for summary judgment is granted.

So ordered.

BY THE COURT

Marano, J.

Footnotes

[1]. General Statutes §52-557g(a) states: "Except as provided in section 52-557h, an owner of land who makes all or any part of the land available to the public without charge, rent, fee or other commercial service for recreational purposes owes no duty of care to keep the land, or the part thereof so made available, safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on the land to persons entering for recreational purposes."

[2]. General Statutes §52-557h provides, in relevant part: "Nothing in sections 52-557f to 52-557i, inclusive, limits in any way the liability of an owner of land which otherwise exists: (1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof . . ."

[3]. §52-557f(3) states: "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.

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