842 N.Y.S.2d 657

43 A.D.3d 1386

Bruce C. Quackenbush, Respondent

v.

City of Buffalo, Appellant.

2007-07191

Supreme Court of New York, Fourth Department

September 28, 2007

[43 A.D.3d 1387] COUNSEL

Alisa A. Lukasiewicz, Corporation Counsel, Buffalo (John J. Cotter, Jr., of counsel), for defendant-appellant.

James A. Partacz, West Seneca, for plaintiff-respondent.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 1, 2006 in a personal injury action. The order, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint.

It is hereby Ordered that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum:

Plaintiff commenced this action seeking damages forinjuries he sustained when the mountain bike he was riding hit a large hole on atrail located in a park owned by defendant, City of Buffalo (City). We concludethat Supreme Court properly denied the City's motion for summary judgmentdismissing the complaint. Contrary to the contention of the City, GeneralObligations Law § 9-103 does not confer immunity upon it. That statute generallyprovides immunity to landowners who permit others to use their property forcertain enumerated recreational activities (*see* § 9-103 [1] [a], [b]).When the landowner is a government entity, however, "the appropriate inquiry is'the role of the landowner in relation to the public's use of the property indetermining whether it is appropriate to apply the limited liability provisionof [that statute]' " (*Blair v Newstead Snowseekers,* 2 A.D.3d 1286, 1288[2003], *lv denied* 2 N.Y.3d 704 [2004]; *see Myers v State of New York,* 11 A.D.3d 1020 [2004]; *see generally Ferres v City of New Rochelle,* 68 N.Y.2d446, 451-455 [1986]; *Rashford v City of Utica,* 23 A.D.3d 1000 [2005]).

[43 A.D.3d 1388] We conclude that statutory immunity does not apply here, inasmuch as the parkis actively operated, supervised and maintained in such a manner that theapplication of such immunity would not create an additional inducement to keepthe property open to the public for the specified recreational activities setforth in General Obligations Law § 9-103 (1) (a) (*see e.g. Ferres,* 68NY2d at 451-455; *Rashford,* 23 A.D.3d at 1001; *Keppler v Town of Schroon,*267 A.D.2d 745, 747 [1999]; *cf. Sega v State of New York,* 60 N.Y.2d 183,188-191 [1983], *rearg denied* 61 N.Y.2d 670 [1983]; *Myers,* 11 A.D.3d1020 [2004]; *Perrott v City of Troy,* 261 A.D.2d 29, 31-32 [1999]; *Stentov State of New York,* 245 A.D.2d 771, 772-773 [1997], *lv denied* 92 N.Y.2d802 [1998]).

Contrary to the further contention of the City, section 21-2 of its City Code is also inapplicable to this case. That section provides that no civil action shall be maintained against the City for damage or injuries sustained in consequence of, inter alia, the defective or dangerous condition of any sidewalk or crosswalk, pedestrian walk or path unless the City had received prior written notice of the condition. In enacting General Municipal Law § 50-e (4), however, the Legislature indicated its intent to limit application of the prior written notice requirement to streets, highways, bridges, culverts, sidewalks or crosswalks, and under the facts of this case "[t]he statute must be construed . . . as a flat prohibition not only of the [City's] enactment of any notice of claim provision other than that provided for in the statute, but also a prohibition of any notice of defect enactment pertaining to locations beyond the six specified" (*Walker v Town of Hempstead,* 84 N.Y.2d 360, 368 [1994]). We reject the City's contention that the unimproved "trail" or "path" upon which plaintiff was injured is the functional equivalent of a sidewalk (*cf. Woodson v City of New York,* 93 N.Y.2d 936, 937-938 [1999];*Garrison v City of New York,* 300 A.D.2d 14, 15 [2002], *lv denied* 99 N.Y.2d 510 [2003];*Rutto v County of Westchester,* 298 A.D.2d 450, 450-451 [2002]; *Scoville v Town of Amherst,* 277 A.D.2d 1038 [2000]).

We reject the further contention of the City that plaintiff assumed the risk of injury. Although "the risk of striking a hole and falling is an inherent risk in riding a bicycle on most outdoor surfaces" (*Goldberg v Town of Hempstead,* 289 A.D.2d 198[2001]; *see Rivera v Glen Oaks Vil. Owners, Inc.,* 41 A.D.3d 817, 820-821[2007]; *Schiavone v Brinewood Rod & Gun Club,* 283 A.D.2d 234, 236-237[2001]), we agree with plaintiff that there is an issue of fact whether the hole at issue in this case was open and obvious (*see Berfas v Town of Oyster Bay,* 286 A.D.2d 466; *see also Moore v City of New York,* 29 A.D.3d 751[2006];

[43 A.D.3d 1389] *Weller v Colleges of the Senecas,* 217

A.D.2d 280, 284-285 [1995]; *cf. Rivera*, 41 A.D.3d at 820-821; *Goldberg*, 289 A.D.2d 198[2001]).

Finally, as the proponent of the motion for summary judgment, the City was required to establish as a matter of law that it did not create the dangerous condition and did not have actual or constructive notice of it (*see Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 A.D.3d 857 [2005]; *see also Schmitz v Alpha House, Inc.*, 26 A.D.3d 805 [2006]; *Pelow v Tri-Main Dev.*, 303 A.D.2d 940, 940-941 [2003]). We conclude that the City failed to establish that it did not create the dangerous condition and did not have actual or constructive notice of it but, even assuming, arguendo, that the City met its initial burden, we conclude that plaintiff raised triable issues of fact whether the alleged defect was "visible and apparent and [existed] for a sufficient length of time prior to the accident to permit [the City's] employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]).

Present--Martoche, J.P., Smith, Peradotto, Green and Pine, JJ.