

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X
STEVE ZISSOU,

Plaintiff,

-against-

THE COUNTY OF NASSAU, THE NASSAU COUNTY
SHERIFF'S DEPARTMENT, THE NASSAU COUNTY
CORRECTIONAL CENTER,

Defendants.
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TRIAL/IAS PART 21

INDEX # 9471/06

Motion Seq. 1

Motion Date 10.3.11

Submit Date 12-8-11

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The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

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Defendants (hereinafter "County"), collectively by their attorney, John Ciampoli, County Attorney for the County of Nassau, move by notice of motion for an order pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and all cross-claims.

This action is brought to recover damages for personal injury resulting from the alleged negligence of the defendants. Plaintiff states that on March 24, 2005, he was exiting the Nassau County Correctional Center when he was struck at the top of his head by a metallic entrance/exit gate arm which is raised and lowered by an operator, to allow entrance or exit of vehicles to the parking facilities. As a result, plaintiff allegedly sustained personal injury.

The County moves for summary judgment on the ground that it had no actual or constructive notice of any defects or dangerous conditions at the gate in question and that the plaintiff's own reckless conduct was the proximate cause of his injuries. The County points to Nassau County Administrative Code §12-4(e) which precludes actions where there was no prior

written notice of the unsafe, dangerous or defective condition of, among other things, driveways, unless the claimant can establish that the municipality created the defect through an affirmative act.

The County produced the gate operator, correction officer Chris Anadollis, at a deposition. He testified, inter alia, that part of his job was to raise and lower the gate arm when a vehicle enters and exits the correctional center. He testified that he looks around the area to see if it's safe before he hits the button to let the gate arm go up and/or down. Furthermore, when a pedestrian such as the plaintiff exits the correctional center, he is supposed to follow the signs indicating pedestrians to stay on the sidewalk and then cross the crosswalk in front of the gatehouse. The County alleges that plaintiff did not walk along the designated crosswalk and his own recklessness was the proximate cause of his injuries. The County states that there was no defect in the gate and that the existence of the gate was open and obvious. The plaintiff should have known that instead of following the posted signs directing pedestrians to walk on the sidewalk, walking in the roadway where a gate opens and closes for motor vehicles to pass poses a danger of injury.

In opposition, plaintiff states that he has visited the correctional center various times prior to the date of the incident and has never observed any signs, nor was he ever given any directions guiding him, as a pedestrian, where he should walk when entering or exiting the parking facilities.

Plaintiff argues that Officer Anadollis testified that he could not recall whether there were any signs on the date of the incident even though he believed there should have been signs present. He further argues that Officer Anadollis did not recall seeing him anytime prior to the incident, and only noticed him after he was struck and was located on the ground despite the fact that the officer normally looks around to see if it is safe before he presses the button which moves the gate up and down.

Plaintiff further argues that Officer Anadollis was negligent in his operation of the gate because he could not have been paying attention to the gate at all or carefully following proper procedures or he would have clearly observed plaintiff walking toward and underneath the gate prior to the incident.

Plaintiff argues that defendants were clearly aware that such an injury may result from pedestrians being allowed to walk under a gate arm; that they knew or should have known that there were no signs warning pedestrians not to walk underneath said gate; and that they knew or should have known that there was not a path clearly marked for pedestrians to follow.

In reply, the County argues that plaintiff misconstrued Officer Anadollis' testimony and that his injuries are a result of his own negligence. It argues that on the date of the incident, there were signs clearly posted directing pedestrians where to walk. Defendant attaches photographs and an affidavit in support from John Stafford, Supervisor of Buildings and Ground Maintenance for the Nassau County Correctional Facility.

Based on the foregoing, the decision of the court is as follows:

“It is well settled that a the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Bhatti v Roche*, 140 AD2d 660, 528 N.Y.S.2d 1020 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 390 N.E.2d 298, 416 N.Y.S.2d 790 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 479 N.E.2d 229, 489 N.Y.S.2d 884 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980], supra). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 N.Y.S.2d 134 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631, 595 N.Y.S.2d 236 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957], supra).” *Recine v. Margolis*, 24 Misc. 3d 1244A; 901 N.Y.S.2d 902

In the case at bar, the County has made a prima facie showing in favor of awarding summary judgment, therefore, the burden shifts to plaintiff to come forward with competent evidence to demonstrate that a material issue of fact exists to preclude such relief.

On this record, the court finds that plaintiff has successfully raised material issues of fact to preclude summary judgment. Whether there were proper warning signs posted on the date of the incident and whether Officer Anadollis followed proper procedures are material issues of fact for the jury to decide. Likewise, whether plaintiff was comparatively negligent is an issue for the jury.

Accordingly, it is

ORDERED, that the application for summary judgment is **DENIED**.

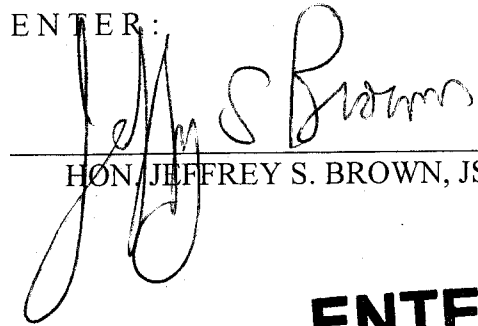
The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
December 16, 2011

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ENTER:



HON. JEFFREY S. BROWN, JSC

ENTERED
DEC 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE