

James Stack

v.

Joseph Hernandez

LLI-CV-04-5000024S

Superior Court of Connecticut, Litchfield

June 12, 2007

Caption Date: June 11, 2007

Judge (with first initial, no space for Sullivan, Dorsey, and Walsh): Pickard, John W., J.

Opinion Title: MEMORANDUM OF DECISION

Before me is the defendant's motion for summary judgment (#109) in this premises liability case. For the reasons that follow, I conclude that the motion must be denied.

The plaintiff alleges that October 7, 2003 he was trimming trees at the defendant's property at the invitation and permission of the defendant. He alleges that while he working he stepped in a depression in the defendant's lawn and fractured his leg. He alleges that his injuries were caused by the negligence of the defendant in failing to remedy the depression in the lawn or in failing to warn him of it, even though he knew or should have known of its presence. The defendant has filed this motion for judgment on the grounds that there is no genuine issue of material fact on the issue of notice. He supports his motion with a brief, certified copies of selected portions of the plaintiff's deposition and with an affidavit from the defendant. The plaintiff has filed an opposing brief supported by uncertified copies the entire depositions of the plaintiff and defendant, and a portion of a deposition of Kenneth Healy.[1]

"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.) *Old Farms Associates v. Commissioner of Revenue Services*, 279 Conn. 465, 479, 903 A.2d 152 (2006). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of

law." (Internal quotation marks omitted.) *Zielinski v. Kotsoris*, 279 Conn. 312, 318, 901 A.2d 1207 (2006).

"Litigants have a right to have issues of fact decided by a jury. Summary judgment procedure is especially ill-adapted to negligence cases, where, as here, the ultimate issue in contention involves a mixed question of fact and law, and requires the trier of fact to determine whether the standard of care was met in a specific situation. The conclusion of negligence is necessarily one of fact. Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner." (Citations omitted; internal quotation marks omitted.) *Spencer v. Good Earth Restaurant Corporation*, 164 Conn. 194, 198 (1972).

"A possessor of land has a duty to an invitee to reasonably inspect and maintain the premises in order to render them reasonably safe. In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover." (Citations omitted.) *Sevigny v. Dibble Hollow Condo Ass'n., Inc.*, 76 Conn.App. 306, 320 (2003). "The existence of actual or constructive notice is a question of fact . . ." *Henriquez v. Allegre*, 68 Conn.App., 238 Conn.App. 238, 248, note 15 (2002).

The evidence submitted by the defendant leads to the following findings. On October 7, 2003 the plaintiff was an invitee on the defendant's property when he stepped in a depression in the front lawn and broke his leg. The depression was approximately 4 inches in width and 3 or 4 inches in depth. The plaintiff's right toe went into the depression and stopped. The lawn was grass which was bumpy and had yellow patches in it. The plaintiff did not see the depression before he stepped into it. The defendant had no actual knowledge of the depression. He had performed normal maintenance on the lawn himself and had never noticed it.

The defendant argues that there is no evidence from which the trier of fact could conclude that he had actual or constructive notice of the depression or that it was a danger of which the plaintiff was entitled to be warned. I disagree. Although the plaintiff's claim is not strong, a reasonable person could conclude that the depression in the lawn was a "danger" which the defendant should have discovered and remedied with a reasonable inspection. "A party has the same right to submit a weak case as he has to submit a strong one." *Grondin v. Curi*, 262 Conn. 637, 648, note 12 (2003). "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Spencer v. Good Earth Restaurant Corporation*, 164 Conn. 194, 199 (1972). The motion for summary judgment is denied.

BY THE COURT,

John W. Pickard

Footnotes

[1]. Practice Book Sec. 17-46 requires that papers supporting or opposing a motion for summary judgment must be "sworn of certified copies." The defendant objects to the plaintiff's use of uncertified copies of the depositions. In deciding this motion the court agrees with the defendant and has not made use of anything other than the certified portions of the depositions supplied by the defendant.