53 Misc.3d 1220(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Supreme Court, Warren County, New York.

Jody **BURGESS** and Ethan **Burgess**, Individually and as Parents and Guardians of EB, a minor, Plaintiffs.
v.
CITY OF **GLENS FALLS** and **Glens Falls** Little League, Inc., Defendants.

No. 60229.
|
Nov. 18, 2016.

Attorneys and Law Firms

Bartlett, Pontiff, Stewart & Rhodes, P.C., **Glens Falls** (Paula Nadeau Berube of counsel) for plaintiffs.

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., Albany (Brienna L. Christiano of counsel) for defendants/third-party plaintiffs City of **Glens Falls** and **Glens Falls** Little League, Inc.

Law Offices of Susan B. Owens, White Plains (Paul J. Catone of counsel) for third-party defendant.

Opinion

ROBERT J. MULLER, J.

***1** On May 29, 2013, the infant plaintiff was on an upper tier of a set of bleachers at the East Field Little League Complex (hereinafter East Field) in the City of **Glens Falls**, Warren County. A section of the bleachers' foot plank was missing and allegedly resulted in the infant **falling** and sustaining injuries. The property where East Field is located is owned by defendant City of **Glens Falls** (hereinafter the City) and is leased to defendant **Glens Falls** Little League, Inc. (hereinafter GFLL) under the terms of a 30 year lease running from January 1, 1992 to December 31, 2021. Plaintiffs commenced this action against defendants in May 2014.[1] Disclosure has been completed and a note of issue was filed in June 2016. Defendants now move for summary judgment dismissing the action as to the City upon the ground that the City was an out-of-possession landlord who had relinquished control of the premises to GFLL.

"As a general rule, an out-of-possession landlord is not responsible for dangerous conditions existing upon leased premises after possession of the premises has been transferred to the tenant" (*McLaughlin v. 22 New Scotland Ave., LLC,* 132 AD3d 1190, 1192 [2015] [internal quotation marks and citations omitted] see *Vanderlyn v. Daly,* 97 AD3d 1053, 1055 [2012], lv. denied 20 NY3d 853 [2012]). "Exceptions to this rule include situations where the landlord retains control of the premises, has specifically contracted to repair or maintain the property, has through a course of conduct assumed a responsibility to maintain or repair the property or has affirmatively created a dangerous condition" (*Whittington v. Champlain Ctr. N. LLC,* 123 AD3d 1253, 1254 [2014] [internal quotation marks and citations omitted]; see *Davison v. Wiggand,* 247 A.D.2d 700, 701 [1998]). However, "without notice of a specific dangerous condition, an out-of-possession landlord cannot be faulted for failing to repair or otherwise rectify it. Accordingly, the burden is on the plaintiff to prove actual or constructive notice and a reasonable opportunity to repair or remedy the dangerous condition" (*Pomeroy v. Gelber,* 117 AD3d 1161, 1162 [2014] [internal quotation marks, brackets and citations omitted]; see *Oates v. Iacovelli,* 80 AD3d 1059, 1060 [2011]).

Under the terms of the lease between GFLL and the City, GFLL had "exclusive use of the Property" for conducting its baseball program. GFLL agreed that it would construct baseball fields on the site at its expense. The lease provided that "GFLL shall be responsible for all maintenance and repairs to the Property". Timothy E. Guy, GFLL's president in 2013 and for about eight years prior thereto, testified at his deposition that GFLL was responsible for maintenance at East Field. Guy acknowledged that, after the accident, the league's vice-president stated to him that he had noticed a few weeks before the accident that a foot plank was missing from the relevant bleachers. Michael Mender, the City's Assistant to the Mayor, submitted an affidavit in which he stated that the City "has not and does not participate in a course of conduct that includes inspection, repair or maintenance of the bleachers at the East Field Little League Complex". He testified at his deposition that he was not aware of any notice of prior accidents, maintenance calls to the City, or work by the City regarding East Field during the previous three years. Defendants made a prima facie showing that the City is entitled to summary judgment dismissing the complaint as to it (see e.g. *Brown v. BT–Newyo, LLC,* 93 AD3d 1138, 1138 [2012]).

***2** In opposition, plaintiffs assert that the City was not an out-of-possession landlord because it maintained control over the premises and that the City should have known about the defective condition. Plaintiffs rely in part on the provision of paragraph 3 of the lease, which provides as follows regarding use of East Field by the City:

> The parties understand that the City may wish to conduct certain scheduled events on the Property when it is not being used by GFLL. When the City wishes to conduct such an event, it shall contact GFLL in advance to confirm that the proposed use is acceptable to GFLL. The City shall be responsible for any maintenance or repairs required as a result of the events it conducts.

This provision does not reflect that the City maintained control over the premises. Under the provision, the City had to contact GFLL, and GFLL determined whether the proposed use was acceptable to it. GFLL had dominion and control over the premises under the express terms of the lease, and the fact that the City could seek permission to use the premises (and assume responsibility for such use) does not lead to the conclusion that the City had failed to relinquished control of the premises to GFLL (cf. *Page v. State of New York*, 72 AD3d 1456, 1458 [2010] [agreement did not establish transfer of control where owner made space "available," did not denote the agreement as a lease, did not fully relinquish possession and expressly remained responsible for repairs]). The current situation is, at best, more akin to a situation where the owner has a limited right to re-enter, which does not necessarily vitiate the owner's status as an out-of-possession landlord (see e.g. *Whittington v. Champlain Ctr. N. LLC*, 123 AD3d 1253, 1254–1255 [2014]).[2]

The City had last used East Field before the accident pursuant to a request granted by GFLL under this provision of the lease for an "Annual Summer Jam" concert held on July 3, 2012. Plaintiffs' counsel speculates that it is "entirely possible" that the missing foot plank was removed at the time of this City sponsored concert. However, the concert occurred over 10 months before the accident and there is no competent proof indicating that the relevant plank had been removed or damaged at such time (cf. *Oats v. Iacovelli*, 80 AD3d at 1060–1061 [expert evidence indicating that rotting wood and rusty nails were visible and should have given the owner notice of the condition of a deck that collapsed]). Plaintiffs have not provided any evidence that the City had actual or constructive notice of the condition other than speculation, and "speculation ... is insufficient to raise a question of fact to preclude summary judgment" (*Lockwood v. Layton*, 79 AD3d 1342, 1344 [2010]).

Based upon the foregoing analysis and upon review of the papers as enumerated hereinafter, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint as to defendant City of **Glens Falls** is granted; and it is further

***3** ORDERED that any relief not specifically addressed has nonetheless been considered and is hereby expressly denied.

The above constitutes the Decision and Order of this Court.

The original of this Decision and Order has been filed by the Court together with the Notice of Motion of Defendants, dated September 26, 2016, and the submissions referenced below. Counsel for defendants is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry in accordance with CPLR 5513.

Papers reviewed:

1. Affidavit in Support of defendants' Motion of Brienna L. Christiano, Esq., dated September 26, 2016, annexed Exhibits A through K.

2. Affidavit in Support of defendants' Motion of Michael Mender, dated September 23, 2016, annexed Exhibit 1.

3. Defendants' Memorandum of Law, dated September 26, 2016.

4. Affidavit in Opposition to Motion of Paula Nadeau Berube, Esq., dated October 7, 2016, annexed Exhibits A through E.

5. Plaintiffs' Memorandum of Law, dated October 7, 2016.

6. Reply Affidavit of Brienna L. Christiano, Esq., dated October 20, 2016.

7. Defendants' Reply Memorandum of Law, dated October 20, 2016.

All Citations (Table), 2016 N.Y. Slip Op. 51752(U)

Slip Copy, 53 Misc.3d 1220(A), 2016 WL 7233976

Footnotes

1 In March 2015, defendants brought a third-party action against the infant's grandmother, Martha Young, who was reportedly supervising him at the time he **fell**.

2 Plaintiffs also point to a provision of the lease in which the City agreed to provide water and sewer services. While not universal, nonetheless it is not uncommon for a landlord to include such services in a lease. Such services are not relevant to the current case and do not reflect that the City retained control over the premises.

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