JUDGE DECLINES TO FIND HOSES INHERENT DANGER TO BICYCLES

New York Law Journal
May 9, 2006 Tuesday

New York Law Journal
Section: Pg. 33, (col. 3); Vol. 235

Length: 558 words

Byline: Mark Fass

Body

Taxis. Manholes. Pedestrians. Perhaps even horses and carriages.

These are all seemingly inherent dangers for bicyclists in Manhattan.

But what about garden hoses?

A Manhattan judge has ruled that question too close to call and allowed a biker's personal injury suit to go forward, denying the defense's motion for summary judgment.

The defendants ask the court to determine that a garden hose across a pathway is inherent to bicycle riding in New York City, Supreme Court Justice Sherry Klein-Heitler wrote in **Eagle v. Chelsea Piers**, 109877/03. Curbs and sewer grates are frequently encountered by New York bicycle riders. However, at this juncture it is not clear that a garden hose in New York City is so common as to eliminate any duty of care in its placement.

The injurious hose felled Harry Eagle on a Thursday afternoon in 2001 as he took his usual lunchtime ride on the bicycle path along the West Side Highway.

As Mr. Eagle exited the u-shaped Pier 60 at the Chelsea Piers, he saw and then struck a loose, standard-green hose carrying water to a docked ship, the Majestic Star.

Mr. Eagle, 48, crashed his bike and broke his hip, which required the insertion of a pin.

He initiated a suit against the owners of the ship, Majestic Voyages, and the Chelsea Piers.

The defendants argued among other things that Mr. Eagle admitted seeing the hose 25 feet before reaching it and nonetheless attempted to cross it, and that encountering such hoses is an inherent risk in bicycling in New York City and Mr. Eagle therefore assumed the risk as soon as [he] mounted his bike.

Mr. Eagle demurred.

I cannot remember ever riding over a garden hose on a public thoroughfare before, he testified. Nor do I remember ever seeing a garden hose laid loosely across a paved bicycle/pedestrian way anywhere in Manhattan before my accident.

Justice Klein-Heitler noted that by participating in a recreational activity a person assumes the risks that are inherent and arise out of the nature of that activity. However, she held that the defense failed to establish that a garden hose is one such inherent risk in Manhattan.

Although plaintiff admittedly saw the hose many yards before reaching it and had biked the path many times before, these facts are insufficient to justify judgment as a matter of law, Justice

Klein-Heitler concluded. She, therefore, dismissed the defense's motion for summary judgment, as well as Chelsea Piers' motion for summary judgment for contractual and common-law indemnification against Majestic Voyages.

Dominique Penson and Bruce Kaye of the personal-injury firm Barasch McGarry Salzman & Penson represented Mr. Eagle.

With implied assumption of riskyou have to show among other things that the risk you're talking about is one that is inherent in the sport or the recreation, Mr. Penson said. It's certainly at minimum a question of fact whether encountering a garden hose is an inherent risk. There are lots of inherent risks to bicycling in Manhattan, but I don't think that's one of them.

Glenn H. Egor of the Uniondale office of Rivkin Radler represented Chelsea Piers. He has filed a notice of appeal.

Joe Perrone of Bennett Giuliano McDonnell & Perrone represented Majestic Voyages. He expressed disappointment with the decision.

You're always fighting that bias and presumption that the plaintiff should have a jury trial, Mr. Perrone said.

Classification

Language: ENGLISH

Publication-Type: Newspaper

Subject: DECISIONS & RULINGS (90%); SETTLEMENTS & DECISIONS (90%); LITIGATION (90%); SUMMARY JUDGMENT (89%); PERSONAL INJURY (89%); BONE FRACTURES (77%); TESTIMONY (76%); SUITS & CLAIMS (73%); CYCLING (73%); SUPREME COURTS (73%); LAW COURTS & TRIBUNALS (73%); INDEMNITY AGREEMENTS (60%)

Company: BARASCH MCGARRY SALZMAN & PENSON PC (84%)

Industry: NAICS541110 OFFICES OF LAWYERS (84%); SIC8111 LEGAL SERVICES (84%)

Geographic: NEW YORK, NY, USA (96%); NEW YORK, USA (96%); UNITED STATES (96%)

Load-Date: August 7, 2011

46 A.D.3d 367
Supreme Court, Appellate Division,
First Department, New York.

Harry EAGLE, Plaintiff–Respondent,
v.
CHELSEA PIERS, L.P., et al.,
Defendants–Appellants–Respondents,
Majestic Voyages, Inc., Defendant–
Respondent–Appellant.

Dec. 18, 2007.

Synopsis

Background: Bicyclist brought action against pier and owner of vessel docked at pier for injuries allegedly sustained when bicyclist was caused to fall off bicycle while riding over water hose running from vessel across pathway to water supply inside pier's motor vehicle parking area. The Supreme Court, New York County, Sherry Klein Heitler, J., granted in part and denied in part defendants' motions for summary judgment. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] hose strewn across paved bicycle path was not risk inherent to bicycling, and therefore doctrine of assumption of risk did not apply, and

[2] genuine issue of material fact as to whether pier was aware of vessel owner's recurrent, dangerous practice of improperly placing hose across path precluded summary judgment.

Affirmed as modified.

West Headnotes (2)

[1] Automobiles
Knowledge Of, and Duty to Observe, Defect or Danger

Garden hose strewn across paved bicycle path was not a risk inherent to sport of bicycling in an urban area, and therefore the doctrine of assumption of risk did not serve as a bar to bicyclist's action against pier and owner of vessel docked at the pier for injuries allegedly sustained when bicyclist was caused to fall off bicycle while riding over water hose running from vessel across pathway to water supply inside pier's motor vehicle parking area.

1 Cases that cite this headnote

[2] Judgment
Tort Cases in General

Genuine issue of material fact existed as to whether pier was aware of vessel owner's recurrent, dangerous practice of improperly placing garden hose across bicycle path, precluding summary judgment in bicyclist's action against pier and owner of vessel docked at pier for injuries allegedly sustained when bicyclist was caused to fall off bicycle while riding over water hose running from vessel across pathway to water supply inside pier's motor vehicle parking area.

1 Cases that cite this headnote

Attorneys and Law Firms

****60** Rivkin Radler LLP, Uniondale (Melissa M. Murphy of counsel), for appellants-respondents.

Bennett, Giuliano, McDonnell & Perrone, LLP, New York (Joseph J. Perrone of counsel), for respondent-appellant.

Barasch McGarry Salzman & **Penson**, New York (**Dominique Penson** of counsel), for respondent.

TOM, J.P., FRIEDMAN, WILLIAMS, McGUIRE, KAVANAGH, JJ.

Opinion

***368** Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered May 4, 2006, which denied the motion of defendants Chelsea Piers, L.P. and Chelsea Piers Management, Inc. (collectively Chelsea) and the cross motion of defendant Majestic Voyages, Inc. (Majestic) for summary judgment dismissing the complaint, and which denied that part of Chelsea's motion for summary judgment on their cross claims against Majestic for common-law and contractual

indemnification, and which granted so much of Chelsea's motion for summary judgment on their cross claim against Majestic for breach of contract, unanimously modified, on the law, to the extent of granting Chelsea conditional summary judgment on the cross claim for contractual indemnification, and otherwise affirmed, without costs.

Plaintiff commenced this action against Chelsea and Majestic for injuries he allegedly sustained when he was caused to fall off his bicycle while riding over a water hose stretched along the bicycle/pedestrian pathway of Pier 60 at Chelsea Piers. Majestic owned a vessel that was docked at the pier at the time of plaintiff's accident ****61** pursuant to a lease with Chelsea, and ran the garden-type hose from the vessel across the subject pathway to a water supply inside the pier's motor vehicle parking area.

[1] **[2]** Denial of Chelsea and Majestic's applications for summary judgment was appropriate since a garden hose strewn across a paved bicycle path is not a risk inherent to the sport of bicycling in an urban area, and thus, the doctrine of assumption of risk does not serve as a bar to plaintiff's action (*see Morgan v. State of New York,* 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202 [1997]). Nor was Chelsea entitled to summary judgment on the ground of lack of notice since there are triable issues concerning whether Chelsea was aware of Majestic's recurrent, dangerous practice of improperly placing the hose across the subject bicycle path (*see O'Connor–Miele v. Barhite & Holzinger, Inc.,* 234 A.D.2d 106, 106–107, 650 N.Y.S.2d 717 [1996]).

The court also properly granted so much of Chelsea's motion for summary judgment on their cross claim against Majestic for breach of contract. It is undisputed that Majestic failed to name Chelsea as an additional insured under its liability policy as it was required to do pursuant to the parties' lease (*see Inchaustegui v. 666 5th Ave. Ltd. Partnership,* 96 N.Y.2d 111, 114, 725 N.Y.S.2d 627, 749 N.E.2d 196 [2001]; *Taylor v. Gannett Co.,* 303 A.D.2d 397, 399, 760 N.Y.S.2d 47 [2003]).

However, the court improperly denied that branch of Chelsea's ***369** motion for summary judgment on their cross claim against Majestic for contractual indemnification. Chelsea established that the right to indemnification was based upon an express contract (*see Cunningham v. Alexander's King Plaza, LLC,* 22 A.D.3d 703, 707, 803 N.Y.S.2d 125 [2005]), and an award of conditional summary judgment on the cross claim is appropriate. In view of this conclusion, there is no need to address Chelsea's request for summary judgment on the cross claim for common-law indemnification.

We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

Parallel Citations

46 A.D.3d 367, 848 N.Y.S.2d 59, 2007 N.Y. Slip Op. 09941

End of Document