Franklin County Legal Journal

Volume 23, No. 13, pp. 35-40

Sider v. Borough of Waynesboro

JOLEEN L. SIDER, Plaintiff, v. BOROUGH OF WAYNESBORO, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 2003-983

Negligence; Statute of repose, 42 Pa.C.S.A. §5536; Summary judgment

1. The statute of repose relating to construction projects requires that lawsuits against persons involved with improvements to real estate who perform acts of individual expertise on the project must be filed within 12 years of the project's completion.

2. A genuine issue of material fact exists as to whether defendant was negligent in the maintenance of a swing set located on defendant's property where discovery indicates that defendant had actual possession and control of the swing set at the time plaintiff was injured; such an issue of fact renders defendant ineligible for protection against a negligence claim under the statute of repose and ineligible for relief by way of summary judgment.

Appearances:

James M. Stein, Esq., *Attorney for Plaintiff*

C. Kent Price, Esq., *Attorney for Defendant*

OPINION

Van Horn, J., June 29, 2005

Facts

Plaintiff, Joleen Sider, was injured while using a swing set in the Borough of Waynesboro's (Defendant) Memorial Park on July 15, 2001. The park is situated on real estate owned by Defendant. The swing set was manufactured and delivered to Defendant by an unknown third party in approximately 1967. Defendant's employees assembled the swing set in the same year and anchored it to the real estate by setting the legs in three feet of concrete. Defendant continuously maintained the swing set during the 34-year period prior to the accident.

Plaintiff's injuries occurred when, while swinging, the steel cross-pipe from which the swing suspended detached from the upright end-posts causing her to fall to the ground. The cross-pipe then struck Plaintiff on the head causing her injuries. Plaintiff is now suing Defendant on a theory of negligence seeking monetary damages from her injuries.

Procedural History

On August 11, 2003, Plaintiff filed a Complaint. Defendant filed an Answer with New Matter on February 9, 2004. On February 12, 2004, Plaintiff filed Plaintiff's Response to New Matter. On May 12, 2005, Defendant filed a Motion for Summary Judgment Against Plaintiff. On May 16, 2005, Plaintiff filed Plaintiff's Answer to Defendant's Motion for Summary Judgment. On May 18, 2005, the Court entered an Order of Court issuing a Rule to Show Cause upon Plaintiff. Defendant filed a Praecipe to list the matter for oral argument along with Defendant's Brief in Support of Motion for Summary Judgment on May 24, 2005.

Plaintiff replied with Plaintiff's Argument Brief and Praecipe to list the matter for oral argument on June 8, 2005. After reviewing the issue in this matter, the Court has decided to forego oral argument and rule based upon the parties' briefs and its own understanding of the law in question.

Discussion

Statement of the Case

Defendant's motion for summary judgment is based on Defendant's contention that it is immune from liability under the statute of repose, and, as such, no genuine issue of material fact can exist as to an essential element of Plaintiff's negligence cause of action. The relevant issue for the Court's determination in this matter is whether Defendant is entitled to summary judgment based upon the statute of repose for construction projects where Defendant erected the swing set more than 12 years prior to the accident upon which the Plaintiff's cause of action is based.[1] Plaintiff submits that Defendant, as the owner in actual possession and control of the swing set, is excepted from the defense to liability provided under the statute of repose. The Court agrees and denies Defendant's motion for summary judgment.

Summary Judgment

Pennsylvania Rule of Civil Procedure 1035.2 specifies the standard regarding a motion for summary judgment in a civil action at law and provides that:

> After the relevant pleadings are closed...any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2

A trial court's standard of review when deciding a motion for summary judgment requires the court to review the entire record to determine whether a question of material fact exists concerning an element of the non-moving party's claim or defense. Cassell v. Lancaster Mennonite Conference, 834 A.2d 1185, 1188 (Pa. Super. 2003). Pennsylvania has adopted the reasoning of the United States Supreme Court in matters of summary judgment in that "a non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Ertel v. Patriot-News Co., 674 A.2d 1038, 1042 (Pa. 1996) *cert. denied*. 117 S.Ct. 512. When deciding summary judgment, trial courts must review the record in the light most favorable to the non-moving party. The court must grant that party the benefit of all reasonable inferences and resolve all doubts in the party's favor. Lewis v. Philadelphia Newspapers, Inc., 833 A.2d 185, 190 (Pa. Super. 2003). Finally, summary judgment will be granted only in cases that are clear and free from doubt. Feidler v. Morris Coupling Company, 784 A.2d 812, 815 (Pa. Super. 2001).

Statute of Repose

The statute of repose relating to construction projects provides in general: "[A] civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover for: (1) Any deficiency in the design, planning, supervision or observation of construction, or construction of the improvement; and (3) Injury to the person...arising out of any such deficiency." 42 Pa.C.S.A. § 5536(a)(1), (3). The statute provides an exception where it states: "The limitation prescribed by subsection (a) shall not be asserted by way of defense by any person in actual possession or control, as owner...of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury...for which it

is proposed to commence an action or proceeding." 42 Pa.C.S.A. § 5536(b)(2).

Since § 5536 is a statute of repose, application of § 5536 does not merely bar a litigant's right to a remedy, as a statute of limitation does, but completely abolishes and eliminates the cause of action itself. Michell v. United Elevator Co., Inc., 434 A.2d 1243, 1248-49 (Pa. Super. 1981). A party seeking protection under § 5536 must show: (1) the thing constructed is an improvement to real property; (2) more than 12 years has passed since the completed construction of the improvement to real property and the injury; and (3) the activity of the moving party must be within the class which is protected by the statute. Noll by Noll v. Harrisburg Area YMCA, 537 Pa. 274, 281, 643 A.2d 81, 84 (1994); Schmoyer by Schmoyer v. Mexico Forge, Inc., 621 A.2d 692, 694 (Pa. Super. 1993).

Here, it is undisputed by the parties that the swing set qualifies as an improvement to real property as contemplated by the statute. See *supra* [FN1]. It is also undisputed that greater than 12 years have passed since Defendant completed the assembly of the swing set from its component parts and the occurrence of Plaintiff's injuries.

As to whether Defendant is within the class protected by the statute, neither party makes that specific allegation; although, the parties do agree that Defendant erected the swing set.[2] To determine if Defendant falls within the class protected under the statue of repose, the Court looks to our Supreme Court's interpretation of the statute from McConnaughey v. Building Components, Inc., 536 Pa. 95, 637 A.2d 1331 (1994). In McConnaughey, the Supreme Court explained that the unambiguous language of the statute is meant to protect those who perform acts of "individual expertise" akin to those commonly thought to be performed by builders. McConnaughey, 637 A.2d at 1334. Here, Defendant assigned Parks Department maintenance employees, supervised by a foreman, to plan for the assembly and to assemble the component parts of the swing set and permanently affix it as an improvement to Defendant's real property.[3] The Court is satisfied that Defendant, through its employees, performed those acts identified within the statue of repose to qualify as being within the class protected by the statue.

As the Court has determined that Defendant has satisfied the essential elements to qualify for relief under the § 5536(a), it must now turn its attention to whether Plaintiff is correct in her assertion that Defendant is excepted from relief pursuant to § 5536(b). Plaintiff supports her position by noting that Defendant admits that it owns Memorial Park along with the playground equipment within the park.[4] Plaintiff alleges that Defendant had actual possession and control of the swing set as owner at the time of Plaintiff's injuries.[5] Defendant makes no such admission in its motion for summary judgment. Therefore, the Court finds that it must determine what is intended by actual possession and control from § 5536(b)(2) and whether the record reveals facts that would indicate Defendant's complicity with that intention.

The Superior Court clearly indicated that the terms "actual possession" and "control" in relation to § 5536(b)(2) are meant to connote a person with a possessory interest in and a duty to maintain the improvement. Fetterhoff v. Fetterhoff, 512 A.2d 30, 32 (Pa. Super. 1986). By admission, Defendant has a possessory interest in the swing set as owner. By the facts from the record, Defendant has a duty to maintain the swing set and has continuously done so since its assembly in 1967.

To begin, Defendant's duty to maintain the swing set is evident from the lack of any facts that would suggest that Defendant transferred its possessory interest to the park and its improvements by lease or deed at any time prior to the accident. Next, the fact that Defendant exercised its duty is evident from the deposition testimony of Defendant's Parks Department maintenance workers. Stanley Pryor, an employee since the time of the swing set's assembly, testified that maintenance personnel regularly painted and inspected the swing set.[6] Terry Barkdoll, Park Supervisor since 1978, testified that his department has been involved in the regular maintenance of the parks and park equipment ever since he began his employment.[7] Based on the abundant testimony of these long-time Parks Department employees, it is clear that Defendant, as owner, has been solely responsible for and has performed the maintenance of the swing set sufficient to have exercised actual possession and control pursuant to § 5536(b)(2). Therefore, the Court concludes that Defendant is not entitled to relief under § 5536(a) and, as such, genuine issues of material fact remain as to the essential elements of Plaintiff cause of action.

Conclusion

Upon careful review of the record, the Court finds that Defendant is not entitled to the relief provided pursuant to 42 Pa.C.S.A. § 5536(a) as the facts contained in the record indicate that Defendant was in actual possession or control, as owner, of the subject improvement at the time that Plaintiff suffered her injuries, thereby, exempting Defendant from the relief otherwise provided. Defendant's Motion

for Summary Judgment is denied.

ORDER OF COURT

And now this 29th day of June, 2005, this matter having come before the Court on Defendant's Motion for Summary Judgment, and the Court having considered the relevant documents submitted by the parties, it is hereby ordered that Defendant's Motion for Summary Judgment is denied.

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[1] The Court notes that each party put forth the issue of whether the swing set constituted an improvement to real property and concluded that it did. The Court agrees noting the Superior Court's finding in Schmoyer by Schmoyer v. Mexico Forge, Inc., 621 A.2d 692 (Pa. Super. 1992) that a play ground Spin Around permanently anchored in concrete and embedded in the real estate for greater than 17 years constituted an improvement to real property.

[2] Defendant's Motion for Summary Judgment ¶¶ 14 and 22 (May 12, 2005); Plaintiff's Answer to Defendant's Motion for Summary Judgment ¶ 22 (May 16, 2005); Plaintiff's Answers to Request for Admissions nos. 1 and 2 (May 24, 2005).

[3] Deposition of Stanley Pryor 8:2 - 14:14 (Feb. 2, 2005).

[4] Defendant's Motion for Summary Judgment ¶ 6 (May 12, 2005).

[5] Plaintiff's Answer to Defendant's Motion for Summary Judgment ¶ 20 (May 16, 2005).

[6] Deposition of Stanley Pryor 16:19 - 18:18 (May 24, 2005).

[7] Deposition of Terry Barkdoll 5:20 - 6:2 (May 24, 2005).