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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3654-15T3

DENNIS WHITE,
Administrator Ad
Prosequendum and General
Administrator of The Estate
of DAFIQ RASHEED, Deceased,

Plaintiff-Appellant,

v.

JAMES ASTACIO, SR.,
and DORIS ASTACIO,

Defendants-Respondents.

Argued May 23, 2017 – Decided July 21, 2017

Before Judges Messano and Espinosa.

On appeal from the Superior Court of New
Jersey, Law Division, Atlantic County,
Docket No. L-4771-11.

Christopher S. Lipari argued the cause for
appellant (Lipari & Walcoff, LLC, attorneys;
Mr. Lipari, of counsel and on the brief).

Chad M. Moore argued the cause for
respondents (Hoagland, Longo, Moran, Dunst &
Doukas, LLP, attorneys; Mr. Moore, of
counsel; Dawn P. Marino, on the brief).

PER CURIAM

Defendants Doris and James Astacio¹ permitted Doris's sister and brother-in-law, Diana and Jason Adams, to host a party at their home. Dafiq Rasheed, an adult guest, drowned in their pool. Dafiq's father, plaintiff Dennis White, brought this negligence action against defendants, alleging a survivorship claim on behalf of Dafiq and a wrongful death claim on behalf of Dafiq's estate. Plaintiff appeals from an order granting summary judgment to defendants. We affirm.

I.

We review the facts, drawing all legitimate inferences in plaintiff's favor, to determine if a genuine issue of material fact exists that precludes summary judgment. R. 4:46-2(c).

Diana and Jason hosted a sixteenth birthday party for their son at defendants' home. Although the complaint alleges defendants hosted the party, plaintiff admitted in answers to interrogatories that Diana was the host and that Doris was not present at the time of the party. James testified he was doing yardwork in the front of the house most of the time "because it wasn't [his] party," and he actually left the premises at some point.

¹ Because some witnesses and parties share last names, we refer to them all by their first names to avoid confusion. No disrespect is intended.

Diana testified that, as the party was ending, DafiQ decided to go into the pool. She observed him putting on goggles, dancing around and then jumping in, feet first, into the deep end of the pool. Christopher Maglione, another adult guest, laughed as he watched DafiQ dancing on the side of the pool.

Jason was in the pool when he saw DafiQ jump in. He stated DafiQ "started bobbing for like 30 seconds" and then grabbed Jason's shoulder, pulling him under the water. Jason testified, "Chris said he was in trouble" and DafiQ "went under water right away, within a minute['s] time." Christopher jumped into the pool, fully clothed. He brought DafiQ's head above the water, and pulled him to the edge of the pool where Jason helped to pull DafiQ out of the water and onto the concrete. The immediacy of the response was confirmed by Diana, who testified she saw Christopher jump into the pool within one minute of the time that DafiQ had jumped in.

Jason administered cardiopulmonary resuscitation (CPR) to DafiQ for several minutes. James heard someone call out, "somebody call 911." He ran to the backyard, saw DafiQ and ran inside to call 911.

Emergency medical technicians (EMTs) administered CPR when they arrived, but to no avail. DafiQ was pronounced dead at the hospital. Dr. Ian Hood, a forensic pathology expert retained by

plaintiff, issued a report in which he concluded Dafiğ likely struggled in the water for two to four minutes before dying from "asphyxia due to drowning."

When asked whether a person had been assigned to watch the pool area that day, James testified: "No, not necessarily. We just try and keep a vigilant eye on it, you know, in general." James also testified he owned a shepherd's crook² and kept it along the fence near the pool on the day of the incident. At his deposition, James was shown a photograph of the area where he purportedly kept the shepherd's crook and acknowledged it was not shown there. Jason could not recall whether a shepherd's crook was present.

Christopher testified "safety devices or flotation devices" were affixed to a three-foot-high fence that surrounded the pool area on the day of the incident, including a shepherd's crook. He explained he did not grab any of the safety devices because he was very close to the pool and going to get them would have taken longer than jumping in. He and Jason were able to get Dafiğ out of the pool quickly, within "[f]our or five seconds," without any of the safety devices.

² A shepherd's crook is a ten-to-twelve-foot pole with a loop on the end that can be used to pull someone out of water.

Jason testified seeing signs around the pool at the time that said "swim at your own risk, deep end, shallow end, stuff like that . . . I think one was no lifeguard present, swim at your own risk."

Plaintiff's pool safety expert, Dr. Francesco Pia, stated "defendants owed an inherent duty to provide both a safe swimming environment to invited pool party guests who were using their in-ground backyard pool and to protect their invited guests from drowning by the exercise of reasonable care." He identified pool safety recommendations of the American Red Cross for pool safety that defendants failed to follow, two of which are relevant for this appeal. First, defendants did not provide a shepherd's crook, which would have been used to pull Dafiq out when he was in distress. Second, defendants failed to have a lifeguard or "designated water watcher," trained in first aid, CPR, and water safety, "whose specific responsibility is to supervise bathers during a pool party" and who could have used the shepherd's crook to prevent Dafiq from drowning. Dr. Pia opined that defendants' "deviat[ions] from acceptable unguarded backyard pool party safety standards . . . were substantial factors which contributed to [Dafiq's] drowning."

At his deposition, Dr. Pia testified, "[Christopher] correctly made a determination that it would be faster for him to

hop over the fence . . . to dive into the pool and pick [Dafiq] up as opposed to running over and getting the shepherd's crook." He clarified that Christopher's actions were appropriate to recover Dafiq's body even if the shepherd's crook had been present.

II.

The complaint alleged Dafiq was an invitee to defendants' premises; they owed him a duty to use reasonable care to keep the premises free from dangerous conditions; and defendants breached that duty by allowing a dangerous condition that was the proximate cause of Dafiq's death. The breaches of duty alleged are based on Dr. Pia's opinion, that defendants failed: (1) to have a shepherd's crook easily accessible while guests were in the pool, and (2) to designate a water watcher while guests were in the pool.

In their motion for summary judgment, defendants argued that, pursuant to Tighe v. Peterson, 175 N.J. 240 (2002), they did not owe any duty to Dafiq, a social guest, to make their pool safer for him than for themselves because he was familiar with the pool. In opposition, plaintiff argued defendants failed to exercise reasonable care. The Law Division granted defendants' motion, holding,

Defendants had no duty . . . to obtain a water watcher or shepherd's crook. [Dafiq] was an adult swimmer, who was at [d]efendants' pool

before, and he was intelligent enough to notice that there was no water watcher present before, during or after the party. More so, the shepherd's crook is immaterial as [Dafiq] was taken out of the pool quickly by [Christopher].

. . . .

Defendants were not throwing a party, hosting a party, or conducting activities on the date in question. Rather, [d]efendants allowed . . . Diana . . . to use their backyard to host a birthday party, wherein Diana . . . hosted the party and invited guests.

In this appeal, plaintiff argues the trial judge erred by applying an incorrect standard of care, defendants had a duty to exercise reasonable care when permitting a pool party to occur at their residence, and genuine issues of fact exist, precluding summary judgment. We have considered these arguments in light of the record and applicable principles of law and conclude they lack merit.

III.

In reviewing a summary judgment decision, we apply the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Viewing "the evidence in a light most favorable to the non-moving party," we "determine if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Rowe v. Mazel Thirty,

LLC, 209 N.J. 35, 38, 41 (2012) (second quotation citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). We review questions of law de novo, and need not accept the trial court's conclusions of law. Davis v. Devereux Found., 209 N.J. 269, 286 (2012).

To defeat a motion for summary judgment, "[t]he opponent must 'come forward with evidence' that creates a genuine issue of material fact." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div.) (quoting Brill, supra, 142 N.J. at 529), certif. denied and appeal dismissed, 211 N.J. 608 (2012); see R. 4:46-2(c). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

Plaintiff argues the duty defendants owed to Dafiq was not merely that of a landowner to disclose or neutralize dangerous conditions the landowner knows or should know exist on the property. Relying upon Hanna v. Stone, 329 N.J. Super. 385 (App. Div. 2000), he argues defendants owed a "heightened standard" to him "to exercise reasonable care for the protection of his/her guest." Model Jury Charge (Civil), 5.20F(4), "Social Guest — Defined and General Duty Owed," Note to Judge 2, "Exception as to

Host's Activities" (2014). This duty arises "[i]n cases where the host is conducting some 'activity' on the premises at the time of his/her guest's presence." Ibid.

Hanna, the case relied upon by plaintiff, instructs that where the focus is not on a physical condition of the property but on activities conducted thereupon, the duty to use reasonable care falls upon "the person conducting the activity." 329 N.J. Super. at 389. The "activity" defendants conducted was to allow their adult relatives to host a party on their property. Although plaintiff acknowledges that Diana and Jason were the hosts, he contends defendants had a duty to exercise reasonable care at a party hosted by others that required them to do the following while guests are in the pool: (1) have a shepherd's crook easily accessible, and (2) designate a water watcher.

In Parks v. Rogers, the Court "revisit[ed] the scope of a homeowner's duty to protect an unsuspecting social guest of dangers on the premises," 176 N.J. 491, 494 (2003) (emphasis added), and noted, "[a] landowner is not required to provide greater safety on his premises for a social guest than he would for himself," id. at 497-98. The landowner has "the duty to disclose to the social guest the dangerous condition or to correct it" so the social guest has "the same knowledge possessed by the host of dangerous conditions." Id. at 498 (citation omitted). "If, however, 'the

guest is aware of the dangerous condition or by a reasonable use of his faculties would observe it, the host is not liable' because of the guest's failure to use due care." Ibid. (citation omitted).

It is undisputed that Dafiq was familiar with defendants' pool, having used it previously. It is also evident that he would have been aware of the absence of a shepherd's crook or a water watcher through "a reasonable use of his faculties." Even if we do not impute knowledge of the dangerous condition to Dafiq, defeating any claim that defendants are liable, plaintiff's proofs fail to establish a genuine issue of fact as to proximate cause.

To prove a breach of duty proximately caused an alleged injury, a plaintiff must establish "any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Conklin v. Hannoeh Weisman, 145 N.J. 395, 418 (1996)). While causation is an issue ordinarily determined by the factfinder, "in the unusual setting in which no reasonable factfinder could find that the plaintiff has proven causation by a preponderance of the evidence, summary judgment may be granted dismissing the plaintiff's claim." Id. at 60.

As we have noted, plaintiff's expert opined that it was the breach of the duty to have a shepherd's crook and a water watcher

that proximately caused Dafiq's death. However, Dr. Pia's testimony that the action taken by Christopher – to hop over the fence, dive into the pool and pick up Dafiq – would have been the correct course of action even if a shepherd's crook had been present and would also have been faster than attempting to rescue Dafiq with a shepherd's crook.

Turning to the function of a water watcher, Dr. Pia stated:

Once [Dafiq's] surface struggle started in the defendants' in-ground backyard pool, an attentive trained "water watcher" would have used ordinary care to rescue [him] while he was struggling on the surface of the water. The extension of the shepherd's crook by the "water watcher" on the pool deck of the defendants to the decedent would have taken seconds and enabled the rescue of [Dafiq] before his submersion.


The record shows Dafiq was observed by the other adults present continuously from the time he jumped into the pool and Christopher jumped into the pool to rescue him within a minute. CPR was administered immediately. The actions taken correspond to Dr. Pia's description of activities a designated water watcher would perform. And, as noted, Dr. Pia acknowledged the actions taken would have been the correct choice even if a shepherd's crook had been available.

On this record, no reasonable factfinder could conclude that the failures to have a shepherd's crook or a water watcher

constituted breaches of a duty that proximately caused Dafiq's death and therefore, summary judgment was appropriate.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION