

Kremerov v Forest View Nursing Home, Inc.

2003 NY Slip Op 30076(U)

August 19, 2003

Supreme Court, Queens County

Docket Number: 0002429/2001

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 13
Justice

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DORA KREMEROV, et al.	:	x	Index	
	:		Number <u>24291</u>	2001
	:			
- against -	:		Motion	
	:		Date <u>June 4,</u>	2003
	:			
FOREST VIEW NURSING HOME, INC.	:		Motion	
	:		Cal. Number <u>19</u>	
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The following papers numbered 1 to 10 were read on this motion by the defendant Forest View Nursing Home, Inc., pursuant to CPLR 3025 and 3212, for leave to amend the answer to include the affirmative defense of assumption of the risk, and for summary judgment dismissing the complaint based upon that defense.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits	5 - 7
Reply Affidavits	8 - 10

Upon the foregoing papers it is ordered that the motion is determined as follows:

I. The Relevant Facts

The plaintiff Dora Kremerov ("Kremerov") commenced this action seeking damages from the defendant Forest View Nursing Home, Inc. ("Forest View"), for personal injuries she sustained on March 27, 2001, while participating in a bowling activity while attending Forest View's Adult Daycare Program. The complaint interposes a cause of action based upon negligence.¹

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Pursuant to a stipulation dated October 1, 2002, a derivative cause of action interposed by Kremerov's husband was discontinued and withdrawn, with prejudice.

During her examination before trial ("EBT"), Kremerov stated that she arrived at Forest View's Adult Daycare Center at 2:00 P.M., and then had lunch. Thereafter, the Forest View coordinator announced to everyone that there would be bowling. The bowling activity had been offered before, but Kremerov had never previously participated or bowled. A Forest View coordinator showed her how to put her fingers in the ball and to push the ball. Kremerov followed the coordinator's instructions; however, on her second attempt, her right foot twisted inside her shoe and she fell, sustaining injuries. At the time of her fall, she was wearing closed shoes that were tied. Kremerov indicated that the floor was smooth, and she had no prior problems with her shoes.

The Forest View coordinator indicated that Forest View did not offer bowling shoes to clients, but it did provide a bowling ball that was lighter than a regular bowling ball. Before the bowling activity began, he demonstrated how to bowl to the clients. Prior to March 27, 2001, no one ever fell while bowling. In addition, prior to the accident, he told everyone to wear comfortable shoes without heels; however, he did not reiterate this on the date of the accident.

A nurse who works at Forest View submitted an expert affidavit indicating that Kremerov was a registered participant in the Adult Daycare Program since December 22, 1998, and was cleared to participate in full recreational activities. The bowling activity involved a light-weight rubber ball, bowling-type pins, and was played on non-slip tile flooring. The nurse indicates that there were no prior injuries as a result of the activity, and no prior complaints about the light-weight ball or the non-slip tile flooring. In her opinion, inherent in any recreational activity is a risk that a participant might twist her ankle and sustain other injuries as a result thereof.

II. Motion

Forest View moves to amend its answer to interpose the affirmative defense of assumption of the risk, and for summary judgment dismissing the complaint based upon that defense.

Kremerov opposes the motion asserting she will be prejudiced by any grant of leave to amend after issue has been joined and discovery has been completed, and Forest View is liable for negligent supervision. In support, she annexes the affidavit of an expert in physical education and recreation who asserts, based upon his review of the EBTs and other items, that: (1) Forest View was negligent in failing to provide proper instructions on the mechanics of bowling and bowling safety; and, (2) Forest View was

negligent in permitting Kremerov to bowl while wearing leather-soled shoes with one and one-half-inch length heels. Kremerov also notes that the Forest View Policy and Procedure Manual indicates that Forest View would provide necessary materials and supplies for the activities program and would provide a safe environment.

III. Decision

Pursuant to CPLR 3025[b], leave to amend a pleading should be freely granted upon such terms as may be just, absent prejudice or surprise resulting directly from the delay (see, Edenwald Contr. Co. v City of New York, 60 NY2d 957). In exercising its discretion, a court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom (see, Haller v Lopane, ___ AD2d ___, 759 NYS2d 504). In addition, a court must examine the underlying merit of the proposed amendment as, to do otherwise, would be a waste of judicial resources (see, Sidor v Zuhoski, 257 AD2d 564).

Here, leave to amend is being sought shortly after discovery was completed, discovery in this case continued after the note of issue was filed, and the proposed amendment has merit. Moreover, Kremerov was aware of the facts forming the foundation for the defense, and has failed to demonstrate any prejudice resulting from the delay in seeking the amendment. As a result, the defendants are granted leave to amend their answer to interpose the affirmative defense of assumption of the risk (see, Sidor v Zuhoski, supra; CPLR 3025[b]).

By engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in, and arise out of, the nature of the sport generally and which flow from such participation (see, Morgan v State, 90 NY2d 471, 484; Lapinski v Hunter Mt. Ski Bowl, Inc., ___ AD2d ___, 760 NYS2d 549). In assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard includes whether the conditions caused by the defendant's negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport (see, Morgan v State, supra at 485; Lapinski v Hunter Mt. Ski Bowl, Inc., supra). The duty of care owed by the defendant also must be assessed against the background, skill and experience of the particular plaintiff (see, Morgan v State, supra at 486).

Here, although Kremerov never bowled previously, she was instructed on how to push the light-weight ball, and there is no evidence that the instructions provided were in any way erroneous.

Similarly, as a light-weight ball was used and the floor was composed of non-skid tile, there is no evidence that Forest View created a dangerous condition over and above the usual dangers inherent in the sport of bowling. Similarly, there is no evidence that the length of the heel on Kremerov's shoe caused her foot to twist inside her shoe or otherwise caused her fall. In any event, the evidence demonstrates that participants in the Adult Daycare programs were previously cautioned not to wear shoes with heels.

In view of the evidence, the affidavit of Kremerov's expert was insufficient to raise an issue of fact as to whether Forest View unreasonably increased the risks to which Kremerov was exposed (see, Bono v Hunter Mt. Ski Bowl, Inc., 269 AD2d 482, lv denied 95 NY2d 754; Bouchard v Smiley Brothers, Inc., 258 AD2d 548, lv denied 93 NY2d 815; cf., Stackwick v Young Men's Christian Ass'n, 242 AD2d 878; Conary v Clover Lanes, Inc., 199 AD2d 1067). As a result, Forest View is entitled to summary judgment dismissing the complaint (see, Morgan v State, supra; Lapinski v Hunter Mt. Ski Bowl, Inc., supra; Bono v Hunter Mt. Ski Bowl, Inc., supra).

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the branch of the motion by the defendant Forest View Nursing Home, Inc. for leave to amend the answer to include the affirmative defense of assumption of the risk is granted; and it is further

ORDERED that the branch of the motion by the defendant Forest View Nursing Home, Inc. for summary judgment dismissing the complaint based upon that defense is granted, and the complaint is dismissed.

Dated: August 19, 2003

J.S.C.