

Gafner v Chelsea Piers, L.P.

2004 NY Slip Op 30135(U)

October 6, 2004

Supreme Court, New York County

Docket Number:

Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Richter
Justice

PART 24

Valentina Gabriel

INDEX NO. 107360/03

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

Chelsea Piers LP

The following papers, numbered 1 to _____ were read on this motion to/for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED
FILED
OCT 18 2004
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MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

*Case restored to Active status
A pre-trial conference is scheduled
in part 24 for 10/20/04 at 2:15 pm.*

Dated: 10/16/04

Rosalyn Richter
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
HON. ROSALYN RICHTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

-----X

Valentina Gafner,

Plaintiff,

-against-

Chelsea Piers, L.P.,

Defendant.

Decision and Order
Index No. 107360/03
Motion Sequence No. 1

FILED

OCT 18 2004

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RICHTER, J:

In this negligence action, plaintiff moves by order to show cause to vacate a judgment entered against her for failure to appear at an initial calendar call. The Court finds that plaintiff's timely motion sufficiently demonstrates a reasonable excuse for the default as well as evidence of a potentially meritorious claim. CPLR 5015(a)(1). Accordingly, the Court vacates the prior default judgment entered against plaintiff, and will consider defendant's motion for summary judgment pursuant to CPLR 3212.

Plaintiff seeks recovery for an injury which allegedly occurred on December 14, 2002, during an ice skating session at the defendant Chelsea Piers ice skating rink. On that day, several bright orange, moveable, cylindrical cones approximately three feet high were positioned on the ice. The cones were arranged to create separate skating spaces within the rink. Plaintiff claims that she fell after a short period of skating when one of the cones toppled over into her path. As a result, she allegedly sustained serious damages to her knee. Plaintiff further alleges that defendant's use of the cones and its employees' use of the cones, was negligent and created a hazardous condition not necessary or inherent to the sport of skating.

In opposition, and in support of its summary judgment motion, defendant argues that plaintiff “assumed the risk” that she could be hurt that day. In particular, they argue that the cones’ bright color and height made them an open and obvious danger, so that when plaintiff chose to skate anyway, the defendants were relieved of any liability for her ensuing injuries. Indeed, plaintiff’s deposition testimony acknowledges that she was aware of the cones’ presence.

Although plaintiff’s awareness of the cones and some of the other underlying facts appear not to be in dispute,¹ this Court finds the very issue of defendant’s negligence to be a question of fact for the jury. *See, e.g., Johnson v. Goldberger*, 286 A.D.2d 604 (1st Dept. 2001) (“It is uncommon to grant summary judgment in a negligence action, even where the facts are uncontradicted.”); *McCummings v. NYC Transit Auth.*, 81 N.Y.2d 923 (1993) (“often, even if all the parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination.”) (citations omitted). In this case, the evidence presented does not establish as a matter of law that defendant is free from negligence or that plaintiff assumed the risk of injury such that defendant is relieved from liability.

As an initial matter, defendant’s motion papers are insufficient to establish a prime facie entitlement to summary judgment. Defendant does not include an affidavit of anyone with first-hand, personal knowledge of the accident.² Instead, defendant relies upon its attorney’s affidavit as well as the deposition testimony of its business manager, Mr. Schoer, who arrived on the scene shortly after the accident. *See Adam v. Cutner & Rathkopf*, 238 A.D.2d 234 (1st Dept. 1997)

¹The Court notes, however, that the parties disagree as to the number of people skating at the time of plaintiff’s fall.

²Defendant does submit a copy of its answer, which was verified by the attorney of record for Chelsea Piers, but not by a person with actual knowledge of the underlying events.

("An attorney's affidavit is of no probative value on a summary judgment motion unless accompanied by documentary evidence which constitutes admissible proof."). Notably, Mr. Schoer's deposition testimony does not prove that defendant lacked actual or constructive notice of the potentially hazardous condition since Mr. Schoer stated that he knew the cones sometimes tipped over while people were skating. Thus, in light of Mr. Schoer's testimony and the fact that defendant maintained control over the rink, defendant has not established, on this motion, that it lacked the requisite notice of the allegedly dangerous condition. Moreover, plaintiff does not need to show that defendant "had, or should have had, knowledge of the exact item" which caused plaintiff to fall. *Rivera v. 2160 Realty Co., L.L.C.*, ___ A.D.3d ___, 781 N.Y.S.2d 645 (1st Dept. 2004) (defendant's awareness of a recurring condition sufficient to deny summary judgment); *see also Pianforini v. Kelties Bum Steer*, 258 A.D.2d at 634 (2d Dept. 1999) ("Actual notice may be found where the defendant created the condition, or was in fact aware of its existence.").

In addition, plaintiff's papers in opposition include an affidavit of Mr. Berheim, a sports and recreation consultant who is familiar with this facility. Mr. Berheim stated his belief that when the fallen cones were not immediately righted by defendant's employees, an "entrapment" was created, that this entrapment caused plaintiff's accident, and that this condition was not a safe environment. Although Mr. Berheim's affidavit does not include an explanation of the particular standards he used to evaluate the defendant's rink, a copy of his resume evidencing his extensive experience in recreation management is included. The Court finds Mr. Berheim's particular experiences with ice skating to be sufficient consideration of his affidavit and the opinions contained therein. The Court further notes that the skaters using the rink on that day

were not professional skaters, but rather members of the public, skating for their leisure. Thus, the Court finds the issue of whether defendant was negligent in its use of the cones to be a jury question. In any event, given the deficiency in defendant's motion papers, the Court need not reach the issue of plaintiff's submissions and summary judgment must be denied.

The question of whether the plaintiff voluntarily assumed the risk is also inappropriate for summary determination here. *See, e.g., Lamey v. Foley*, 188 A.D.2d 157 (4th Dept. 1993) ("Generally, the issue of assumption of risk is a question of fact for the jury."). Contrary to defendant's arguments, an assumption of risk analysis does not begin and end with a determination of whether the risks were open and obvious. Rather, it must be determined whether the injury-causing risks were created by conditions "over and above the usual dangers that are inherent in the sport," or those risks which are "inherent in and arise out of the nature of the sport generally." *Morgan v. State of New York, et al*, 90 N.Y.2d 471 (1997) (joint decision determining whether assumption of risk doctrine applied to plaintiffs injured in bobsledding, martial arts and tennis accidents). For example, the Court of Appeals in *Morgan* found that a tennis player who tripped over a hole in the net should not be deemed to have legally assumed the risk of his ensuing injuries. However, the Court distinguished and dismissed the claims of an experienced bobsledder who collided with the course's exit wall and a martial arts student who was injured upon falling to the floor, finding these injuries to be solely the result of dangers inherent to those sports. *Id.* Here, the evidence presented by defendant with this motion does not establish as a matter of law that the risk of falling over a moveable cone placed on the ice by the rink's management is a danger inherent to the sport of ice skating. *Compare Byrne v. Westchester Co.*, 178 A.D.2d 575 (2d Dept. 1991) (ice skater assumed the risk of injury resulting

from a known defect in the surface of the ice).

The assumption of risk doctrine is not an absolute defense, but is cast as a measure of a defendant's duty of care, *Turcotte v. Fell*, 68 N.Y.2d 432 (1986). Whether a plaintiff will be found to have fully apprehended and voluntarily assumed the risks of the situation depends in part on an evaluation of her skills and experience. See *Morgan*, 90 N.Y.2d at 486; *Andrews v. Onondaga*, 298 A.D.2d 837 (4th Dept. 2002) ("Although defendant established that the trees were an open and obvious condition . . . there is an issue of fact whether plaintiff made an informed estimate of the risk involved as measured against her skill and experience in sledding."). The Court also finds these issues to require a factual finding by a jury.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied. This case, which had been marked submitted, should be marked active in the Court computer. The parties shall appear in Part 24 on October 20, 2004 at 2:15 for a pre-trial conference.

This constitutes the decision and order of the Court.

October 6, 2004

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Rosalyn Richter
Justice Rosalyn Richter