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SCANNED ON 5/4/2006

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

PR — Sherry Klein Heitler

PART 30

0109877/2003

EAGLE, HARRY
vs
CHELSEA PIERS, L.P.

SEQ 2

SUMMARY JUDGMENT

EX NO. 109877/03

TION DATE

TION SEQ. NO. (002)

TION CAL. NO.

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

	PAPERS NUMBERED
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

is decided in accordance with the memorandum decision dated 4/19/06

FILED
MAY 04 2006
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4.19.06

SHERRY KLEIN HEITLER

SHERRY KLEIN HEITLER, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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HARRY EAGLE,

Index No. 109877/03

Plaintiff,

DECISION AND ORDER

-against-

CHELSEA PIERS, L.P.,
CHELSEA PIERS MANAGEMENT INC.
and MAJESTIC VOYAGES, INC.,

Defendants.

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SHERRY KLEIN-HEITLER, J.:

In this personal injury case, defendant Chelsea Piers seeks summary judgment for contractual and common law indemnification as well as for breach of contract on its cross-claim against Majestic Voyages, Inc. Chelsea Piers also seeks an order granting summary judgment dismissing plaintiff's complaint. Defendant Majestic Voyages, Inc. opposes Chelsea Piers' application for summary judgment with regard to their cross-claims and also seeks summary judgment dismissing plaintiff's complaint. Plaintiff opposes these applications.

The facts in this case are as follows. Plaintiff was riding a bicycle along the bicycle/pedestrian pathway of Pier 60 on Chelsea Piers when he hit a garden-style water hose, stretched across the pathway, allegedly causing him to fall from his bicycle sustaining injuries. Plaintiff admits to seeing the hose well in advance of hitting it. The hose was placed by defendant Majestic Voyages, owners of the vessel to which the hose ran. The docking space was leased to defendant Majestic Voyages by defendant Chelsea Piers. Plaintiff brought this suit against defendants seeking damages in the amount of $1 million for injuries resulting from the fall. Defendant Chelsea Piers has brought a cross-claim against Majestic Voyages seeking

indemnification, contribution and damages for breach of contract. Both defendants have moved for summary judgment against plaintiff on a theory of primary assumption of risk.

The court first turns to the issue of assumption of risk. Defendants argue that plaintiff assumed the risk of injury and thus is barred from all recovery as a matter of law. The defendants specifically contend that: (1) plaintiff admitted, in deposition, to seeing the hose some 25 feet before reaching it and still attempted to cross it; and (2) encountering such garden hoses is a risk inherent in bicycling in New York City and thus the risk was assumed as soon as plaintiff mounted his bike.

It is well settled that by participating in a recreational activity a person assumes the risks that are inherent in and arise out of the nature of that activity (see, Morgan v. State of NY, 90 N.Y.2d 471 [1997]). A person consents to the consequences of the acts which are known, apparent and reasonably foreseeable (see, Turcotte v. Fell, 68 N.Y.2d 432 [1986]). In considering defendants' application, the court notes that as to the respective weight that should be accorded knowledge and inherency the Court of Appeals has stated that "for purposes of determining the extent of the threshold duty of care, knowledge plays a role, but inherency is the *sine qua non*." (See, Morgan v. State of New York, 90 N.Y.2d 471, 484 [1997].)

The defendants ask the court to determine that a garden hose across a pathway is inherent to bicycle riding in New York City. Curbs and sewer grates are frequently encountered by New York City 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. 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.

In denying both motions for summary judgment, the court notes that to obtain summary judgment, a movant must establish its entitlement, as a matter of law, to a judgment in its favor (See, Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]). "[I]t must clearly appear that no material and triable issue of fact is presented" (see, Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 N.Y.2d 439, 441 [1968]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue (see, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). In the instant case, there are issues of fact relating to whether or not encountering a garden hose is inherent in bicycle riding in New York City.

The court now turns to Chelsea Piers' request for, *inter alia*, a declaratory judgment. Their motion includes a request for: contractual and common-law indemnification against Majestic Voyages and contribution, as well as damages, for breach of contract against Majestic Voyages. In support of their claim, Chelsea Piers points to language in the Marina License and Permit agreement ("lease") which requires the lessee to indemnify the lessor for any liability arising out of the use of the docking space including liability which flows from the lessor's breach of, or non-compliance with, the terms and conditions of the lease or of the Marina Rules. Specifically, this provision provides that:

> Owner shall indemnify and save Licensor, its partners and its and their owners, director, officer, employees and agents, the State of New York and its agencies and instrumentalities and all liability, loss damage, claim or expense (including reasonable attorneys' fees than an Indemnitee may suffer or incur arising out of, based upon or in any way related to the Vessel, the use by Owner of berthing space at the Pier or the licenses granted hereby (including without limitation any limitation any breach or default by or on behalf of Owner in complying with the terms and conditions hereof or of the Marina Rules).

(See, Exhibit F, Chelsea Piers' Motion for Summary Judgment, ¶ 5.)

They further point to another provision of the lease which requires the lessee to maintain a third party marine operators liability insurance policy.

> Owner shall maintain in full force and effect at all times during the Term (I) a "named perils" or "all risks" marine hull insurance policy in an amount at least equal to the full value of the Vessel, (ii) a third party marine operator's liability insurance policy (also known as a "P & I Policy"), incorporating U.K. rules or the equivalent, for bodily injury and property damage with a combined single limited of $5,000,000...

(Id. at ¶ 6.)

It is undisputed that no such insurance policy was obtained by Majestic Voyages. Chelsea Piers also reminds the court that they did not place the hose across the pathway and allege having no knowledge of its presence. They argue that relevant case law counsels the full vindication of their claims by recognizing the right to full indemnification of the statutorily or vicariously liable party, by the negligent party, even in the absence of an explicit agreement like that found in the present case (see, e.g., Velez v. Tishman Foley Partners, 245 A.D.2d 155 [1st Dep't 1997]; Correia v. Professional Data Management, Inc., 259 A.D.2d 60 [1st Dep't 1999]). Chelsea Piers argues that if any liability can be attributed to them it is strictly and categorically passive such to justify declaratory judgment.

Majestic Voyages, likewise, makes several claims. First, they urge the court not to grant Chelsea Piers' cross-claim for breach of contract by arguing that the sorts of damages at issue in the present case would fall outside of the coverage of the insurance policy required by the lease as it was, they argue, Chelsea Piers negligence in turning off the water at the slip which led to the hose being placed at that location. Specifically, Majestic Voyages argues that the policy would not have covered the lessor's negligent acts and so there are no cognizible economic damages to be claimed. Majestic

Voyages also disputes Chelsea Piers' claim for contractual indemnity pointing to lease language which similarly exempts claims caused by the willful misconduct of the lessor from any obliged indemnification.

> Owner shall be solely responsible for any and all acts and omissions of the Owner Licensees unless such claims are caused by the gross negligence or willful misconduct of Licensor.

(See, Exhibit F, Chelsea Piers' Motion for Summary Judgment, ¶ 5.)

They argue that Chelsea Piers had constructive knowledge of the conditions which would necessitate the hose being placed as it was -- i.e., the water at the slip being turned off in the winter months. Whether or not such was misconduct, Majestic Voyages argues, is a question of fact unsuitable for resolution by summary judgment. They also dispute Chelsea Piers' claim for common law indemnity by denying that Chelsea Piers' liability was strictly passive as, it is argued, they had constructive knowledge as stated above.

Chelsea Piers responded to Majestic Voyages' allegations of negligence by indicating that there was a place to hook up a hose which would not have resulted in it traversing the width of the pathway. They also note that Chelsea Piers management had told Majestic Voyages on several occasions that they had improperly run their hose and began even unhooking the hose whenever they saw it misplaced. It is difficult to reconcile Chelsea Piers' arguments that, on the one hand, they had no knowledge of the placement of the hose, and on the other hand, they continually warned Majestic Voyages that the hose was misplaced. The court believes there are issues of fact constitute outstanding issues of fact which prohibit a grant of summary judgment at this time.

As to Chelsea Piers' claim for breach of contract there are no facts in dispute. Majestic Voyages failed to procure the insurance policy as per the lease agreement. This is a clear breach for

which Chelsea Piers is entitled to summary judgment (see, Inchaustegui v. 666 5th Ave. Ltd. Partnership, 96 N.Y.2d 111 [2001]).

The Clerk is directed to enter judgment for Chelsea Piers on the breach of contract claim in an amount to be determined at trial.

The parties are directed to appear for a pre-trial conference on WEDNESDAY, MAY 17, 2006 at 9:30 AM at 60 Centre Street, Room 438, New York, New York, 10007.

All remaining claims are hereby severed and shall proceed to trial.

This shall constitute the decision and order of the court.

DATED: APRIL 19, 2006

SHERRY KLEIN HEITLER
J.S.C.