

Perotta v Bi-Lmar Amusement, Inc.

2007 NY Slip Op 30508(U)

March 14, 2007

Supreme Court, Suffolk County

Docket Number: 0018839/2004

Judge: Peter Fox Cohalan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

INDEX # 18839-04
RETURN DATE: 7-7-06 (008)
7-21-06 (009 & 010)
MOT. SEQ. # 008, 009 & 010

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
JAMES PEROTTA,

Plaintiff,

-against-

BILLMAR AMUSEMENT, INC., BILLMAR
AMUSEMENTS N.Y. PARTY WORKS, INC.,
THE PRICE COMPANY AND PRICE
ENTERPRISES, INC.,

Defendants.
-----x

CALENDAR DATE: November 1, 2006
MNEMONIC: MD; MG; XMot D.; C/Disp.

PLTF'S/PET'S ATTORNEY:

WALLACE, WITTY, FRAMPTON & VELTRY
600 Suffolk Avenue, Suite A
Brentwood, New York 11717

DEFT'S/RESP ATTORNEY:

GALLAGHER, WALKER, BIANCO &
PLASTARAS, ESQS.
Attys for Price
98 Willis Avenue
Mineola, New York 11501
KELLY, RODE & KELLY, LLP
Attys for Billmar
218 Griffing Avenue
Riverhead, New York 11901

Upon the following papers numbered 1 to 49 read on this motion and cross-motions for summary judgment:
Notice of Motion/Order to Show Cause and supporting papers 1-13; 18-26; Notice of Cross-Motion
and supporting papers 27-34; Answering Affidavits and supporting papers 14-17; 35-38; 39-42;
Replying Affidavits and supporting papers 43-45; 46-49; Other _____; and after hearing counsel
in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, Billmar Amusements, Inc. (hereinafter Billmar), to compel depositions of the co-defendant, Costco Wholesale Corp. s/h/a The Price Company's employees (hereinafter Costco), is denied as moot; the motion and cross-motion by the defendants Billmar and Costco for summary judgment and dismissal of the plaintiff's complaint pursuant to CPLR §3212 on the grounds of assumption of the risk are granted and the plaintiff's action is dismissed; the alternative relief by Billmar seeking indemnity from the co-defendant, Costco is denied as moot.

The plaintiff instituted this negligence action for personal injuries allegedly sustained as a result of participating in an amusement game known as the **Gladiator Joust** on September 2, 2001 at a company Labor Day barbeque at the Nesconset warehouse of Costco located at 3000 Route 25 in Nesconset, Suffolk County on Long Island, New York. Costco as part of the entertainment arranged with Billmar, to provide a jousting game which the plaintiff voluntarily participated in against another Costco employee, Michael Jambor. **Gladiator Joust** consists of two individuals standing on pedestals several feet apart from

each other using padded pugil sticks to hit their opponent in an attempt to knock the opponent off the pedestal. The winner is declared to be the one remaining on the pedestal. Plaintiff voluntarily participated in the game and was knocked off his pedestal and fell into his opponent's pedestal and was injured in his ribs. Plaintiff thereafter instituted the present lawsuit.

Defendant Bilmar now moves (seq. #008) seeking to compel further depositions of two (2) co-employees of the plaintiff who worked with him at Costco and the defendant, Costco moves (seq. #009) and co-defendant, Billmar (seq. #010) cross-moves for summary judgment and dismissal of the plaintiff's complaint, pursuant to CPLR §3212, arguing that the injury complained of by the plaintiff was both foreseeable and inherent in the game. Plaintiff opposes the requested relief arguing that he was injured due to the carelessness on the part of the defendants.

For the following reasons, Billmar's motion to compel further depositions (seq. #008) is denied as moot and the motion and cross-motion by the defendants (seq. #009 & 010) for summary judgment and dismissal of the plaintiff's complaint pursuant to CPLR §3212 are hereby granted in their entirety and the plaintiff's action is dismissed.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc., v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974).

However, while summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [**VanNoy v. Corinth Central School, District**, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. **DiSabato v. Soffee**, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); **Usefof v. Yamali**, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980).

In **Benitez v. New York City Board of Education**, 73 NY2d 650, 543 NYS2d 29 (1989), the Court of Appeals stated:

“ As an integral part of athletic competitions, persons are generally held by their actual and implied consents to the risks of ‘injury-causing events which are known, apparent or reasonably foreseeable consequences of their participation’ “ citing **Turcotte v. Fell**, 68 NY2d 432,439, 510 NYS2d 49.

In a case where the plaintiff fell on a jungle gym, the Court in **Auwarter v. Malverne Free School District**, 274 AD2d 528, 715 NYS2d 852 (2nd Dept 2000) similarly held that where a plaintiff engages in an activity at elevated heights and invites the possibility of falling, he assumes the risks of injury attendant with a fall from an elevated position. By engaging in a sport or recreational activity, the plaintiff consents to those commonly appreciated dangers and risks inherent in and which arise out of the sport generally and which flow from such participation. See, **Morgan v. State of New York**, 90 NY2d 471, 662 NYS2d 421 (1997).

In assessing whether the defendants have violated a duty of care to plaintiff, the applicable standard would include whether the conditions caused by the defendants’ alleged claims of negligence are “unique and created a dangerous condition over and above the usual dangers inherent in the sport” **Owen v. RJS Safety Equipment**, 79 NY2d 967, 582 NYS2d 998 (1992). Here, in the case at bar, the defendants present proof that the apparatus was assembled properly and in operational order and that there was supervision of the jousting unit. Moreover, the type of injury sustained by the plaintiff to his ribs is the type of injury foreseeable from being struck by his opponent’s pugil stick or from falling from the pedestal and striking the opponent’s padded pedestal. In an attempt to buttress his claim of negligence, plaintiff’s claims an unassumed, concealed and unreasonable increased risk in the apparatus used. Plaintiff’s claims are without any evidentiary support in the record. Plaintiff’s testimony was extremely non-descriptive and stated merely that he lost his footing and “fell onto Mike Jabor’s pedestal and struck my body, not my face, and I was immediately winded and in excruciating pain.” Nowhere does the plaintiff’s testimony suggest that he was unaware of an increased risk from an injury producing event that he did not see at the time he entered the competition. **Marcano v. City of New York**, 99 NY2d 548, 754 NYS2d 200 (2002).

As the Court noted in **Joseph v. New York Racing Association, Inc.**, 28 AD3d 105, 809 NYS2d 526 (2nd Dept. 2006), plaintiff may not recover if he is

“... aware of the existence of a particular condition on the premises where the activity is to be performed, and actually appreciates or should reasonably appreciate the potential danger it poses, yet participates in the activity despite this awareness, he or she must be deemed to have assumed the risk of injury which flows therefrom.”

Here, in the instant case, the plaintiff was aware that he would be standing on a padded pedestal and would be engaging in a joust where the objective was to hit his opponent and attempt to knock him off balance and off the pedestal. Inherent in that competition between plaintiff and Mr. Jambor was the increased danger associated with the elevated height including the possibility of being catapulted to the ground, being hit by a pugil stick and/or hitting his opponent's padded pedestal and injuring himself. See also, **Cevetillo v. Town of Mount Pleasant**, 262 AD2d 517, 692 NYS2d 426 (2nd Dept. 1999). As an integral part of athletic competitions, plaintiff must be held by his actual or implied consent to the risks of “injury-causing events which are known, apparent or reasonably foreseeable consequences” of his participation in this kind of event. **Turcotte v. Fell**, supra.

Plaintiff's counsel, in an attempt to prevent the granting of summary judgment to the defendants, suggests that there was improper supervision or improper padding of the pedestal stands but a review of the available testimony does not support the claims of plaintiff's counsel. The plaintiff himself does not aver that there was improper supervision or improper padding and states he was aware of the game, its purpose and had seen it performed in a television show called “American Gladiators.” See, **Marcano v. City of New York**, supra, which noted that even a complete novice who had not witnessed any contemporaneous incidents was found to have assumed the risks of participation in a specific recreational activity, even though he had never used parallel bars, had never been instructed on their use and had never seen anyone else use that particular equipment. The risks inherent in two players striking each other with sticks while standing on pedestals trying to knock each other off their respective pedestals is certainly obvious and involve risks associated with height and hitting one another. The plaintiff has failed to establish a factual issue as to an unseen, concealed or unassumed risk so as to warrant denial of the defendants' motion and cross-motion for summary disposition of the plaintiff's action. **Liccone v. Gearing**, 252 AD2d 956, 675 NYS2d 728 (4th Dept. 1998); See also, **Barbato v. Hollow Hills Country Club**, 14 AD3d 522, 789 NYS2d 199 (2nd Dept. 2005).

Accordingly, the defendants' motion and cross-motion for summary judgment and dismissal of the plaintiff's complaint pursuant to CPLR §3212 on assumption of the risk grounds are hereby granted in their entirety. The portion of Billmar's cross-motion which

sought summary judgment on its claim of indemnification on the part of Costco is denied as moot. The motion by defendant Billmar seeking further depositions of Costco employees is also denied as moot in light of this Court's decision granting summary judgment and dismissing the plaintiff's action. Plaintiff's action is dismissed.

Settle Judgment

The foregoing constitutes the decision of the Court.

Dated: March 14, 2007



J.S.C.