

Thomas v Broadway Pilates, Ltd.
2007 NY Slip Op 30618(U)
April 6, 2007
Supreme Court, New York County
Docket Number: 0104316/2005
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD
J.S.C.
Justice

PART 35

Index Number : 104316/2005
THOMAS, NINA
vs
BROADWAY PILATES LTD
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 104316/05
MOTION DATE 4/2/07
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

FILED

APR 10 2007

COUNTY CLERK'S OFFICE
NEW YORK

This motion and case is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant Broadway Pilates, Ltd. for an order, pursuant to CPLR 3212 granting summary judgment, dismissing the complaint of plaintiff Nina Thomas, is granted. It is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 4/6/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

NINA THOMAS, x

Plaintiff,

-against-

BROADWAY PILATES, LTD.,

Defendant.

EDMEAD, J.S.C. x

Index No. 104316/05

DECISION/ORDER

MEMORANDUM DECISION

Defendant Broadway Pilates, Ltd. (“defendant”) moves for an order, pursuant to CPLR 3212 granting summary judgment, dismissing the complaint of plaintiff Nina Thomas (“plaintiff”), arguing that no triable issues of fact exist sufficient to defeat the within motion.

This case arises from an alleged injury sustained by plaintiff on March 26, 2004 during the course of a Pilates lesson at the defendant’s Pilates studio. Plaintiff claims that her hand slipped while she was performing a Pilates maneuver under the supervision of an instructor on a piece of equipment known as a “Reformer.” Defendant claims that the supervision was appropriate and there was nothing defective with the machine; therefore, summary judgment is appropriate.

Plaintiff counters that the defendant committed multiple acts of negligence, including permitting plaintiff to undertake the exercise known as the snake given the condition of the pain running from plaintiff’s hip down her left leg, and each negligent act committed by defendant was a proximate cause of plaintiff’s severe injuries.

Deposition Testimony

Plaintiff began Pilates training at defendant's location on or about April, 2001 (pl.'s dep. p. 35). She trained at defendant's facility about once a week, occasionally twice a week, and very rarely would she skip a week (pl.'s dep. p. 39). She had a standing Friday at 11:00 o'clock appointment usually with Jacqueline Lynch ("Lynch"), plaintiff's instructor, but on occasion with another instructor (pl.'s dep. pp. 39-41).

Plaintiff used the Reformer on a daily basis each time she visited defendant's studio (pl.'s dep. p. 51).

The sessions were usually one hour. On the date of her accident, almost toward the end of the session, about ten minutes before the session ended, her accident occurred. The period about 15 minutes before the accident occurred, plaintiff did not have any complaints about the manner or method in which Lynch was working with her on the Pilates exercises (pl.'s dep. p. 53).

Plaintiff had done the particular exercise involved in her accident before. She had started doing this exercise a couple of months before her accident (pl.'s dep. p. 56).

Plaintiff had not been told that this particular exercise was something she would work towards doing when she was at the appropriate strength or dexterity level (pl.'s dep. p. 58).

When she first started doing this exercise, Lynch demonstrated the exercise, verbalized the activity and then plaintiff performed the exercise (pl.'s dep. pp. 58-59).

Plaintiff had never made any complaints to the owner or the trainer or any other instructors regarding the condition of the equipment in the studio, or about the manner or method in which defendant was providing physical assistance to her (pl.'s dep. p. 66).

At the time of the accident, when plaintiff did her first "repetition" or "pass" Lynch was

standing to plaintiff's left; plaintiff thinks Lynch was holding a cup of coffee (pl.'s dep. p. 69).

In the process of doing the second "repetition" or "pass," plaintiff states: "I lost my grip...with both hands" she "...just couldn't support [the carriage] any more." (pl.'s dep. p. 76) Plaintiff did not physically feel any muscular pain or tension that made her lose her grip; she "felt unstable" and "probably" felt shaking in her arms (pl.'s dep. pp. 76-77).

At no time while plaintiff was on the Reformer, but before she lost the grip, does she remember saying anything to her trainer, Lynch. And, plaintiff did not ask for any type of help or assistance (pl.'s dep. p. 77).

Lynch was a client at defendant's studio in December, 1998; she became an instructor at defendant's studio in September, 1999 (Lynch dep. p. 13). She had been a Pilates instructor for two and one half years before plaintiff became her client (Lynch dep. p. 36).

One persistent injury that plaintiff presented with over the course of her training was pain down the side of her left leg that she had been to many doctors for and nobody could find a reason for it (Lynch dep. p. 53). Also a part of her complaint concerning the radiating pain plaintiff complained about her left hip (Lynch dep. p. 61).

Plaintiff liked to do exercises that she felt were difficult or that would bring a sense of invigoration to her if she did them (Lynch dep. p. 61).

When the accident occurred, plaintiff was on one of the larger Reformers. It occurred after 45 minutes of training (Lynch dep. pp. 73-74). The accident occurred while doing the snake exercise. If plaintiff was performing the snake that day, plaintiff did not have a particular injury (Lynch dep. pp. 78-79). Plaintiff had been doing this exercise for two to three months, once a week, a total of eight to twelve times, three repetitions on each - one's left and right side - before

the date of the accident (Lynch dep. pp. 84-85, 89). Up until the date of plaintiff's accident, she had not had any problems performing the snake (Lynch dep. p. 93).

Every time plaintiff did the snake exercise, Lynch "spotted" her by placing her hands "sort of ...right near [plaintiff's] hips but not on her." (Lynch dep. pp. 96-96)

At the time of plaintiff's accident, she was performing the snake, her hands slipped and her eye hit the carriage on the way out; as she was going out, she fell (Lynch dep. pp. 107-108).

Before the date of plaintiff's accident, she had never made any complaints to Lynch to the effect that she was not comfortable doing this exercise (Lynch dep. p. 111).

On plaintiff's first two repetitions doing the snake on the date of her accident, Lynch advised her that she was holding her hands in an incorrect position. Lynch asked plaintiff if she was in pain, if that was why plaintiff wasn't doing the exercise correctly. One can fall if one does not place and hold one's hands in the proper position (Lynch dep. pp. 113-115).

When Lynch asked plaintiff if she was in pain, plaintiff responded that she was okay and that she wanted to do it again (Lynch dep. p. 116).

Lynch had her hands in position around plaintiff's waist. Plaintiff's fall was "quicker than a second" (Lynch dep. pp. 117-118).

Defendant's Contentions

As explained in defendant's brochure, the Pilates "sessions are designed to develop and maintain strength, flexibility, coordination and proper body alignment." Movements are performed on a mat or with apparatus that can be adjusted to work every part of the body with correctly adjusted resistance."

The plaintiff was clearly a voluntary participant in the Pilates exercise class and had been

taking Pilates lessons at defendant's location once a week for over three years prior to her accident. Further, she had been performing the snake maneuver on the Reformer for "a couple of months" prior to her accident. She had performed the exercise a minimum of eight to twelve times prior to the date of her accident. In addition, she had been using the Reformer to perform about ten other exercises on a routine basis. Based on her background, skill level and experience, she was familiar with the piece of equipment and could appreciate the risks associated with her participation.

Lynch developed an exercise plan for plaintiff in accordance with plaintiff's goals and physical condition. Lynch noted that plaintiff got stronger and more flexible over the three year period and was able to progress into more advanced exercises. Plaintiff did not make any complaints about the exercises, but rather appreciated the challenge and the choice of exercises.

Julie Sorrentino ("Sorrentino"), defendant's owner, certified Lynch when she became an instructor. Ms. Lynch received over 100 hours of training before being certified to teach Pilates.

Plaintiff, a well educated woman, fully appreciated and voluntarily assumed the risk of injury by her participation. Plaintiff assumed the risks inherent in the Pilates exercise, which reasonably include the chance that her hands could slip while on the apparatus and get injured, despite the assistance that a spotter/instructor might be able to provide. Plaintiff participated in an activity that included stretching and physical activities, with and without equipment. Though Lynch was the "spotter," she was not an insurer of the plaintiff's safety.

Fran Lehen ("Lehen"), defendant's expert, a Pilates instructor with more than 34 years of practical experience, opined that based on the testimony that the plaintiff "lost her grip" and that her "hands slipped" while holding onto the carriage, it was her opinion that neither Lynch nor

defendant can be held responsible for plaintiff's accident. The risk of the plaintiff's hands slipping while performing the snake exercise is a risk inherent in the activity and not one that can be controlled by the instructor. Since plaintiff indicated that she was okay to proceed with the third repetition, it was proper for Lynch to allow her to proceed. Lynch's technique in spotting the plaintiff was proper and was not a contributing factor in the plaintiff's accident. Further, Lehen opined that the plaintiff possessed the requisite skill and experience to perform the snake maneuver based on the number of years she had been doing Pilates and the level of exercise she was performing. In her opinion, the plaintiff's accident resulted from those risks inherent in the activity, and not from any negligence on the part of Lynch or defendant.

While it is unfortunate that plaintiff got injured, simply because her arms gave out, such does not mean that defendant was negligent.

Plaintiff's Contentions

Plaintiff argues that she fell to the ground, while in the process of executing a movement under the private and direct supervision and instruction of her teacher, Lynch, who was defendant's employee, and in the absence of appropriate supervision by Lynch, plaintiff's hands gave way from their designated position, the "carriage" that she was on, and she careened abruptly backwards and she fell violently onto the carriage, striking her left eye, which was open, against a shoulder block that was a part of the Reformer.

The defendant equipped the Reformer with shoulder blocks that were not properly designed - the top of the shoulder block was small enough so that it could enter the orbit of the plaintiff's left eye causing the blunt trauma to plaintiff's left eye resulting in the injury.

According to Karen Schoenberger, plaintiff's expert, an instructor in the field of Pilates for more than 11 years, plaintiff was injured as a result of the negligence of the defendant. Defendant should not have permitted the plaintiff to undertake the exercise known as the snake given the condition of the pain running from plaintiff's hip down her left leg. Defendant should have stopped the plaintiff from attempting the "snake," toward the very end of plaintiff's lesson, after plaintiff had incorrectly performed the movement on two previous repetitions. Defendant failed to properly spot the plaintiff. Defendant failed to properly stop the carriage from careening backwards after the plaintiff lost her grip, and defendant failed to provide the plaintiff with safely designed shoulder blocks on the Reformer, but instead equipped the Reformer with dangerous blocks that had an edge that caused the blunt trauma to plaintiff's eye resulting in her injury.

In light of the condition of plaintiff's left leg and hip, defendant should not have permitted plaintiff to undertake the "snake," because the snake is a movement which places a great deal of stress on a hip and leg and plaintiff's left leg and hip were compromised and radiated pain.

Further, this is not an "assumption of risk" case, but a secondary assumption of risk case, in which the plaintiff understood as a "voluntary acknowledgment" that the potential exists for injury rather than a consent to suffer any injury.

Plaintiff did not have an awareness, or appreciation of, the nature of the risk and therefore did not voluntarily assume any risk.

Plaintiff further argues that in light of the fact that defendant has failed to produce the index card containing the information concerning plaintiff's appointments, plaintiff's injuries she may have reported to defendant, and the record of plaintiff's training, summary judgment should

be denied and an inference be drawn against defendant for its spoliation of crucial evidence.

Defendant's Reply

First, plaintiff's awareness of the risk is to be assessed against the background of the skill and experience of the particular plaintiff. Second, plaintiff, as a voluntary participant in a sporting or recreational activity, consents to those commonly-appreciated risks which are inherent in and arise out of the nature of the activity generally, and which flow from such participation. In this case, plaintiff is anything but a novice. She had been participating in Pilates at defendant's location once a week for over three years, and she routinely used the Reformer during her lessons. It is incredible for plaintiff to now argue that she was unaware of the risk of "losing her grip" based on her vast experience using the Reformer.

Further, the evidence in this case is not supported by the plaintiff's statement that "the snake was not suited for Ms. Thomas, in light of the pain running down her leg." The plaintiff is essentially attempting to transfer any blame from herself to her instructor, Lynch, for allowing her to participate in Pilates.

Rather, the plaintiff chose to participate in Pilates and both she and Lynch were aware of plaintiff's existing ailments.

Plaintiff's expert affidavit is conclusory and does not remove this case from the assumption of risk doctrine.

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562). Opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Assumption of Risk

“A plaintiff may voluntarily enter a relationship with a defendant that involves a known, potential risk of injury, and in so doing tacitly consents to relieve the defendant of a duty of care otherwise owed to the plaintiff. Many activities, notably sports and recreational activities, have inherent risks of injury that cannot be eliminated by the exercise of reasonable care. (Citations omitted) Therefore, courts often hold as a matter of law that a plaintiff who voluntarily participates in a sporting or recreational activity is owed no duty of care with respect to the obvious risks associated with the activity. (Citations Omitted) As Judge Cardozo stated in these circumstances, ‘The timorous may stay at home.’”

“Assumption of the Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases,” (12 *Fordham Intellectual Property, Media & Entertainment L.J.* 583, 590 [Winter 2002])

Primary Assumption of Risk

Defendant contends that, as a matter of law, plaintiff assumed the risk of her injury, thus barring her recovery. Care must be taken to distinguish between two distinct doctrines of assumption of risk. The first is embraced within the CPLR article 14-A concept of “culpable conduct attributable to the claimant” (CPLR 1411). It is akin to comparative negligence; it does not bar recovery, but diminishes recovery in the proportion to which it contributed to the injuries (CPLR 1411). The defendant is here arguing another category of assumption of risk, sometimes called “primary” assumption of risk (*see, Turcotte v Fell*, 68 N.Y.2d 432, 438, 510 N.Y.S.2d 49, 502 N.E.2d 964). If applicable, the doctrine of primary assumption of risk is not a measure of plaintiff’s comparative fault, but a measure of the defendant’s duty of care. Primary assumption of risk eliminates or reduces the tortfeasor’s duty of care to the plaintiff and, in the former case, constitutes a complete bar to recovery, notwithstanding CPLR article 14-A (*see, Turcotte v Fell*, *supra* at 438-439, 510 N.Y.S.2d 49, 502 N.E.2d 964; *Maddox v City of New York*, 66 N.Y.2d 270, 276, 496 N.Y.S.2d 726, 487 N.E.2d 553; *Arbegast v Board of Educ.*, 65 N.Y.2d 161, 165-171, 490 N.Y.S.2d 751, 480 N.E.2d 365). Primary assumption of risk may be express or implied (*compare, Arbegast v Board of Educ.*, *supra* at 162, 490 N.Y.S.2d 751, 480 N.E.2d 365, with *Maddox v City of New York*, *supra*, 66 N.Y.2d at 276, 496 N.Y.S.2d 726, 487 N.E.2d 553). The doctrine is frequently applied, or sought to be applied, to claims of injury arising out of a plaintiff’s participation in a sporting or entertainment event or activity, whether amateur or professional (*see, Owen v R.J.S. Safety Equip.*, 79 N.Y.2d 967, 582 N.Y.S.2d 998, 591 N.E.2d 1184, *aff’g*, 169 A.D.2d 150, 572 N.Y.S.2d 390 [professional auto race]; *Benitez v New York City Bd. of Educ.*, 73 N.Y.2d 650, 543 N.Y.S.2d 29, 541 N.E.2d 29 [high school football game];

Turcotte v Fell, *supra* [professional horse race]; *Maddox v City of New York*, *supra* [major league baseball game]; *Arbegast v Board of Educ.*, *supra* [“donkey basketball” game]; *Adamczak v Leisure Rinks Southtown*, 170 A.D.2d 951, 565 N.Y.S.2d 661 [broomball game]; *Marlowe v Rush-Henrietta Cent. School Dist.*, 167 A.D.2d 820, 561 N.Y.S.2d 934, *aff'd* 78 N.Y.2d 1096, 578 N.Y.S.2d 872, 586 N.E.2d 55 [gym class baseball game]; *Verro v New York Racing Assn.*, 142 A.D.2d 396, 536 N.Y.S.2d 262, *lv. denied*, 74 N.Y.2d 611, 546 N.Y.S.2d 556, 545 N.E.2d 870 [professional horse race]; *Cole v New York Racing Assn.*, 24 A.D.2d 993, 266 N.Y.S.2d 267, *aff'd* 17 N.Y.2d 761, 270 N.Y.S.2d 421, 217 N.E.2d 144 [same]; *see also*, *Sutfin v Scheuer*, 74 N.Y.2d 697, 543 N.Y.S.2d 379, 541 N.E.2d 408, *aff'g*, 145 A.D.2d 946, 536 N.Y.S.2d 320 [game of catch]).

The applicability of the doctrine depends on the nature and scope of the participant's awareness and consent (*see*, *Turcotte v Fell*, *supra*, 68 N.Y.2d at 439, 510 N.Y.S.2d 49, 502 N.E.2d 964). “As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation” (*Turcotte v Fell*, *supra* at 439, 510 N.Y.S.2d 49, 502 N.E.2d 964, citing *Maddox v City of New York*, *supra*, 66 N.Y.2d at 277-278, 496 N.Y.S.2d 726, 487 N.E.2d 553; *see*, *Benitez v New York City Bd. of Educ.*, *supra*, 73 N.Y.2d at 657, 543 N.Y.S.2d 29, 541 N.E.2d 29). On the other hand, the defendant generally has a duty to exercise reasonable care to protect athletic participants from “unassumed, concealed or unreasonably increased risks” (*Benitez v New York City Bd. of Educ.*, *supra* at 658, 543 N.Y.S.2d 29, 541 N.E.2d 29). To establish plaintiff's assumption of risk, a defendant must show that plaintiff was aware of the defective or dangerous condition and the resultant risk, although it is not necessary to

demonstrate that plaintiff foresaw the exact manner in which his injury occurred (*Maddox v City of New York*, *supra*, 66 N.Y.2d at 278, 496 N.Y.S.2d 726, 487 N.E.2d 553). Whether it can be concluded that a plaintiff made an informed estimate of the risks involved in an activity before deciding to participate depends on the openness and obviousness of the risk, plaintiff's background, skill, and experience, plaintiff's own conduct under the circumstances, and the nature of defendant's conduct (*see*, *Benitez v New York City Bd. of Educ.*, *supra*, 73 N.Y.2d at 657-659, 543 N.Y.S.2d 29, 541 N.E.2d 29; *Turcotte v Fell*, *supra*, 68 N.Y.2d at 440, 442, 510 N.Y.S.2d 49, 502 N.E.2d 964; *Maddox v City of New York*, *supra*, 66 N.Y.2d at 277-278, 496 N.Y.S.2d 726, 487 N.E.2d 553). Perhaps the most important factor, however, is whether the risk is inherent in the activity (*Owen v R.J.S. Safety Equip.*, *supra*, 79 N.Y.2d at 970, 582 N.Y.S.2d 998, 591 N.E.2d 1184; *Turcotte v Fell*, *supra*, 68 N.Y.2d at 443-444, 510 N.Y.S.2d 49, 502 N.E.2d 964; *Maddox v City of New York*, *supra*, 66 N.Y.2d at 277, 496 N.Y.S.2d 726, 487 N.E.2d 553).

A plaintiff will not be held to have assumed those risks that are not inherent (*see*, *Cole v New York Racing Assn.*, *supra*, 24 A.D.2d at 994, 266 N.Y.S.2d 267; *see also*, *Owen v R.J.S. Safety Equip.*, *supra*), i.e., not "ordinary and necessary" in the sport (*Turcotte v Fell*, *supra*, 68 N.Y.2d at 443, 510 N.Y.S.2d 49, 502 N.E.2d 964, citing *Cole v New York Racing Assn.*, *supra*). The conditions that exist at similar facilities are relevant to that inquiry, as are the rules of the game (*Turcotte v Fell*, *supra* at 440-443, 510 N.Y.S.2d 49, 502 N.E.2d 964). Generally, the issue of assumption of risk is a question of fact for the jury (*Maddox v City of New York*, *supra*, 66 N.Y.2d at 279, 496 N.Y.S.2d 726, 487 N.E.2d 553; *see*, *Owen v R.J.S. Safety Equip.*, *supra*); however, if the facts are not in dispute, it may be decided as a matter of law (*see*, *Maddox v City*

of *New York, supra*).

In *Morgan v State*, 90 NY2d 471, 685 N.E.2d 202, 662 NYS2d 421 91997) the Court of Appeals decided four assumption of risk cases. The Court held in part that in assessing whether an owner or operator of an athletic facility has violated a duty of care to participants who are injured on premises while engaged in voluntary sports activities, the applicable standard should include 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. A showing of some negligent act or inaction, referenced to the applicable duty of care owed to plaintiff by the defendant, which may be said to constitute a substantial cause of the events which produced the injury is necessary. Additionally, the application of the assumption of risk doctrine in assessing the duty of care owed by such a defendant requires that the participant have knowledge of the injury-causing defect, and also appreciation of the resultant risk, which is to be assessed not in a vacuum but against the background of the skill and experience of the particular plaintiff. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty. Also, 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 flow from such participation.

In *Chimerine v World Champion John Chung Tae Kwon Do Institute*, 90 NY2d at 488, the Court held that for purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the *sine qua non*. Accordingly, plaintiff's claim to recover for injuries sustained while attempting a "jumping" or "hopping" kick maneuver during her fourth class at defendants' martial arts training school was correctly dismissed on assumption

of the risk grounds. Plaintiff's instructor directed that she "step, hop, skip, jump, kick, land" and she attempted this maneuver after seeing it performed by the instructor and a few classmates. A reasonable person of participatory age or experience must be expected to know that there is a risk of losing one's balance and of injury when hopping, skipping or jumping in such circumstances. The Court found that there was no record material that the elemental maneuver plaintiff attempted to execute was so unreasonably risky that plaintiff would not have realized that there was a risk of injury.

In *Beck v Scimeca*, 90 NY2d at 487, the plaintiff was injured while participating in a class at defendant's karate school. The plaintiff, who was thirty years old, had been a student at the school for fifteen months, attending two or three classes a week. He was injured while attempting a "jump roll," a technique in which the student tumbles over an obstacle--one that he had executed on prior occasions. On the day of the accident, the instructor had left the classroom and placed in charge of the class a fifteen-year-old student who raised the height of the obstacle higher than it had been for the plaintiff's previous "jump rolls." When the plaintiff attempted the roll at the increased height, he landed awkwardly and suffered a spinal injury. Both the appellate division and the court of appeals affirmed dismissal of the action. The allegation that a student of superior skill (though youthful) was placed in charge of the class does not, standing alone, warrant a trial. The court found that it was indisputable that the plaintiff assumed the risk of landing incorrectly. The fact that the barrier was set at a higher level, a circumstance of which the plaintiff was keenly aware, reinforced the finding that the risks involved were open and obvious.

The case of *Lee v Maloney*, 270 AD2D 689, 704 NYS2d 729 (3d Dept 2000) is instructive herein. In *Lee*, plaintiff Gregory Lee, a nationally ranked weight lifter, participated in

the 1996 River Valley Classic Bench Press Championship held in the gymnasium at Southside High School in the City of Elmira, Chemung County. The competition was sponsored by Club Nautilus, a fitness club. As sponsors, defendants provided, *inter alia*, weights, bars and volunteer staff. Competitors had the option of choosing their own spotters or having spotters assigned. John Comereski and Edward Patten, organizers of the event, conducted a safety briefing for the contestants and the spotters prior to the competition. According to plaintiff, he successfully completed his first two lifts with no difficulties with either the bench or his spotters. After completing his second lift of 550 or 555 pounds, he returned for his third lift choosing to lift 565 pounds. He laid supine on the bench, counted to three and had his brother take the bar off the rack. He remembered bringing the bar down but when he started to push it up, it felt as though the pad on the bench shifted to his left, causing his shoulder blade to slip off the bench and wrenching his body to the left. Upon losing control of the bar, plaintiff contends that his spotter failed to timely grab it, waiting instead for the judge to yell "grab it" or "take it." The bar dropped to the left, where Maloney was spotting, landing partially on plaintiff's chest and arms which caused him injuries that required surgery.

The court held that given his experience and record of expertise in this sport, as a matter of law, that plaintiff must be held to have assumed the risks inherent therein which reasonably includes the knowledge that a heavily weighted bar might slip out of his control and injure him despite the assistance that a fully attentive spotter might be able to provide. And, the injury was instantaneous, giving the spotters little time to react.

In the instant case, plaintiff never indicated that she could not proceed with the third repetition, she never indicated that she was experiencing any pain radiating from plaintiff's hip

down her left leg or anywhere else, before during or after the procedure that resulted in her accident, and by consenting to the activity, plaintiff cannot argue that defendant should not have permitted her to do the exercise because of the physical condition of her left hip. Plaintiff assumed the risks inherent in the Pilates exercise which reasonably include the knowledge that her hands could slip while on the apparatus and that she could get injured, despite the assistance that a spotter might be able to provide.

Secondary Assumption of Risk

In explaining the distinction between primary and secondary assumption of risk, "Some courts define as secondary assumption of risk when the plaintiff voluntarily encounters a known and appreciated risk of injury created by defendant's negligence. (Citations omitted) Unlike its primary form, a plaintiff in the secondary assumption of risk context has not impliedly consented to relieve the defendant of a duty of care.(Citations omitted) Secondary assumption of risk is not a complete defense, but has been merged with the defense of contributory negligence under comparative fault laws. (Citations omitted) When the plaintiff's decision to encounter risk is unreasonable, secondary assumption of risk is tantamount to contributory negligence, and the plaintiff's claim should be submitted to the jury for analysis under comparative fault principles. (Citations omitted) However, if the plaintiff's decision to encounter the risk is reasonable, the court is faced with a dilemma: Should this type of assumption of risk (1) completely bar recovery; (2) be evaluated under comparative fault principles; or (3) be abolished as a defense? Courts are split on the issue. There is authority in favor of retaining this type of assumption of risk as a complete defense.(Citations omitted) Nevertheless, some courts have concluded that a plaintiff's assumption of risk, irrespective of reasonableness, should be factored into the

comparative fault computation. (Citations omitted) Still other courts have held that this type of assumption of risk is not a defense at all.(Citations omitted) Reasons advanced for this extreme position include: (1) it would be anomalous to deny recovery to a plaintiff who acted reasonably while permitting partial recovery to a plaintiff who acted unreasonably; and (2) this type of assumption of risk inequitably punishes reasonable conduct. (Citations omitted)” “Assumption of the Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases,” (12 Fordham Intellectual Property, Media & Entertainment L.J. 583, 604-605 [Winter 2002]

Livshitz v U.S. Tennis Association National Tennis Center, 196 Misc.2D 460, 761, NYS2d 825 (N.Y. City Civ. Ct. 2003) is distinguishable from the case at bar. In *Livshitz*, a tennis player brought action against a tennis facility for injury she allegedly sustained when a tennis ball hit her in the eye served by instructor, during a paid-for tennis lesson. The tennis facility moved for summary judgment. The Court held that the doctrine of primary assumption of the risk did not insulate facility from negligence liability.

However the *Livshitz* court further noted that “As a general rule, if a garden-variety plaintiff such as *Livshitz* were hit in the eye during a game of tennis, the doctrine of primary assumption of risk would most likely bar her suit, absent special facts. Here, however, the critical fact is that *Livshitz* was not simply a participant in an active tennis game; instead, she paid money in order to receive special tennis instruction and was participating in a particular drill. *Her conduct did invite a risk of injury in the lobbying of the ball, depending on the alleged level of the class (not altogether clear from the present record). Her enrollment did not invite the instructor to launch a ballistic missile at her, at intense speed (as is alleged), if the instructor saw or had reasonable reason to know that plaintiff was day-dreaming, distracted, or otherwise*

unaware that a projectile was coming at her.” (Emphasis added) *Id* at 830

In the case at bar, plaintiff was undisputably injured by her own actions: her hands slipped; she lost her grip.

Likewise, plaintiff’s reliance on *Corrigan v Musclemakers, Inc.*, 258 AD2d 861, 686 NYS2d 143 (3d Dept 1999) is misplaced. In *Corrigan*, plaintiff joined defendant’s health and fitness facility, known as Gold’s Gym. Included in her \$400 annual membership fee were three, one-hour sessions with a personal trainer. On her first visit to the facility, she met with a personal trainer who, in the latter part of their one-hour session, placed her on a treadmill, set the machine at 3.5 miles per hour for 20 minutes and left her unattended. He did not instruct plaintiff on how to adjust the treadmill’s speed, stop the belt or operate the control panel. Shortly into the exercise, plaintiff drifted back on the belt, unsuccessfully attempted to walk faster and was quickly thrown from the machine and sustained a broken ankle. At the time of the incident, plaintiff was 49 years old and had never patronized a health facility or gym of this type. Nor had she ever been on a treadmill.

In the instant case, plaintiff had performed the exercise a minimum of eight to twelve times prior to the date of her accident. In addition, she had been using the Reformer to perform about ten other exercises on a routine basis. Based on her background, skill level and experience, she was familiar with the piece of equipment and could appreciate the risks associated with her participation.

Conclusion

This court finds that defendant has met its burden establishing entitlement to summary judgment. The application of the primary assumption of risk doctrine to this case, warrants the granting of defendant's motion.

Further, this court finds that the issues surrounding the missing index card containing plaintiff's workout history and noted injuries do not preclude the determination of this motion, and the granting of summary judgment. Based on the foregoing, it is hereby

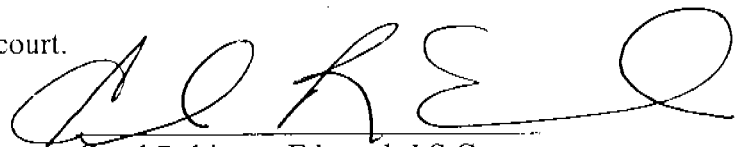
ORDERED that the motion of defendant Broadway Pilates, Ltd. for an order, pursuant to CPLR 3212 granting summary judgment, dismissing the complaint of plaintiff Nina Thomas, is granted. It is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: April 6, 2007


Carol Robinson Edmead, J.S.C.

FILED
APR 10 2007
COUNTY CLERK'S OFFICE
NEW YORK