STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PATRICIA SNIDE, Individually and as Grand-Parent and Court-ordered Custodian and Guardian of SAIRA A. JEFFRIES, an infant,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 7770-04
RJI NO. 01-05-084327

YURY'S SCHOOL OF GYMNASTICS, INC. and YURY TSYKUN,

Defendants.

Supreme Court Albany County All Purpose Term, April 27, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Law Offices of Ackerman, Wachs and Finton, P.C.
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TERESI, J.:

Defendant by notice of motion seeks an order pursuant to CPLR § 3212 dismissing Plaintiffs' complaint. Plaintiffs oppose the motion.

Plaintiffs commenced this action to recover damages that the infant Plaintiff, who was ten years old at the time, sustained as a result of her foot slipping between the springs of a trampoline, called a "tumble track," at Defendant Yury's School of Gymnastics ("Yury's").

Plaintiffs visited Defendant Yury's to learn about the gymnastics classes, observe the facility and possibly enroll the infant Plaintiff in a gymnastics class. While Plaintiff Patricia Snide was filling out the paperwork for the infant Plaintiff to attend a gymnastics class, an instructor took the infant Plaintiff into the gymnastics area, where she joined a class that was participating in an exercise on the tumble track. Plaintiffs claim that no real instruction was given to the infant Plaintiff about how to use the equipment.

The infant Plaintiff was told to jump and perform a scissor-kick across the tumble track. Plaintiffs claim that an instructor hurried the infant Plaintiff through the exercise. The infant Plaintiff performed this exercise one time and began again. Part way across the tumble track, her foot slipped between the springs on the edge of the tumble track and she pulled it up. Plaintiff was taken to a hospital where she learned that she had a fractured ankle.

Plaintiffs claim that the matting that was adhered to the sides of the tumble track was not covering the springs in the area in which the infant Plaintiff slipped, and, therefore, that the tumble track was not safe or properly maintained. Further, they claim that inadequate supervision and instruction were provided to the infant Plaintiff.

Defendants claim that the infant Plaintiff's injuries were reasonably foreseeable incidents of the activity in which she chose to participate, and that the infant Plaintiff assumed the risks inherent in the activity. Defendants point to the fact that the infant Plaintiff used a small trampoline at home and watched gymnasts perform tumbling exercises on television to support their contention that the assumption of risk doctrine applies. Defendants also contend that Defendant Yury Tsykun may not be found liable without piercing the veil of Defendant Yury's, a New York corporation.

"Summary judgment is a drastic remedy and 'should not be granted where there is any doubt as to the existence of a triable issue.'" Napierski v. Finn 229 A.D.2d 869, 870 (3d Dept. 1996) (quoting Moskowitz v Garlock, 23 A.D.2d 943, 944 (1965)). In deciding whether summary judgment is warranted, the court's primary function is issue identification, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law by establishing the nonexistence of material issues of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

The doctrine of assumption of risk applies when, "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." Morgan v. State, 90 N.Y.2d 471, 488 (1997). The risk of assumption doctrine is used to determine the duty of care owed by the owner or operator of an athletic facility to a participant of the athletic activity. See id. The assumption of risk doctrine applies only where the participant has "'not only knowledge of the injury-causing defect but also the appreciation of the resultant risk . . . .'" Id. (quoting Maddox v. City of New York, 66 N.Y.2d 270, 278 (1985)). To determine whether the

participant was aware of the inherent risk, the court must consider "'the background of skill and experience of the particular plaintiff.'" Id. (quoting Maddox v. City of New York, 66 N.Y.2d 270, 278 (1985)). Where the athletic facilities are improperly maintained and pose an unanticipated risk to participants, the participant may not be found to have assumed the risk. For example, where a man who had been playing tennis at a particular tennis club every week for ten years tripped and fell over a torn net, the Court of Appeals found that a torn net is not an risk that is inherent in the activity of tennis, and that the owner of the tennis club had a duty to keep the net in good repair. Id. at 482, 488.

Similarly, here, if one of the mats that covered the tumble track's springs was not attached at the time the infant Plaintiff participated in the activity, the risk of using the tumble track would be greater than the risk inherent in performing gymnastics. Whether the springs were properly covered at the time of the incident are issues of fact.

Further, because the infant Plaintiff, who was just ten years old at the time, had little previous exposure to gymnastics, she may not have been aware of the risks inherent in the activity.

An officer of a corporation is normally not liable for the negligence of the corporation unless he or she participated in a tort committed by the corporation. Trustco Bank New York v. S/N Precision Enterprises, Inc., 234 A.D.2d 665, 668 (3d Dept. 1996).

Since this matter involves an alleged tort, and Defendant Yury Tsykun was the supervisor in charge of the facility and the other instructors, he is not protected from individual liability by his position in the corporation.

Therefore, after a full review of the record, this Court denies Defendants' motion for summary judgment.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So ordered.

Dated: April 26, 2007
Albany, NY

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice for Motion of Summary Judgement dated February 7, 2007, with Attached Attorney Affidavit in Support of Motion for Summary Judgment of Justin O'C. Corcoran, Esq. dated February 7, 2007 with Attached Exhibits A-J.
2. Attorney Affidavit in Opposition to Motion for Summary Judgment of Elliot J. Wachs, Esq. dated March 10, 2007.
3. Attorney Reply in Support of Motion for Summary Judgment of Justin O'C. Corcoran dated April 24, 2007.