Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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BROOK LEWIS and STEPHEN DUNCAN,

Plaintiffs,

Index No: 8547/05
Motion Date: 2/28/07
Motion Cal. No: 27

-against-

STRIKE HOLDING LLC a/k/a STRIKE LONG ISLAND,

Defendant.

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The following papers numbered 1 to 9 read on this motion for an order, pursuant to CPLR 3212, granting summary judgment in favor of defendant Strike Holding LLC a/k/a Strike Long Island, dismissing all of plaintiffs' claims against it.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 7
Reply Affirmation.....	8 - 9

Upon the foregoing papers, it is ordered that the motions are disposed of as follows:

This is an action for personal injury in which plaintiffs Brook Lewis and Stephen Duncan ("plaintiffs") allege that they sustained injury on January 1, 2005, when the go-cart in which they were riding went off the track, due to the improper operation of the vehicle, while go-cart racing at the premises of defendant Strike Holding LLC a/k/a Strike ("Strike Holding"), located at Union Turnpike, New Hyde Park, New York. Strike Holding moves for summary judgment dismissing the complaint on the grounds that plaintiffs assumed the risk of injury that is inherent in go-carting and expressly waived their right to bring any lawsuit arising from engaging in that activity.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party

opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Here, Strike Holding, who submitted in support of its motion, inter alia, the deposition testimony of the plaintiffs and one of its employees, has made a prima facie demonstration of its entitlement to judgment as a matter of law by alleging that the application of the assumption of the risk doctrine, as well as executed waivers, relieve it of any liability for the happening of the accident. "The doctrine of assumption of the risk provides that '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 of New York, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202; see Taylor v. Massapequa Int'l Little League, 261 A.D.2d 396, 397, 689 N.Y.S.2d 523). The assumption of risk doctrine also applies to any readily observable condition of the place where the activity is carried on (citations omitted)." Sanchez v. City of New York, 25 A.D.3d 776 (2d Dept. 2006); see, also, La Sans Kirkland v. Raleigh Hall, 38 A.D.3d 497 (2d Dept. 2007). Indeed, "[p]articipants in sporting events may be held to have consented to injury-causing events which are the known, apparent, or reasonably foreseeable risks of their participation." Rosenbaum v. Bayis Ne'Emon, Inc., 32 A.D.3d 534 (2d Dept.2006), citing Colucci v. Nansen Park, 226 A.D.2d 336 (2d Dept.1996); Turcotte v. Fell, 68 N.Y.2d 432, 439 (1986); and Manoly v. City of New York, 29 A.D.3d 649 (2d Dept. 2006). Cf., Joseph v. New York Racing Ass'n, Inc., 28 A.D.3d 105, 111 (2d Dept; 2006)["when an experienced athlete. . .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"].

Strike Holding's manager, Michael DiFelippo, testified at his deposition that on the evening in question, plaintiffs, who were with separate groups of friends, "after paying and signing the waiver, all . . . were shown a two minute safety video." He described the go-carts as "powered by electric and . . .control[led] by remote control stationed in the middle of the track where the cart attendant . . . [controls] the speed and stop." He further testified that the "customer" can control the "speed and stop" with the brake and gas pedal; however, the carts have four different speeding settings that are controlled by employees of Strike Holding. He added that the accident at issue occurred after the speed of plaintiffs' carts, which they allegedly demonstrated no difficulty in handling, had been increased to the 3rd highest setting. The testimony established that the accident consisted of a collision between the go-cart occupied by plaintiff Stephen Duncan, which came into contact with the cart occupied by plaintiff Brook Lewis. Also submitted in support of the motion was a copy of the waiver signed by plaintiff Brook Lewis, entitled "EXPRESS ASSUMPTION OF RISK, WAIVER, AGREEMENT NOT TO SUE, AND INDEMNITY AGREEMENT." The evidence was sufficient to establish Strike Holding's entitlement, prima facie, to summary judgment in its favor.

The burden then shifted to plaintiffs to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. To meet this burden, plaintiff must

show that, based upon the facts of this case, the doctrine of assumption of risk does not serve as a bar to liability because the risk was "'unissued, concealed, or unreasonably increased' (Lapinski v. Hunter Mtn. Ski Bowl, 306 A.D.2d 320, 321, 760 N.Y.S.2d 549)." Rosenbaum v. Bayis Ne'Emon, Inc., supra. Plaintiffs allege that they were riding on an indoor electric go-cart track in which the speed of the vehicles were controlled by Strike Holding, and that the accident occurred after the go-carts had completed two laps, and Strike Holding's employee shifted from the lowest speed to a higher speed. Plaintiff Duncan testified:

Q. So you went one to two laps, then they sped you up?

A. Yes, I looked at the box and can I tell that they had turned it all the way up. It wasn't, I think, there was middle speed. It was A, B, C, FD and he had it on the one right before the end and then when I looked I saw he turned it up al the way because someone was sitting in front me and I saw him turn it up.

This testimony was not inconsistent with that of Michael DiFelippo, who testified:

Q. What level were they at?

A. They were at C, the third level.

Q. It is your testimony that all the carts were handling that speed at that time?

A. (No response.)

Q. When I say "handling," going okay all at the same location?

A. They were not handling it good, but enough that we get it at that speed.

Q. When you say "not handling it good," what do you mean?

A. There was two cars on there that were giving us a little problem at that time on Level C, the third level.

Q. When you say they were giving a little problem, what do you mean?

A. Like bumping and not driving where we thought it was secure.

Q. At that point; what, if anything, did you do?

A. We tried to drop the speed down?

Q. Did you reduce it from Level 3?

A. No, we tried to drop it; and as we were dropping the speed, the accident occurred.

Clearly, the testimony of plaintiffs and Strike Holding's employee was sufficient to raise a triable issue of fact as to whether the risk was "'unissued, concealed, or unreasonably increased.'" Rosenbaum v. Bayis Ne'Emon, Inc., supra.

In short, where, as here, there may be "faulty safety features . . ., not directly used in playing the game [or participating in the activity]," the perceived risks are 'not automatically an inherent risk of the sport as a matter of law' for purposes of summary judgment (Siegel v. City of New York, 90 N.Y.2d 471, 488, 662 N.Y.S.2d 421, 685 N.E.2d 202)." Cevetillo v. Town of Mount Pleasant, 262 A.D.2d 517 (2d Dept. 1999). The question is whether "the injured plaintiff was subjected to a concealed or unreasonably increased risk" See, Sanchez v. City of New York, 25 A.D.3d 776 (2d Dept. 2006)["plaintiffs failed to raise a triable issue of fact as to whether the injured plaintiff was subjected to a concealed or unreasonably increased risk"]. Such a triable issues was raised here. See, Lipari v. Babylon Riding Center, Inc., 18 A.D.3d 824 (2d Dept. 2005). ["While Lipari assumed the risk that he could be thrown by a frightened horse, the defendant offered no evidence that Lipari, a novice horseback rider, assumed the heightened risk created by the alleged negligent conduct of the trail guides in leaving him unattended in the rear of the line of horses"]; Millan v. Brown, 295 A.D.2d 409 (2d Dept. 2002)["While the injured plaintiff assumed the risk of falling off a horse, she did not assume the risk created by the alleged reckless conduct of the defendant Eric Janelli, who, it is alleged, should have exercised greater caution under the circumstances, given his experience and knowledge of horses"]. It thus cannot be concluded as a matter of law that plaintiffs assumed the risk of the injury-causing event. See Morgan v. State of New York, 90 N.Y.2d 471 (1997).

Having concluded that plaintiffs met their burden of raising a genuine issue of material fact sufficient to rebut defendants' prima facie showing of entitlement to summary judgment, however, does not end the inquiry. Defendants also assert that the waivers executed by plaintiffs preclude this litigation; plaintiffs did not address this prong of the motion. At issue is whether the waiver is enforceable. As a general proposition, "an exculpatory provision ordinarily will be enforced when its language 'expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence' (Lago v. Krollage, 78 N.Y.2d 95, 100, 571 N.Y.S.2d 689, 575 N.E.2d 107; see, Seaboard Surety Co. v. Gillette Co., 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272)." Uribe v. Merchants Bank of New York, 91 N.Y.2d 336, 341 (1998). The General Obligation Law provision, however, represents an exception to that general rule.

General Obligations Law § 5-326, entitled "Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable," provides:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities,

> pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

"To void a release of liability executed by a user of a recreational facility pursuant to General Obligations Law § 5-326, the individual must have paid a fee for use of the facility." Stuhlweissenburg v. Town of Orangetown, 223 A.D.2d 633 (2d Dept. 1996), citing Stone v. Bridgehampton Race Circuit, 217 A.D.2d 541, 629 N.Y.S.2d 80; Miranda v. Hampton Auto Raceway, 130 A.D.2d 558, 515 N.Y.S.2d 291; Lago v. Krollage, 78 N.Y.2d 95, 100, 571 N.Y.S.2d 689, 575 N.E.2d 107. See, also, Millan v. Brown, 295 A.D.2d 409 (2d Dept. 2002)[holding that a riding establishment to which an instruction fee is paid for riding lessons is not a "place of amusement or recreation" within the meaning of General Obligations Law § 5-326.]; Bufano v. National Inline Roller Hockey Ass'n, 272 A.D.2d 359 (2d Dept. 2000)[holding that General Obligation Law § 5- 326 does not void release where payment not paid to the owner or operator of a recreational facility]; Chieco v. Paramarketing, Inc., 228 A.D.2d 462 (2d Dept. 1996)[holding that General Obligation Law § 5- 326 does not void where release signed in conjunction with buyer's purchase of unit and receipt of lessons in use of unit at seller's private flight facility, and was not payment of fee for admission to place of amusement or recreation]; Baschuk v. Diver's Way Scuba, Inc., 209 A.D.2d 369 (2d Dept. 1994)[holding that General Obligation Law § 5- 326 does not void release where defendant's private swimming pool was used for instructional, not recreational or amusement, purposes, the tuition fee paid by the plaintiff for a course of instruction not to be analogous to the use fee for recreational facilities contemplated by the statute]. Cf. Castellanos v. Nassau/Suffolk Dek Hockey, Inc., 232 A.D.2d 354 (2d Dept. 1996)[holding enforceable, without any reference to the General Obligation Law provision, an injury waiver form because it "clearly expressed the intention of the parties to relieve the 'organizers, sponsors, supervisors, participants, owners of the business and owners of the premises.'"] As plaintiffs paid an admission fee to participate in a recreational activity at Strike Holding, this Court finds that General Obligations Law § 5-326 renders the release executed by them is "void as against public policy and wholly unenforceable," and that branch of the motion is likewise denied.

Dated: April 26, 2007

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J.S.C.