[* 1]

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

PRESENT: SOLOMON PART 55

Index Number : 115822/2004

GANGEMELLA, DOUGLASS

VS

BOWLMORE LANES

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 115822/2004

MOTION DATE 1-29-2007

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-4
Answering Affidavits — Exhibits	5-9
Replying Affidavits	10-12

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

Pre Trial Conf. 7-16-02 at 2pm.

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

Dated: 6/6/07

J.S.C.
JANE S. SOLOMON

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

----------x

DOUGLAS GANGEMELLA,

Plaintiff,

Index No.: 115822/2004

- against -

BOWLMOR LANES d/b/a STRIKE LONG ISLAND, LLC,

DECISION AND ORDER

Defendant.

----------x

JANE S. SOLOMON, J:

In this negligence action, defendant Strike Long Island, LLC (s/h/a Bowlmor Lanes LLC d/b/a Strike Long Island LLC) ("Strike") moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint dated November 1, 2004, on the ground that there are no triable issues of fact. Plaintiff Douglas Gangemella cross-moves, pursuant to CPLR §§ 3211 and/or 3212, for an order dismissing Strike's affirmative defenses of assumption of risk ("Third Affirmative Defense") and waiver and release ("Fourth Affirmative Defense") in the answer, dated January 19, 2005. As set forth more fully below, Strike's motion for summary judgment is denied, and plaintiff's cross motion is granted in part.

Background

Strike is an amusement facility, located in New Hyde Park, New York, which maintains a bowling alley, go-kart racing track and a restaurant. On the evening of August 6, 2004, plaintiff and his then girlfriend, Nicole Bonura ("Bonura"), went

to Strike to ride the go-karts. Plaintiff paid a fee to ride the go-karts but was not asked to sign any documentation at that time.

On a previous visit to Strike on January 8, 2003, plaintiff and Bonura also rode the go-karts. During that previous visit, in order to ride the go-karts plaintiff was required to sign an Express Assumption of Risk Waiver Indemnity and Agreement Not to Sue ("Waiver") and was issued a "license". Plaintiff testified that, due to an alleged reading disability, at the time he was presented with the form, he asked the cashier to read it to him, but she refused. Despite not reading or understanding the release, plaintiff signed the Waiver, so that he and Bonura could ride the go-karts, which they did without incident.

On the date in question, plaintiff and his girlfriend rode the go-karts twice. On both occasions, they were wearing seat belts, which were secured by Strike track attendants. On the second ride, when turning around a bend in the 770-foot, "B"-shaped track, plaintiff was involved in an accident with a stalled go-kart in which plaintiff was injured; his injuries included a broken leg. There is inconsistency in the record as to the persons involved in the accident and what actually happened.

According to plaintiff, he could not see a stalled go-

kart on the track (which was allegedly driven by an unidentified male) until he came around the corner. The front left side of plaintiff's go-kart hit the left side of the other go-kart, which apparently was caught in the wall of the track. When plaintiff's go-kart made contact with the wedged go-kart, it was lifted in such a way that the other go-kart fell on top of plaintiff's go-kart and pinned his leg. Bonura testified that she did not observe the accident and that she was on the track ahead of plaintiff at the time. Bonura's testimony supports plaintiff's allegations in that she claims that he hit another man's go-cart that was stuck in the wall.

Jeffrey Katz, then manager of Strike, recounts a different story. According to Katz, plaintiff and Bonura were bumping each other with their go-karts while driving around the track. Katz claims that he notified a track attendant to stop the race and warn them that any further inappropriate behavior would result in their being asked to leave. Katz testified the ". . . collision was, I believe, was [Bonura] hitting [plaintiff] once again after the warning causing her vehicle to jump on top of his vehicle." Katz also testified that when there is a stalled go-kart on the track, Strike's policy is to stop the race immediately.

Discussion

In order for summary judgment to be granted, the movant must proffer admissible evidence to make a prima facie showing that establishes the causes of action "sufficient to warrant the court as a matter of law in directing judgment . . ." CPLR § 3212(b); *see also* Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986). Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so." Zuckerman, 49 N.Y.2d at 562. Summary judgment may only be granted if there is no triable issue of fact presented. Id.

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury. Kenney v. City of New York, 30 A.D.3d 261, 262 (1st Dep't 2006), *citing* Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339 (1928); *see also* Wayburn v. Madison Land Ltd. Partnership, 282 A.D.2d 301, 302 (1st Dep't 2001). In short, "plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury." Derdiarian v. Feliz Contracting Corp., 51 N.Y.2d 308, 315 (1980)(internal citation omitted).

The question of whether a duty of care exists is one for the court to decide. De Angelis v. Lutheran Med. Ctr., 58 N.Y.2d 1053 (1983); Stankowski v. Kim, 286 A.D.2d 282 (1st Dep't 2001). It is established that recreational facilities owe a general duty to participants. *See* Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650 (1989). Strike argues that, because plaintiff signed the Waiver on January 8, 2003, the duty somehow is eradicated. A review of the language in the Waiver, however, demonstrates that claims of negligence as against Strike were not waived (*see* Waiver, ¶¶ 1 and 2). Regardless, even if the Waiver were applicable to the claim here, it would be unreasonable to apply an exculpatory agreement which had been signed nearly two years before the accident in question (*cf.* Savasta v. 470 Newport Associates, 82 N.Y.2d 763 [1993]), especially when there is no evidence that the Waiver was a continuing one.

According to plaintiff, Strike was negligent because Strike breached its duty by failing to stop the ride, in compliance with its own policy, when the other go-kart was stalled on the track. Strike counters that plaintiff assumed all the risks associated with go-karting, and therefore there can be no breach. In assessing whether Strike has violated a duty of care, the applicable standard includes "whether the conditions caused by the defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are

inherent in the'" activity. Morgan v. State of New York, 90 N.Y.2d 471, 485 (1997)(internal citations omitted). Generally, "by engaging in a . . . 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." Id. at 484 (internal citations omitted); *see also* Lombardo v. Cedar Brook Golf & Tennis Club, Inc., 834 N.Y.S.2d 326 (2nd Dep't 2007); Gafner v. Chelsea Piers, L.P., 27 A.D.3d 353 (1st Dep't 2006). While knowledge of the risks associated with such activities and the experience of the participant both play roles in determining the extent of the threshold duty of care, "inherency is the sine qua non." Morgan, 90 N.Y.2d at 484, *citing* Maddox v. City of New York, 66 N.Y.2d 270 (1985), Turcotte v. Fell, 68 N.Y.2d 432, 443 (1986), Scaduto v. State of New York, 56 N.Y.2d 762, *aff'd* 86 A.D.2d 682 (1982); *see also* Dalton v. Adirondack Saddle Tours, Inc., 2007 NY Slip Op 3811 (3rd Dep't May 3, 2007)(holding that plaintiff, who suffered injuries when thrown off a horse while horseback riding, voluntarily consented to participate in said activity and therefore assumed the risks inherent therein). A "showing of some negligent act or inaction, referenced to the applicable duty of care owed to [plaintiff] by [Strike] which may be said to constitute 'a substantial cause of the events which produced the injury' is necessary." Morgan, 90 N.Y.2d at 485, *quoting* Benitez

v. New York City Bd. of Educ., 73 N.Y.2d 650, 659 (1989).

While it may be said that "[i]n riding the go-[k]art, [plaintiff] assumed the risks inherent in the activity, which included the prospect that the go-[k]art would bump into objects" (Loewenthal v. Catskill Funland, Inc., 237 A.D.2d 262, 263 [2nd Dep't 1997]), there is a question of fact as to whether Strike was negligent in, among other things, failing to stop the ride or otherwise allowing the situation to occur (*see* Derdiarian, 51 N.Y.2d 308). Based on the foregoing, Strike has not established that it is entitled to summary judgment as a matter of law.

Accordingly, defendant's motion for summary judgment is denied.

Plaintiff cross-moves to dismiss Strike's Third Affirmative Defense of assumption of risk based on the contention that Strike failed to adequately particularize the defense. This court does not agree. Strike, in its answer, adequately pled assumption of risk and satisfactorily amplified the defense in its Response to Bill of Particulars so as to prevent any unfair surprise to plaintiff.

For the reasons set forth above, Strike's Fourth Affirmative Defense pertaining to the Waiver fails as a matter of law, so that, the cross motion is denied as to the Third Affirmative Defense and granted as to the Fourth Affirmative Defense.

Accordingly, it hereby is

ORDERED that the motion by defendant Strike Long Island (sued s/h/a Bowlmor Lanes LLC d/b/a Strike Long Island LLC) for summary judgment is denied; and it further is

ORDERED that the cross motion by plaintiff Douglas Gangemella is granted to the extent that the Fourth Affirmative Defense is stricken, and otherwise is denied.

Dated: June 6 , 2007

ENTER:

J.S.C.

JANE S. SOLOMON

FILED
JUN 11 2007
NEW YORK
COUNTY CLERK'S OFFICE