[* 1]

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

PRESENT: HON. ROLANDO T. ACOSTA PART 61

Index Number : 111371/2004
DAVIS, JEANNINE
VS
CRUNCH FITNESS
Sequence Number : 001
SUMMARY JUDGMENT

NO. _____
DATE _____
SEQ. NO. _____
CAL. NO. _____

The foll ... papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	see attached
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 9/10/07

SO ORDERED

J.S.C.
ROLANDO T. ACOSTA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

Jeannine Davis a/k/a Jaye Davis

Plaintiff,

– against –

Crunch Fitness Inc,

Defendants.

DECISION/JUDGMENT

Index No. 111371/04

Seq. No. 1

Present:

Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendant's motion for an order dismissing the complaint pursuant to CPLR 3212:

Papers	**Numbered**
Notice of Motion, Affirmation & Affidavit of Law	**1-2 (Exhibits A-G)**
Affirmation, Affidavits & Supplemental Affirmation in Opposition	**3-4 (Exhibits A-C)**
Reply Affirmation	**5**

Plaintiff had been taking yoga classes at Crunch Fitness ("Crunch") two time per week from May 2002 to January 2004. On January 25, 20004, she was injured while attempting an inversion move. The move required that plaintiff perform a backbend where her hands were on the floor by her head, her back was arched upward and her toes were at the base of a brick wall. She was then directed to run up the wall and push off at the top so as to permit her to flip her body over and land upright facing the wall.

According to plaintiff, she and several other students attempted the move but had difficulty because the brick wall, which had a painted surface, was very slippery. Since she was unable to grip the wall with her feet she was unable to maintain her balance. Upon informing the instructor that the wall was too slippery, the instructor allegedly replied "the wall is not slippery. If you are too afraid to do it, then just admit it but do not blame the wall." The instructor acknowledged that he regularly "pushes" students to do the various moves despite their reservations.

Plaintiff attempted the move again, slipped off the wall, fell on her head and was rendered unconscious. She explained that she did not move to a different wall because the class was full with about 50 people and there was no other space available.

Prior to the date of the accident, plaintiff had never seen or attempted this move before. According to the instructor, the move was done only a few times every four to six months. Plaintiff had previously used the wall during class, but only for support such as when doing a headstand.

Cara Sax, a yoga instructor for six years, stated in her affidavit that the inherent risks of injury with yoga include muscle pulls and sprains. In her opinion, the move in question was a gymnastics move and not a yoga move. Richard G. Berkenfeld, a licensed engineer, stated in his affidavit that since the wall was being used to "walk on" with feet wet with perspiration, it required a slip resistant paint.

In her complaint, plaintiff asserted a negligence cause of action. Defendant now moves to dismiss the complaint on the basis that plaintiff assumed the risk involved in performing the move in question.

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center , 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). 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." C.P.L.R. §3212(b).

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 Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, supra, 49 N.Y.2d at 560, 562. 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. Id. at 562.

Here, viewing the facts in the light most favorable to plaintiff (the non-moving party), Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006), defendant has established its prima facie entitlement to summary judgment. Under the doctrine of assumption of risk, 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 sport generally and flow from such participation. Morgan v. State, 90 N.Y.2d 471 (1997). This includes those risks associated with the construction of the playing surface and any open and obvious condition on it. Sykes v. County of Erie, 94 N.Y.2d 912 (2000). It is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which the injury occurred so long as he or she is aware of the potential for injury of the mechanism from which the injury results. Maddox v. City of New York, 66 N.Y.2d 270 (1985). Awareness of the risk is to be assessed against the background of the skill and experience of the particular plaintiff. Morgan v. State, 90 N.Y.2d at 485. If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty by making the conditions as safe as they appear to be. Turcotte v. Fell, 68 N.Y.2d 432, 439 (1986). The assumption of risk bars recovery for injuries resulting therefrom. Morgan v. State, 90 N.Y.2d at 484.

Here, plaintiff clearly assumed the risk involved in performing the optional yoga move at issue. She was an experienced yoga student, having taking class twice a week for approximately two years. In fact, prior to attempting the move, she assessed the risks, and determined that the wall was too slippery. At that point, she could have simply chosen not to attempt the move. In fact, she admitted that the instructor calls out the name of a pose and whether or not the member chooses to do or attempt the particular pose is up to the member. Inasmuch as plaintiff assumed an obvious risk in attempting the inversion move, she is barred from recovering for injuries resulting therefrom. Morgan v. State, 90 N.Y.2d at 484.

Defendant having established its prima facie entitlement to summary judgment, the burden shifted to plaintiff to raise triable issues of fact, which she has failed to do. That Sax described the inversion move as a gymnastics move rather than a yoga move is irrelevant. The move clearly involved yoga related movements, such as a backbend and using a wall for support. That another instructor would not have used this move in his or her class does not in-off-itself deem it a non yoga move. In any event, an instructor has wide latitude in the poses he or she chooses to use in class. As with any other movement or pose, the student, especially an experienced one such as plaintiff, has the option of sitting it out. This is even more so in this case where, as noted above, plaintiff felt that the wall was too slippery for the required movements.

Nor does plaintiff create an issue of fact by Berkenfeld's assertion that the wall should have had slip resistant paint because it was being used to walk on inasmuch as the risks associated with the wall was open and obvious. Sykes v. County of Erie, 94 N.Y.2d 912 (2000)(assumption os risks includes those risks associated with the construction of the playing surface and any open and obvious condition on it).

Last, plaintiff's claim that she was compelled by the instructor into performing the move is not supported by the record. At most, the instructor was insensitive to the students' fears. He did not, however, compelled or coerced the students into actually doing the move. In any event, an instructor or personal trainer routinely pushes their students to do more difficult exercises. See Morgan v. State, 90 N.Y.2d at 487 ("[t]he primary means of improving one's sporting prowess and the inherent motivation behind participation in sports is to improve one's skills by undertaking and overcoming new challenges and obstacles"). In fact, that's one of the benefits of having a personal trainer or taking a class. Accordingly, based on the foregoing, it is

ORDERED that defendant's motion for an order granting summary judgment dismissing the complaint is granted.

This constitutes the Decision and Order of the Court.

September 10, 2007

ENTER

SO ORDERED,

Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

Kenneth B. Goldblatt, Esq.
Goldblatt & Associates, PC
1846 East Main Street (Route 6)
Mohegan Lake, NY 10547
Attorneys for Plaintiff

Demi Sophocleous, Esq.
Morrison Mahoney LLP
17 State Street, Suite 1110
New York, NY 10004
Attorneys for Defendant