

Stein v Onorato

2008 NY Slip Op 30860(U)

March 20, 2008

Supreme Court, Nassau County

Docket Number: 2761-06/

Judge: Daniel R. Palmieri

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
LESLIE STEIN,

TRIAL TERM PART 48

Plaintiff,

-against-

INDEX NO.: 12761/06

MOTION DATE: 1-14-08

SUBMIT DATE: 3-3-08

SEQ. NUMBER - 002

KATHLEEN ONORATO,

Defendant.

-----X

The following papers have been read on this motion:

- Notice of Motion, dated 12-6-07.....1**
- Memorandum of Law, dated 12-6-07.....2**
- Affirmation in Opposition, dated 2-8-08.....3**
- Reply Affirmation, dated 2-15-08.....4**

Defendant's motion for summary judgment pursuant to CPLR §3212 is granted and the action is dismissed.

Plaintiff, an experienced horseback rider, and her daughter went to defendant's premises for a riding lesson on Courtney, a 20 year old gelding horse. When her daughter was done, plaintiff mounted the horse and defendant adjusted the saddlery to suit plaintiff's size and led Courtney with plaintiff aboard, for a few steps.

Plaintiff alleges that defendant unclipped the lead line from the horse's bridle and that the horse bucked. Plaintiff was thrown and this suit for injuries sustained from the fall

[* 2]
ensued. Plaintiff did not see the clip at the end of the lead line hit the gelding but assumes that it did. She did see a flash of light which she assumes was from the clip's movement.

Although defendant denies that any part of the tack hit the horse, determination of that issue is not necessary for this motion.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

[* 3]

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*,

[* 4]
196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Here, the defendant has made a prima facie showing of entitlement to relief thus shifting the burden to plaintiff. However, plaintiff has failed to raise a triable issue of fact as to whether defendant was negligent or created an unreasonable risk. *Kinara v. Jamaica Bay Riding Academy, Inc.*, 11 AD3d 588 (2d Dept. 2004).

A participant in a recreational activity such as horseback riding assumes risks which are “inherent in and arise out of” the nature of the activity and it is well established that an inherent risk in sporting events involving horses is injury due to the sudden and unintended actions of the animals, including those actions which result in the participant being thrown or falling. The experience of the participant certainly is relevant in deciding whether he or she appreciated and, thus voluntarily assumed the risks of the activity . Plaintiff elected to take part in activity where she knew she would be riding a horse. The allegations do not establish that Courtney exhibited some physical defect which may have contributed to the fall or that he had any known, unruly and dangerous propensity. *Dalton v. Adirondack Tours, Inc.*, 40 AD3d 1169, 1171 (3rd Dept. 2007).

The risk that a horse might react to the movement occasioned by rearrangement of the riding gear is inherent in the activity of horseback riding, *Kirkland v. Hall*, 38 AD3d 497 (2d Dept. 2007). Accepting as true plaintiff’s version of what caused the accident, there is

[* 5]
nothing in that scenario which suggests that defendant was negligent or that she failed to observe any established standards of the sport. *Cf Lipari v. Babylon Riding Center, Inc.*, 18 Ad3d 824 (2d Dept. 2005) and *DiPilato v. Biaseti*, 6 AD3d 648 (2d Dept. 2004) where the plaintiffs contended that the defendants were negligent in leaving a novice rider unattended in the rear of the line or by placing other aggressive horses in a paddock so close to the trail that the risk of an accident was unreasonably increased, *Tilson v. Russo*, 30 AD3d 856 (3rd Dept. 2006).

Based on the foregoing, the plaintiff assumed the risk of this accident and has failed to provide sufficient evidence to demonstrate that a triable issue of fact exists as to the conduct of defendant. Hence, summary judgment is granted and the action is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 20, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: Riconda & Garnett, LLP
Attorney for Plaintiff
753 West Merrick Road
Valley Stream, NY 11580**

**Desena & Sweeney, LLP
Attorneys for Defendant Kathleen Onorato
By: Shawn P. O'Shaughnessy
1383 Veterans Memorial Highway
Suite 32
Hauppauge, NY 11788**

ENTERED

MAR 24 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**