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

PRESENT: WALTER B. TOLUB PART 15

Index Number : 118785/2006
HEINTZELMAN, MADISON
vs.
RCPI LANDMARK PROPERTIES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JUL 30 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/24/08

WALTER B. TOLUB J.S.C.

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: IAS PART 15

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MADISON HEINTZELMAN, and infant by her mother and natural guardian, JILL HEINTZELMAN and JILL HEINTZELMAN individually,

Plaintiffs,

-against-

RCPI LANDMARK PROPERTIES, TISHMAN SPEYER PROPERTIES, L.P., RARCO, INC., and RESTAURANT ASSOCIATES, INC.,

Defendants.

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Index No.118785/06
Mtn Seq.002

WALTER B. TOLUB, J.:

By this motion, Defendants Raroc, Inc., Restaurant Associates, Inc., RCPI Landmark Properties, LLC and Tishman Speyer Properties, LP move for summary judgment pursuant to CPLR 3212.

FACTS

Defendants Raroc, Inc. and Restaurant Associates, Inc., together run the business of the restaurant and ice-skating rink the ("Rink") at Rockefeller Center. They operate, control, and maintain the Rink. Defendant RCPI Landmark Properties, LLC owns the Rink. Tishman Speyer Properties, LP is the managing agent of the Rockefeller Center Rink. For the purposes of clarity, the court refers to Defendants Raroc and Restaurant Associates, Inc. collectively as the "RA" Defendants. Defendants RCPI Landmark Properties and Tishman are collectively the "Tishman" Defendants.

This action arises out of an ill-fated ice skating session at one of Manhattan's most visited landmarks. On November 28, 2006, Madison Heintzelman ("Plaintiff") spent her ninth birthday ice-skating at the ice rink at Rockefeller Center.[1] The Rink was moderately crowded and the weather was warmer than average. Two Rink guards were patrolling the ice during Plaintiff's entire session (Defendants' Ex. "J" page 2). The Zamboni ice machine was not used while Plaintiff was present (Defendants' Ex. "L" pg. 1).

Plaintiff and her mother claim that the ice was in reasonable condition notwithstanding a slushy hole, approximately 3-5 feet from the "Prometheus" statue on the side of the Rink. According to Plaintiff, this "divot" was triangular in shape, approximately two inches deep, and the size of the nine-year-old Plaintiff's hand. (See Defendants' Ex. "G" pg. 37). According to both the Plaintiff and her mother, the slushy hole was observable as one neared it, and Plaintiff was urged by her mother to avoid the hole by skating around it. Other skaters avoided the hole as well. Neither Plaintiff nor her mother reported the divot to Defendants. Finally, after over an hour on the Rink, Plaintiff skated near the area but was unable to locate the hole. She lodged her right skate into the divot, twisted her leg, and was injured.

After significant discovery, the instant motion for summary

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[1]Plaintiff's mother brings suit on her infant daughter's behalf.

judgment followed. Defendants argue that this action should be dismissed and that they are not liable because Plaintiff assumed the risks of ice skating. The Tishman defendants also argue that the negligence action against them should be dismissed because they did not control, operate, and/or manage the premises.

DISCUSSION

To be granted a motion for summary judgment, the moving party must make a prima facie showing that there are no triable issues of fact. (Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851 [1985]). The absence of material facts entitles that party to judgment as a matter of law. (Id.). Once the prima facie case is made, the party opposing the motion for summary judgment must produce evidentiary proof that material issues of fact do indeed exist, thereby warranting a trial. (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Alvord and Swift v. Steward M. Muller Const. Co., 46 N.Y.2d 276). Summary judgment is a drastic remedy concerned with issue-finding not issue-determination. (Esteve v. Abad, 271 A.D. 725 [1st Dep't 1947]). If the court has any doubt as to the existence of genuine issues of material fact, summary judgment should be denied. (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [1957]).

Tishman's Motion to Dismiss for Lack of Control of the Premises

As a preliminary matter, this court addresses Tishman's motion for summary judgment seeking dismissal of the action against them for lack of control and supervision over the Rink.

Under New York law, owners of properties may not be held liable for injuries sustained by a plaintiff in the absence of evidence that defendants maintain, control, or supervise the premises. (Butler ex rel. Butler v. Rafferty, 100 N.Y.2d 265 [2003]; Balbuena v. New York Stock Exchange, Inc., 49 A.D.3d 374, N.Y.A.D. [1st Dep't 2008]; Conforti v. Bovis Lend Lease LMB, Inc., 37 A.D.3d 235 [1st Dep't 2007]; Negron v. Rodriguez & Rodriguez Storage & Warehouse, 23 A.D.3d 159 [1st Dep't 2005]).

The Tishman Defendants offered evidence that they play no role in the operation, control, or maintenance of the Rink. Specifically, to support this argument, the Tishman Defendants submitted an affidavit from Carol Olsen, the Director of the Rink at Rockefeller Center. Olsen claims that the Tishman Defendants had no control or supervision of the Rink. (Defendants Ex. M pg. 1). Plaintiff failed to rebut this evidence or submit any evidence to the contrary. Therefore, the Tishman Defendants' motion for summary judgment is granted and the complaint is dismissed as against.

Defendants RA Motion for Summary Judgment Based on Plaintiff's Assumption of Risk

To sustain a cause of action for negligence, a plaintiff must prove defendant had a duty to plaintiff, breached that duty, and that the breach was the proximate cause of plaintiff's injury. Damages and foreseeability must also be shown. (Hyatt v. Metro-North Commuter Railroad, 16 A.D.3d 218 [1st Dep't

2005]).

Generally, a landowner owes a duty to maintain the premises in reasonably safe condition. (Smith v. Costco Wholesale Corp., 50 A.D.3d 499 [1st Dep't 2008]). However, a plaintiff's assumption of risk may lessen or eliminate a defendant's liability to a plaintiff.

The RA Defendants argue that in voluntary sporting events the duty owed to a plaintiff is "a duty to exercise care to make the conditions as safe as they appear to be" (Turcotte v. Fell, 68 N.Y.2d 432, 439 [1986]) and that Defendants did not breach that duty. The RA Defendants further argue that Plaintiff assumed the risk, thereby relieving the RA Defendants of any liability.

Indeed, in measuring a defendant's duty to a plaintiff, courts consider whether the participant assumed the risks of injury. (Turcotte v. Fell, 68 N.Y.2d 432 [1986]); Giordano v. Shanty Hollow Corp., 209 A.D.2d 760 [3d Dep't 1994]). And "[i]f the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (Turcotte v. Fell at 439 *citing* Prosser and Keeton, Torts 68 [5th ed]; 4 Harper, James & Gray, Torts 21.1 [2d ed]).

Courts have held that if the facts are undisputed, a participant in a recreational or sporting event assumes a risk that is known, apparent, or reasonably foreseeable. (Saravia v.

Makkos of Brooklyn, 264 A.D.2d 576 [1st Dep't 1999]). If the condition is among the accepted, usual, and inherent dangers of an activity, the risks are also assumed. (Morgan v. State, 90 N.Y.2d 471,484 [1997]).

For example, the First Department has held professional athletes and those familiar with the premises to have assumed the inherent risks of participating in the sport. By engaging in a sport, despite usual risks or open and obvious defects, players consent to the risk of injury and a defendant is relieved of its duty of reasonable care to plaintiff. (Turcotte v. Fell, supra; Maddox v. City of New York, 66 N.Y.2d 270 [1985]).

Courts have extended this assumption of risk beyond professional athletes to teenage participants and even adult novices. The court found the 14-year-old plaintiff participating in a football game to have assumed the risk of injury of falling on an obviously wet and muddy field. (Morales by Diaz v. New York City Housing Authority, 187 A.D.2d 295 [1st Dep't 1992]). Another 14-year-old was found to have assumed the risk of injury resulting from falling in a pothole under the basket during a basketball game. (McKey v. City of New York, 234 A.D.2d 114 [1st Dep't 1996]). A first time ice-skater assumed the risk of injury from open and obvious divots and marks in the rink. (Clement's v. Skate 9H Realty Inc., 277 A.D.2d 614 [3d Dep't 2000]).

While courts have granted summary judgment based on

plaintiffs assuming the risks of their voluntary participation in recreational activities, assumption of risk is generally treated as an issue of fact. (Anderson v. Lindenhurst Union Free School Dist., 222 A.D.2d 474 [2d Dep't 1995]); Maddox v. City of New York, 66 NY2d 270). To voluntarily assume the risk of injury, a participant must have the knowledge to understand the foreseeable consequences and the resultant risk of that activity. Therefore, a plaintiff's assumption of risk is weighed against the background and skill of the individual participant. (Benitez v. New York City Board of Education., 73 N.Y.2d 650 [1989]; Maddox v. City of New York, supra).

In assessing a child's assumption of risk, courts have set a lower standard of blameworthiness based on the infant's youth and inexperience. In a factually analogous case to the instant one, the Court of Appeals held that the infant ice-skater did not assume the risk of injury from tripping in a hole in the ice. (Pitofsky v. Dalu Corporation, 288 N.Y. 545 [1942]). In Pitofsky v. Dalu Corporation, the child was injured in a hole two and one-half inches wide and five inches long, almost exactly the size of the hole in the instant case. The court held that material issues of fact regarding defendant's negligence precluded the granting of summary judgment.

In Nunez v. Recreation Rooms and Settlement, Inc. , the court addressed whether a nine year old novice skater assumed an open an obvious risk. (Nunez v. Recreation Rooms and Settlement,

Inc., 229 A.D.2d 359 [1st Dep't 1999]). The court denied defendant's motion for summary judgment. Instead, the court held that a nine-year-old first time skater, escaping aggressive skaters on a crowded rink did not assume that risk. Although the other unruly skaters were an open and obvious danger, plaintiff's tender age and inexperience precluded assumption of risk as a matter of law.

However, in the case at bar, the risk was not obvious. In fact, Plaintiff describes the defect in the ice as "blending in," (Defendants Ex. G at pg. 41) Unlike a wet, muddy field or a pothole under a basketball court, the slushy hole in the instant case is less apparent and therefore distinguishable from such open and obvious risks.

Plaintiff's inexperience and youth along with the questionable obviousness of the defect preclude granting summary judgment to the RA Defendants. Plaintiff, just nine years old and unfamiliar with Rockefeller Center has questionable background and skill to comprehend the serious injury that befell her. Genuine issues of material fact remain as to whether the hole was indeed apparent and whether Defendant had constructive notice of this condition. Accordingly, RA's motion for summary judgment must be and is denied.

Accordingly, it is

ORDERED that defendants RCPI Landmark Properties, LLC and Tishman Speyer Properties, LP motion for summary judgment is

granted and the complaint is dismissed as to those parties only; and it is further

ORDERED that defendants Raroc, Inc. and Restaurant Associates, Inc. motion for summary judgment is denied; and it is further

ORDERED that the Clerk of the Court enter judgment.

Counsel for the remaining parties are to appear for a conference on September 12, 2008 at 11am, Room 335 at 60 Center Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/29/08

HON. WALTER B. TOLUB, J.S.C.