

Fraser v City of New York

2008 NY Slip Op 33210(U)

November 24, 2008

Supreme Court, New York County

Docket Number: 401753/03

Judge: Eileen A. Rakower

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.

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

PRESENT: **EILEEN A. RAKOWER**
J.S.C.
Justice

PART 5

Index Number : 401753/2003

FRASER, TRAVIS

vs

CITY OF NE WYORK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 401753/0

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2, 3, 4
5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 11/24/08


EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

TRAVIS FRASER, a minor under the age of
fourteen (14), by his mother and natural guardian,
MYRTLE FRASER, and MYRTLE FRASER,
Individually,

Plaintiffs,

- against -

Index No.
401753/03
**ORDER AND
DECISION**
Mot. Seq.: 004

THE CITY OF NEW YORK, THE BOARD OF
EDUCATION, NEW YORK CITY, THE
TOUSSAINT L'OVERTURE SCHOOL, P.S. 221
and THE HOT SKATES,

Defendants.

FILED
DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X

EILEEN A. RAKOWER, J.S.C.

Plaintiffs bring this action for injuries infant plaintiff allegedly sustained when he fell and twisted his ankle while roller skating. The injury occurred while infant plaintiff was attending a field trip with his fifth grade class at defendant Leisure Time Sports, Inc. d/b/a The Hot Skates' ("Hot Skates") roller rink located at 14 Merrick Road Lynbrook, New York on June 12, 2001. Specifically, plaintiffs allege, as to Hot Skates, "lack of proper care and maintenance of the skating rin[k], and failure/negligence to proper supervise students, lack of orientation and failure to properly orient the plaintiff and improper safety precaution to guide the plaintiff from fall" and "lack of supervision and first aid on the skating rin[k]." Hot Skates moves for summary judgment pursuant to CPLR 3212. Defendants the City of New York, the Board of Education, New York City, and the Toussaint L'Overture School, P.S. 221 ("BOE") cross move for summary judgment. Plaintiffs oppose both the motion and the cross motion.

Hot Skates, in support of its motion, submits the following: the pleadings; plaintiffs bill of particulars; the 50-h hearing transcript of infant; the deposition transcript of infant plaintiff, the deposition transcript of Ralph Pellizzi, infant plaintiff's teacher at the time of the accident; a contract between the BOE and Hot Skates titled "Private Party/Group Skating Agreement" ("the contract"); an accident report; the deposition transcript of Art Freeland, General Manager of Hot Skates; and a Hot Skates Incident Report for the date of the accident.

Hot Skates argues that it did not owe a duty to plaintiff beyond its duty of making the roller rink as safe as it appeared to be as the risk of injury was clear to infant plaintiff and he voluntarily assumed the risk of participating in the activity. Further, Hot Skates argues, that infant plaintiff's accident was not caused by a lack of supervision. Rather, it was caused by his losing his balance, a spontaneous event that no amount of supervision could have prevented. In support of its arguments, Hot Skates refers to infant plaintiff's own 50-h and deposition testimony:

- Q: Before the accident did you ever go skating before?
- A: No.
- Q: That was the first day that you went skating for the first time?
- A: Yes. (Plaintiff 50-h Hearing Page 5).
- ...
- Q: What happened?
- A: Then when I went I was falling. I twisted my ankle and fell back.
- ...
- Q: Did anybody hit you?
- A: No.
- Q: Did you lose your balance?
- A: Yes. (Id. at 32).

Infant plaintiff testifies at his deposition:

- Q: Did you fall quite a bit?
- A: Yes.
- Q: Did you hurt yourself at any time before your accident?
- A: No.
- Q: When you fell, what caused you to fall, was it just because - -you tell me what caused you to fall before you accident?
- A: Not being able to keep my balance. (Plaintiff Deposition, Page 41).

...

Q: What happened when you got that one foot rink? Did you fall?

A: I tried to turn myself.

Q: You tried to turn. What way did you try to turn?

A: To the right.

Q: What happened?

A: I, like, twisted my ankle and fell back.

Q: You lost your balance?

A: Yes.

Q: Did anyone come by you before you lost your balance?

A: No, not that I remember.

Q: You were all alone at that point on that part of the rink?

A: Yeah.

Hot Skates argues that infant plaintiff's actions were entirely voluntary. To this end, Hot Skates points to the fact that there was an arcade area where infant plaintiff spent some of his time but that he voluntarily returned to the rink to try to skate "one more time" before the rink closed.

Plaintiffs, in opposition to both motions, provide only an attorney affirmation. Regarding Hot Skate's motion, plaintiffs argue that Travis told an employee at the skating rink that he had never skated before and asked the employee to give him a lesson and that the employee promised to help him but failed to do so. Plaintiffs also assert that there were two employees inside the rink with the children and that they should have observed that plaintiff was not able to skate when they saw him fall several times. If they had been properly supervising him, plaintiffs argue, they could have prevented the final fall.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249,

251-252 [1st Dept. 1989]).

It is well settled that “[r]elieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks.” (*Morgan v. City of New York*, 90 NY2d 471[1997]). The assumption of risk doctrine has been extended specifically to skating rinks. The court in *Mor v. Yakov*, 256 AD2d 393[2nd Dept. 1998], found that: “the injured plaintiff must be deemed to have assumed the risk of losing her balance and falling while roller skating at the appellant’s roller skating rink.” (*Id.* at 393).

Here, infant plaintiff testifies that he had never skated before, fell several times before his final fall and saw another student get injured on the rink. Infant plaintiff was also required to have his mother sign a permission slip, allowing him to go on the field trip. Infant plaintiff testifies:

Q: Did the permission slip say that it was a trip to a skating rink?

A: Yes.

Q: Did you discuss the fact you were going to go on this trip with your mother?

A: Yes.

Q: At that time you had never been to a skating rink; correct?

A: Yes.

...

Q: Did you discuss the fact that [you] had never gone skating?

A: She knew. (Plaintiff Deposition, Page 23).

As is evidenced by infant plaintiff’s own testimony, not only did he observe the risks inherent in skating, his mother was likewise informed and consented to the risk.

Plaintiffs’ allegation that infant plaintiff was not properly supervised is equally meritless. The general duty Hot Skates owed was to exercise care to make the “rink as safe as it appeared to its patrons.” (*Engstrom v. City of New York*, 270 AD2d 35[1st Dept. 2000]). Despite plaintiffs’ contention that an employee should have instructed infant plaintiff in how to skate, a skating rink does not owe a duty to instruct beginners in skating, an activity which is not inherently dangerous. (*Blashka v. South Shore Skating, Inc.*, 193 AD2d 772[2nd Dept. 1993]). Moreover, a “sudden precipitous event” that could not have been anticipated or avoided by even the most intensive

supervision will relieve the owner of liability. (*Engstrom* at 36)(internal citations omitted).

Here, infant plaintiff's loss of balance was just such an event that could not have been prevented by any more supervision than was provided. Indeed, the instant case is distinguishable from *Nunez v. Recreation Rooms and Settlement*, 229 AD2d 359[1st Dept. 1996]. There, a nine year old girl was injured at a skating rink when she tried to skate away from a commotion caused by "rowdy skaters" and, in doing so, fell and broke her arm. The court found that there were questions of fact as to whether the defendant skating rink had a duty to control the reckless conduct of skaters on its premises when it was aware of the conduct and the risk of the conduct was unassumed, concealed or unreasonably increased and could have been mitigated by adequate supervision. (*Id.* at 360). In contrast, there is no allegation here that the unsupervised behavior of the other students caused infant plaintiff's fall and infant plaintiff testified that his classmates were all behaving at the rink and that he was all alone when he fell. (Plaintiff Deposition, Page 38).

BOE cross moves to dismiss as against it, relying on the similar argument, that it adequately supervised the students; and in any event, no level of supervision could have prevented plaintiff from losing his balance which was the precipitating event to his fall.

It has long been held that the level of supervision required is largely dependant on the surrounding circumstances of the event being supervised. (*Ohman v. Board of Education*, 300 NY 306[1949]). Infant plaintiff testifies that there were about thirty students in his class and all but one went on the trip. Mr. Pellizzi testifies that there were about three or four other teachers that accompanied him on the trip and that their role was to supervise and observe the students. In addition to the supervising teachers, infant plaintiff testified that there were two Hot Skates employees stationed on or near the skating rink floor in order to observe the students.

Both City and Hot Skates have made a *prima facie* showing that there were adequate procedures to ensure proper supervision in place and Hot Skates has also shown that infant plaintiff assumed the risks inherent in participating in the activity which caused his injury. Plaintiffs, in opposititon, fail to submit evidence in admissible for which would raise an issue of material fact precluding summary judgment.

Wherefore it is hereby

ORDERED that the motion and the cross-motion for summary judgment are granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 24, 2008



EILEEN A. RAKOWER, J.S.C.

FILED
DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK