Laponte v Lake Grove Entertainment, LLC

2009 NY Slip Op 32293(U)

October 1, 2009

Supreme Court, Suffolk County

Docket Number: 10448/2007

Judge: Paul J. Baisley

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Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 10448/2007
CALENDAR NO.: 200900566OT
MOTION DATE: 6/11/2009
MOTION NO.: 001 MG

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CHRISTOPHER LAPONTE, an infant by his mother and natural guardian, LORI LAPONTE and LORI LAPONTE, individually,

Plaintiffs,

-against-

LAKE GROVE ENTERTAINMENT, LLC d/b/a SPORTS PLUS,

Defendant.

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PLAINTIFF'S ATTORNEY:
JAKUBOWSKI, ROBERTSON, MAFFEI, GOLDSMITH & TARTAGLIA, LLP
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DEFENDANT'S ATTORNEY:
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Westbury, New York 11590

Upon the following papers numbered 1 to 19 read on this motion and cross-motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-9 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 10-16 ; Replying Affidavits and supporting papers 17-19 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) defendant Lake Grove Entertainment, LLC d/b/a Sports Plus for an order pursuant to CPLR R. 3212 granting it summary judgment on the ground that it bears no liability for the occurrence of the accident is granted and the complaint of this action is dismissed with prejudice.

This is an action to recover damages for personal injuries allegedly sustained on January 5, 2007 by the infant plaintiff, Christopher Laponte, who was then thirteen years of age, while he was skating at Lake Grove Entertainment, LLC d/b/a Sports Plus (Sports Plus) in Lake Grove, New York, when he was suddenly bumped or pushed from behind, causing him to fall and sustain a laceration to his hand. A cause of action premised upon the alleged negligence of the defendant has been pleaded along with a derivative claim on behalf of the infant's mother, Lori Laponte. It is asserted, *inter alia*, that the defendant negligently maintained and controlled the skating rink, failed to provide a safe place for the infant to skate, and failed to control other skaters.

The defendant now seeks summary judgment dismissing the complaint on the ground that it was not negligent, that the infant plaintiff was an admittedly very experienced skater and that he assumed the risks generally inherent in the activity of skating.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to

summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support its motion, the defendant has submitted, *inter alia*, an attorney's affirmation; a copy of the pleadings and verified bill of particulars; and copies of the transcripts of the depositions of Lori Laponte dated August 25, 2008, Christopher Laponte dated August 25, 2008 and Patrick Lever on behalf of the defendant dated September 26, 2008.

The plaintiff opposes this motion with an attorney's affirmation; a copy of the pleadings and verified bill of particulars; copies of the transcripts of the depositions of Christopher Laponte dated August 25, 2008 and Patrick Lever on behalf of the defendant dated September 26, 2008; and the affidavit of Christopher Laponte.

In the instant action it is determined that the defendant has demonstrated *prima facie* entitlement to summary judgment dismissing the complaint on the issue of liability and that the plaintiffs have failed to raise a triable issue of fact to preclude summary judgment.

Lori Laponte testified at her deposition that Christopher started skating when he was about three or four years of age. She described Christopher's skating ability as good and stated he started playing hockey at age six. On the date of the accident she dropped Christopher off at Sports Plus about 8 p.m. for Friday night "free skate." She testified that there were generally rink guards present.

Christopher Laponte testified at his deposition that on January 5, 2007 his mother drove him to Sports Plus with some of his friends. He brought his own skates, which he wore that night but has not skated since. He thought he started skating at about seven or eight years of age and skated peewee hockey through Sports Plus. Just prior to the accident, he usually skated about once a month at Sports Plus and at other rinks.

On the night of the accident, there was "free skate." He was skating with some friends at a slow pace. There were rink guards, but he did not see them during the time he was skating (about half an hour). He testified that he was pushed or bumped into from behind suddenly and lost his balance and fell to the ice. He thought he might have been pushed by someone who was "skating

erratically going fast because it was a fairly rough push." He saw people on different parts of the ice skating fast, but he never told them to stop and never told the rink guard of the same. On prior occasions he had fallen and was bumped into at an ice skating rink. He testified the rink was crowded but he did not recall anyone else being pushed that night. After he fell, he realized his hand was cut.

Patrick Lever testified at his deposition that he was employed by Sports Plus, Lake Grove Entertainment, as the manager of the ice rink, and oversaw the day to day operations at the rink including maintenance, staffing, scheduling, and over-the-counter monies. The rink had a staff of about 30 to 35 people at the time, 15 of whom were rink guards. Rink guards worked the front counter handing out rental skates; when they were off the ice they helped clean the building before and after session; skated out on the ice; and stood at the door and checked admission bracelets for people going on and off the rink.

Lever testified that in January on a Friday winter session, there may be about 200 or 300 people at the rink and that there is one rink guard for every 100 people (Ice Skating Institute Guidelines), but he doubles it to have two rink guards per 100 people. He stated he would have had about four people on the ice skating, but there were a total of seven rink guards who would rotate onto the ice. Twice a year safety training sessions were given to the rink guards. There is a set of rules which are gone over. They are instructed about dress, safety issues and demonstrated how to operate a fire extinguisher or how to evacuate the ice or building. They were instructed where to stand and which way to skate and to direct the flow of skaters. The rink guards are usually hockey players or figure skaters who have skated in the building.

Lever testified that the maximum number of skaters permitted on the ice was 550 people, but he cut it back himself to 450 people as he felt that provided more room and more benches for people to use, and more ice surface. There were posted signs that stated "Skate at your own risk," a "Skater's Code of Conduct" setting forth the rules; and an "Assumption of the Risk" sign. He testified that on Friday and Saturday nights there are safety cones placed down the center of the ice rink to separate traffic and have it move around in a circle. He stated that different people skate at different speeds and if someone was going really fast and zipping in and out then they would be told to slow down. Pushing is not permitted and whoever is pushing or horsing around is told to stop Prior to January 5, 2007, neither he nor his staff received any complaints with regard to public skate sessions where skaters were either skating too fast or causing undue contact with other skaters. He was not aware of any skaters being injured through contact by other skaters during a public skate session in that time period. Incident reports were generated if there was an accident and one was filled out by Security Officer Piscano concerning Christopher Laponte's injury.

In his affidavit submitted in opposition to the motion, Christopher Laponte set forth that he had been to the Sports Plus ice rink many times before the accident without incident. He stated that on the date of the accident, he did not see any rink guards patrolling the ice. He witnessed skaters skating erratically and fast and felt that the rink was extremely crowded, to the point that there was little room on the ice to fall safely without being hit or run into by another skater. He stated that he was struck from behind by a skater who was skating fast causing him to fall and someone ran over his right hand with their skate.

It is noted, however, that Christopher Laponte testified at his deposition that when he fell down and went to pick himself up, he noticed that he could not feel his right hand, that it felt like he couldn't grab the ice. He did not know how his hand was cut and he did not see anyone skate over his hand. He thought that someone had stepped on his hand or kicked it and thought that was how it was cut. He also testified that he never saw the person who pushed him, either just before being pushed or afterwards.

"To recover in a negligence action plaintiff must establish that defendants owed [plaintiff] a duty to use reasonable care, and that they breached that duty (*Atkins v Glens Falls City School District*, 53 NY2d 325, 424 NE2d 531, 441 NYS2d 644 [1981]). It is well established that the application of the doctrine of assumption of risk "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" of a sporting activity (*Morgan v State of New York,* 90 NY2d 471, 484, 685 NE2d 202, 662 NYS2d 421 [1997]). "A participant in a recreational event such as ice skating is presumed to have assumed the risk of potentially injury-causing conditions which are known, apparent or reasonably foreseeable" (*Savaria v Makkos of Brooklyn,* 264 AD2d 576, 577, 694 NYS2d 393 [1999]). While recovery may still be had for damages resulting from exposure to "unreasonably increased risk" (*Morgan,* supra at 485; *Simoneau v State of New York,* 248 AD2d 865, 866, 669 NYS2d 972 [1988]), the mere fact that a defendant could feasibly have provided safer conditions is not dispositive where the risk is open and obvious to the participant taking into consideration the individual's level of experience and expertise (*Morgan*, supra; *Simoneau,* supra; *Maddox v City of New York,* 66 NY2d270, 278, 487 NE 553, 496 NYS2d 726 [1985]). Moreover, in assessing the application of the doctrine of assumption of risk, it is not necessary 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,* supra,). However, the operator of a facility in which sporting activities take place owes a duty of care to such participants not to enhance the inherent risks (*Hornstein v State of New York,* 30 AD2d 1012, 294 NYS2d 320 [1968]). The standard of care required of one who operates such a facility is to make the facility as safe as it appears to be to its patrons (*Turcotte v Fell,* 68 NY2d 432, 439, 510 NYS2d 49 [1986]); (*McBride v The City of New York and Wollman Rink Operations*, 2007 NY Slip Op 52079U, 17 Misc3d 1119A, 851 NYS2d 64 [Sup Ct, New York Cty 2007]).

In *Zambrana v City of New York et al.* (262 AD2d 87, 691 NYS2d 471 [1st Dept 1999]), the Appellate Division concluded that collisions between skaters were common and a risk that all skaters assumed. It further stated that the fact that an accident occurs moments after the defendant acts does not, in and of itself, establish a proximate link to defendant's liability.

The owner of a skating rink has the duty to exercise care to make the rink as safe as it appeared to be. The owner has a duty to control the reckless conduct of skaters on its premises where it is aware of the conduct, where the risk posed by the conduct was either unassumed, concealed or unreasonably increased, and where the risk could have been mitigated or prevented through adequate supervision. "Collisions between skaters... are a common occurrence and a risk which all skaters assume. Assumption of risk, however, is not to be determined in a vacuum.... Rather, it is to be assessed against the background of the skill and experience of the particular

plaintiff" (see, *Islam et al v City of New York, et al,* 2007 NY Slip Op 5122U, 16 Misc3d 1102A, 841 NYS2d 826 [Sup Ct. Kings Cty 2007]).

In *Lopez et al v Skate Key, Inc. et al.* (174 AD2d 534, 571 NYS2d 716 [1st Dept 1991]), it was held that participants in sporting events were deemed as a matter of law to have assumed the known risks associated with the particular sport and that collisions between skaters were a common occurrence, and found that there was insufficient evidence in the record to demonstrate the existence of a dangerous condition for a sufficient period of time to have put the skating rink on notice and that the collision was a result of the sudden and abrupt action of another skater which was a risk assumed by the skater as a matter of law. In the instant action, the defendant's submissions demonstrate that no one reported fast or erratic skating at the time of plaintiff's accident and the plaintiff did not report the same to anyone or leave the ice. He did not see anyone push him and did not know who knocked him over. Other than the plaintiff's conclusory testimony and affidavit, unsupported by any other witness statement or admissible testimony, there is insufficient evidence in the record to demonstrate the existence of a dangerous condition for a sufficient period of time to have put the skating rink on notice that someone was skating erratically and pushing or that the person had been doing the same for a sufficient period to have put the rink on notice, or that the push was intentional. Nor has it been demonstrated that the number of skaters in the rink exceeded the number permissible by law. Although the plaintiff opines that the rink was crowded, the mere fact that a defendant could feasibly have provided safer or less crowded conditions is not dispositive where the risk is open and obvious to the participant taking into consideration the individual's level of experience and expertise (*Morgan*, supra; *Simoneau*, supra; *Maddox v City of New York,* supra). Here, the plaintiff had been skating on a regular basis since he was a young child and he was not a novice, having played on a hockey team. Based upon the foregoing, the plaintiff has failed to raise a factual issue with the submission of admissible evidence to preclude summary judgment.

Accordingly, the motion is granted and the complaint of this action is dismissed with prejudice.

Dated: October 1, 2009

PAUL J. BAISLEY, JR.
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION