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6-3-10

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

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Index Number : 115178/2007

CLARKE, JAMES A.

VS.

CATAMOUNT SKI AREA

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. 115178/07

MOTION DATE 3/09/2010

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

n 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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: 5/27/2010

HON. JOAN M. KENNEY

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: IAS Part 8

----------X

JAMES A. CLARKE

Plaintiff,

- against -

CATAMOUNT DEVELOPMENT CORPORATION, ZACK LANG, an infant by his mother and natural guardian CARI LANG, and CARI LANG, individually,

Defendants.

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DECISION AND ORDER
Index Number: 115178/07
Cal.: 3/09/2010
Motion Seq. No.: 004

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Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion seeking dispositive relief:

Papers	**Numbered**
Notice of Motion, Affirmation, Affidavits, Exhibits & Memorandum in Support	1-30
Affirmation in Opposition, Affidavits & Exhibits	31-34
Reply Affidavit & Reply Memorandum	35-36

In this personal injury action, defendant Catamount Development Corporation (Catamount) moves for summary judgment, pursuant to CPLR 3212, against plaintiff James A. Clarke (Clarke), Zack Lang (Zack), and Cari Lang (Cari, collectively the Langs). The Langs also move for summary judgment, seeking an Order dismissing Catamount's cross claims.

FACTUAL & PROCEDURAL BACKGROUND

On December 28, 2005, Zack and Clarke collided with one another at an intersection (the crossover area) between two ski trails located at the Catamount Ski Resort, which is owned and operated by Catamount. The trails were named "On Stage" and "Catamount." The crossover area was approximately 15-20 feet wide (Michael Maybee deposition attached to Catamount's summary judgment motion, Exhibit "T" at 13). A line of trees divides the trails, which meet on the right side

of On Stage and the left side of Catamount (*see* Exhibit "D" attached to Lang opposition papers). There are two orange-colored flags that flank both sides of a "TRAILS MERGE," signpost, that is located at the top of the area where On Stage converges with the Catamount trail (William Gilbert deposition attached to Catamount summary judgment motion, Exhibit "G" at 31; Exhibit "D" attached to Langs' opposition papers). On the Catamount trail, an orange flag and orange flap are affixed on the left side of the tree line, right before the trails intersect in the crossover area (*see* Exhibit "D" attached to Langs' opposition papers).

At the time of the collision, Zack was traversing from the On Stage to the Catamount trail (Zack deposition attached to Catamount summary judgment motion, Exhibit "K" at 166). Zack was taking a break from the racing program he was attending, and decided to take a few practice runs down the On Stage trail (*see* Zack deposition at 51, 73-75). It is uncontested that Clarke was attempting to use the crossover area to switch from the Catamount trail to the On Stage trail, when the collision occurred (Clarke deposition at 58, 159). Skiers were expected to traverse from the On Stage trail to the Catamount trail, and not vice versa (*see* Gilbert deposition at 142-143). Mr. Michael Maybee, a race team coach at Catamount, stated at his deposition that Clarke's attempt to use the Catamount trail to the On Stage trail was "unorthodox" since it required the skier to go uphill at an unusual angle (*see* Maybee deposition attached to the Catamount's summary judgment motion at 90, 91).

On October 30, 2007, Clarke commenced this action, directing causes of action against Catamount, William Gilbert (Gilbert), Donald Edwards (Edwards), and the Langs (the Clarke action). On or about March 6, 2008, the Langs commenced a separate action against Catamount, Gilbert, Edwards, and Clarke (the Lang action). The action was discontinued against Gilbert and Edwards as per the terms of a so-ordered stipulation dated July 8, 2009. Another stipulation dated July 13, 2009, consolidated the actions. On September 29, 2009, Clarke's attorney filed a note of issue and certificate of readiness for trail (Exhibit "I" attached to the Langs' summary judgment motion).

ARGUMENTS

Catamount argues no triable issues of fact exist because both skiers voluntarily assumed the risk of collision pursuant to the controlling cases and the General Obligations Law.

In opposition, plaintiffs contend that Catamount's summary judgment motion must be denied because questions of material fact exist as to whether or not Catamount's failure to warn or erect barriers in the crossover area, created unreasonably enhanced risks, that are not inherent in skiing.

DISCUSSION

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

> As we have stated frequently, 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the foregoing guidance, the courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy,* 35 NY2d 361, 364 (1974)(because entry of summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)(in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez,* 68 NY2d at 324-25.

Based on the doctrine of primary assumption of risk, a voluntary participant in a sport "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" (*see Whitman v Zeidman*, 16 AD3d 197, 197 [1st Dept 2005]). The risk of injury caused by another skier constitutes an inherent risk of downhill skiing (*see* General Obligations Law § 18-101; *see also Kaufman v Hunter Mtn. Ski Bowl*, 240 AD2d 371, 371 [2d Dept 1997]). In view of such inherent risks, the ski operator/landowner's only duty is to protect the plaintiff from unassumed, concealed, or unreasonably increased risks (*see Lipinski v Hunter Mtn. Ski Bowl*, 306 AD2d 320, 321 [2d Dept 2003]; *see e.g. Farone v Hunter Mtn. Ski Bowl, Inc.*, 51 AD3d 601, 602 [1st Dept 2008]).

Catamount has satisfied its burden and has established a *prima facie* showing of entitlement to summary judgment against plaintiffs. Not only are Clarke and Zack charged with knowledge of this risk, pursuant to Section 18-101 of the General Obligations Law, but both testified to being aware of the inherent risk of injury caused by, *inter alia*, other persons using the facilities (Clarke deposition to the Langs' summary judgment, Exhibit "K" at 56; Zack deposition at 90).[1] Furthermore, no one disputes that plaintiffs are experienced skiers with season passes to Catamount (Clarke deposition at 43; Lang deposition at 10). Clarke also obtained his certification to be a ski instructor at Catamount (Clarke deposition at 40) and admitted that he "could ski [all the trails] as good as anyone back on the mountain then" (*see* Exhibit "K" at 141). Zack also considered himself an expert skier based on his familiarity in skiing all the slopes at Catamount (Zack deposition at 137; 53). Since plaintiffs were advanced skiers with extensive experience at Catamount, they each assumed the risk of collision with one another (*see Braun v Davos Resort*, 241 AD2d 533, 534 [2d Dept 1997]).

Plaintiffs contend that Catamount unreasonably increased the risk of collision in the crossover area by failing to erect a barrier between the Catamount and On Stage trails. Further, the absence of a written "trails merge" sign on the Catamount trail unreasonably enhanced the chance of injury. These conclusory assertions are unsupported both factually and legally.

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[1] CPLR 3212[b] permits the Court to "search the record" in consideration of the Langs' summary judgment motion against Clarke (Index No. 115178/07, motion seq. 005).

First, numerous orange warning flags were posted on the On Stage and the Catamount trails (Gilbert affidavit attached to Catamount summary judgment motion ¶ 8). Additionally, skiers are warned of the intersection by a "trails merge" sign, that is clearly visible when descending the On Stage trail. Such signage, including the orange warning flags, are clearly seen in the photographs attached to Zack's opposition papers (*see* Exhibit "B").

Second, plaintiffs' reliance on *Rigano v Coram Bus Services, Inc.*[2] is misplaced. Namely, the facts of this case as they pertain to Catamount, are distinguishable from the facts of *Rigano*. Catamount did not unreasonably increase the risk of a collision in the crossover area, nor do the parties contest the undisputed inherent risk of skier-on-skier collisions, nor the advanced skill level of Clarke and Lane. Plaintiffs' familiarity with the Catamount slopes, and the posted signage warning skiers of the readily observable trail merge also provide support for Catamount's arguments (*see Farone v Hunter Mtn. Ski Bowl*, Inc., 51 AD3d 601, 602 [1st Dept 2008]). Notably, reliance upon *Rigano* as the controlling authority is misplaced. The First Department specifically narrowed its holding in Rigano to "the instant circumstances" (*see Rigano*, 226 AD2d at 274). As a result, plaintiffs have failed to raise a triable issue of fact because each of them fully assumed the inherent risk of collision with another skier (*see e.g. Calabro v Plattekill Mr. Ski Ctr.*, 197 AD2d 558, 559 [2d Dept 1993] ["Inasmuch as the plaintiff voluntarily participated in the activity of skiing, was aware of the dangers associated with the sport, and knew or should reasonably have known of the patently obvious and readily observable terrain conditions which included the dip, the Supreme Court correctly found that [plaintiff] assumed the risk of falling in this case"]).

Third, even if Catamount's signage was deemed inadequate, plaintiffs fail to raise a contested issue of fact that would warrant a trial to determine the proximate cause of the collision. Clarke's "unorthodox" decision to cut through terrain where visibility was concedely "very poor" (*see* Clarke deposition at 165), undermines his argument that additional signage would have prevented the

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[2] 226 AD2d 274 [1st Dept 1996]

accident. Plaintiffs failed to rebut Catamount's claim that a material factual dispute exists as to the proximate cause of the collision (*see Lapinski v Hunter Mtn. Ski Bowl*, 306 AD2d 320, 321-322 [2d Dept 2003]).

This Court declines to consider the submitted and unsworn affidavit of Clarke's purported ski safety expert, Mr. Stanley Gale. Mr. Gale was also unidentified by Clarke as a designated expert, who would be called at trial, until after the note of issue and certificate of readiness were filed, which attests to the completion of discovery. Clarke offers no valid excuse for the delay in identifying his expert (*Geradi v Verizon New York*, 66 AD3d 960, 961 [2d Dept 2009].

Finally, Zack claims Catamount is liable in *loco parentis* since he was enrolled in the Catamount Racing Program on the day of the collision. When a person, other than a parent, undertakes to control, care for, or supervise an infant, such person is required to use reasonable care to protect the infant over whom the defendant has assumed temporary custody or control. *Pitkewicz v Kane*, 227 AD2d 113, 114 [1st Dept 1996]. However, liability is limited by the scope of the defendant's supervision over the infant plaintiff (*see e.g. Pitkewicz*, 227 AD2d at 114 [Boy scout leader not liable for infant plaintiff's injuries sustained during ski trip, although defendant was responsible for general organization of ski trip and training on the beginner ski slope, because defendant did not undertake to supervise plaintiff on the more advanced slopes where the injury actually occurred]).

However, recent caselaw has narrowed the scope of the assumption of risk defense within the context of in *loco parentis* claims. In *Trupia v Lake George Cent. School Dist.*,[3] the Court of Appeals held that an infant plaintiff did not assume the risk of injury when he injured himself from a bannister while attending a summer program administered by defendants on their premises. The *Trupia* Court reversed the dismissal of the infant plaintiff's negligent supervision claim, ruling that "[l]ittle would remain of an educational institution's obligation to adequately supervise the children

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[3] _ NY3d _, 2010 NY Slip Op. 02833 [2010]

in its charge if school children could generally be deemed to have consented in advance to the risks of their misconduct." (*Trupia*, * 4 [internal citations omitted].) However, the majority also stated that "we do not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage . . . in the context of pursuits both unusually risky and beneficial that defendant has in some non-culpable way enabled." (*Id.*) The *Trupia* majority's reasoning for carving out the exception is that an assumption of risk framework helps to preserve the pursuit of athletic and recreational activities which possess "enormous social value." (*Trupia*, *3.) Since the activity of riding down a bannister is "not a case in which the defendant solely by reason of having sponsored or otherwise supported some risk-laden but socially valuable voluntary activity," the *Trupia* majority held that such activity is not worthy of protection under the assumption of risk doctrine (*see id.*)

Zack's in *loco parentis* claim must also fail under this set of facts. Like *Pitkewicz*, Catamount was not supervising Zack at the time of his collision despite his enrollment that day in the Catamount Racing Program. Zack freely and voluntarily engaged in a practice runs, during his lunch break, without the consent or supervision of Catamount's coaches or other personnel in the racing program. Furthermore, *Trupia* is not applicable in this case because there is little doubt that skiing, as opposed to banister riding, would enjoy broad consensus that skiing is an "unusually risky and beneficial" activity worthy of protection under an assumption of risk defense (*see Trupia*, *4).

Accordingly, it is

ORDERED, that Catamount Development Corporation's motion for summary judgment against James A. Clarke, Zack Lang, and Cari Lang is granted; and it is further

ORDERED, that the Clerk of the Court shall mark this matter dismissed as against Catamount Development Corporation; and it is further

ORDERED, that the Clerk of the Court shall dismiss defendants' Zack Lang, an infant by his mother and natural guardian Cari Lang, and Cari Lang, individually, causes of actions against Catamount Development Corporation; and it is further

ORDERED, that defendants' Zack Lang, an infant by his mother and natural guardian Cari Lang, and Cari Lang, individually, motion for summary judgment to dismiss Catamount's cross claims is denied without prejudice to renew upon proper notice pursuant to CPLR 2214[a]; and it is further

ORDERED, if applicable, that counsel for James A. Clarke are to file their appearance.

Dated: May 28, 2010

E N T E R

Hon. Joan M. Kenney
J.S.C.