

**Wittner v Mackall**

2010 NY Slip Op 32303(U)

August 13, 2010

Supreme Court, New York County

Docket Number: 113431/06

Judge: Marcy S. Friedman

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

MARCY S. FRIEDMAN, J.S.C.

PRESENT: \_\_\_\_\_

PART 57

Justice

Index Number : 113431/2006

WITTNER, ILENE

VS.

MACKALL, BARRY

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

on this motion ~~to~~ for summary judgment

*E*  
*8/18/10*  
*ec*

PAPERS NUMBERED

6, 10, 13

2

3

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*Memos of Law 11-13*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED

AUG 18 2010

NEW YORK COUNTY CLERK'S OFFICE

NYS SUPREME COURT RECEIVED  
AUG 17 2010  
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Dated: 8-13-10

*[Signature]*  
MARCY S. FRIEDMAN, J.S.C.<sup>S.C.</sup>

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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

**FILED**  
AUG 18 2019  
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COUNTY CLERK'S OFFICE

\_\_\_\_\_  
ILENE WITTNER,  
*Plaintiff(s),*

- against -

Index No.: 113431/06

BARRY MACKALL, WILLIAM  
SCHWINGHAMMER and LAKOTA LODGE,  
*Defendant(s).*

DECISION/ORDER

\_\_\_\_\_  
x

In this action, plaintiff sues for damages sustained while hiking on the premises of defendant William Schwinghammer. Defendants Schwinghammer, Mackall, and Lakota Lodge (“Lodge”) move for summary judgment dismissing plaintiff’s complaint on the grounds that General Obligations Law §9-103 immunizes them from liability, that they did not owe a duty to plaintiff, and that plaintiff assumed the risk by participating in the hike.

It is undisputed that plaintiff was a volunteer with non-party the Family Center (“Center”), a non-profit, charitable organization. Plaintiff was staying at the Lodge for a “buddy weekend” sponsored by the Center. Defendant Schwinghammer owns the Lodge and defendant Mackall, then a volunteer with the Center, accompanied plaintiff’s group on the weekend at the Lodge.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853

002

[1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).”

(Zuckerman, 49 NY2d at 562.)

It is well settled that General Obligations Law § 9-103 [“GOL 9-103”] “provides that a person in possession of property owes no duty of care to others who use it for a broad variety of recreational activities unless a charge is exacted for use of the property or there is a willful or intentional failure to guard or to warn against a dangerous condition.” (Sega v State of New York, 60 NY2d 183, 186-187 [1983]. See also Sena v Town of Greenfield, 91 NY2d 611 [1998]; Ferres v City of New Rochelle, 68 NY2d 446 [1986].)<sup>1</sup> Put another way, this statute “grants immunity for ordinary negligence to landowners who permit members of the public to come on their property to engage in several enumerated recreational activities,” including hiking. (Sena, 91 NY2d at 615 [internal quotation marks and citations omitted].)

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<sup>1</sup> General Obligations Law § 9-103 provides in pertinent part:

1. Except as provided in subdivision two, a. an owner, lessee or occupant of premises, . . . owes no duty to keep the premises safe for entry or use by others for . . . hiking [and other enumerated activities], or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes; b. an owner, lessee or occupant of premises who gives permission to another to pursue any such activities upon such premises does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted. . . .
2. This section does not limit the liability which would otherwise exist a. for willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; or b. for injury suffered in any case where permission to pursue any of the activities enumerated in this section was granted for a consideration other than the consideration, if any, paid to said landowner by the state or federal government . . . c. for injury caused, by acts of persons to whom permission to pursue any of the activities enumerated in this section was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger. . . .

On this record, plaintiff fails to raise a triable issue of fact in opposition to defendants' prima facie showing that the statute immunizes defendants from liability. Plaintiff's contention that defendants were paid by the Center is unavailing. There is no evidence that the fee paid by the Center to the Lodge was a fee for the hike. Rather, the uncontradicted evidence is that the fee was for food or arts and crafts supplies provided to attendees of the buddy weekend. (See Schwinghammer Aff. in Opp. at ¶¶ 5-6.) Thus, the fee has no nexus to the hike and does not constitute "consideration" within the meaning of GOL 9-103. (See Heminway v State Univ. of New York, 244 AD2d 979 [4<sup>th</sup> Dept 1997] [held that no nexus existed between fee and sledding, where fee was charged for use and cleaning of lodge, not use of hill for sledding]; Powderly v Colgate Univ., 248 AD2d 365 [2d Dept 1998], lv denied 92 NY2d 811 [held that no triable issue of fact existed as to whether student activity fee or tuition was consideration for plaintiff's use of hill on university campus for sledding].) Nor is there merit to plaintiff's contention that GOL 9-103 does not apply because defendants supervised the premises as a recreational facility. The authority relied upon by plaintiff applies only to municipal or state agencies operating and supervising parks (see e.g., Ferres, 68 NY2d at 449), not to private landowners. (Heminway, 244 AD2d at 980.) Finally, plaintiff fails to make any showing that defendants' alleged failure to warn was willful or intentional.

To the extent that plaintiff contends that defendants negligently supervised the hike, the court finds that the primary assumption of the risk doctrine bars her claims. It is settled that "by engaging in a sport or recreational activity, a participant 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." (Green v City of New York, 263 AD2d 385 [1<sup>st</sup> Dept 1999], quoting Morgan v

State of New York, 90 NY2d 471, 484 [1997].) Under the doctrine of primary assumption of risk, the defendant's duty "is a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty." (Id. at 485, quoting Turcotte v Fell, 68 NY2d 432, 439 [1986].) The doctrine covers many different categories of sports and recreational activities, involving spectators as well as participants.

Here, it is undisputed that plaintiff was aware that it had rained before the hike, and that the trail could be slippery. Plaintiff had experience with the trail, as she had hiked it the year before. (See P.'s Dep. at 43-44, 63.) The risks were also open and obvious. (Cometti v Hunter Mountain Festivals Ltd., 241 AD2d 896, 898 [3d Dept 1997] [mountain trail is a "natural geographical phenomenon, the danger of which is open and obvious rather than latent."].)

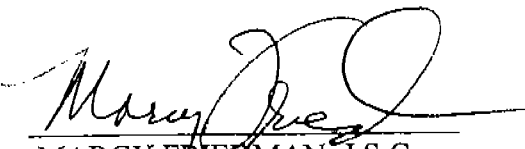
Further, while plaintiff asserts that the hike was mandatory (see P.'s Dep. at 50), there is nothing in the record to demonstrate that plaintiff was required or forced to participate in the hike. Accordingly, it cannot be said that plaintiff's participation in the hike was not voluntary. (See Maddox v City of New York, 66 NY2d 270, 279 [1985].) "Because the condition that caused her injuries was neither latent nor concealed, plaintiff's injuries cannot be said to have resulted from any breach of duty by defendant." (Cometti, 241 AD2d 898 [3d Dept 1997].)

Finally, plaintiff fails to submit any evidence in support of her contention that defendants were negligent in permitting the hike to continue after the rain the night before, or in supervising the hike. The court has considered the plaintiff's remaining claims and finds them without merit.

It is accordingly hereby ORDERED that defendants' motion is granted to the extent that the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York  
August 13, 2010



Marcy Friedman, J.S.C.

**FILED**  
AUG 18 2010  
NEW YORK  
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