

**Kostkowicz v Roxy Roller Rink, Inc.**

2011 NY Slip Op 31245(U)

May 6, 2011

Supreme Court, New York County

Docket Number: 104240/05

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

JOHN KOSTKOWICZ,  
Plaintiff,

Index No.: 104240/05

Motion Date: 09/30/10

- v -

Motion Seq. No.: 04

THE ROXY ROLLER RINK, INC., THE BEER  
GARDEN, INC., and E.M.D. ENTERPRISE INC.,  
Defendants.

Motion Cal. No.: 72

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
_____	1
_____	2
_____	3

**FILED**

Cross-Motion:  Yes  No

MAY 11 2011

Upon the foregoing papers,

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Plaintiff John Kostkowicz commenced this negligence action alleging that he was injured while roller skating at the Roxy Roller Rink located at 515 W. 18<sup>th</sup> Street on September 16, 2004. He claims that his injuries arose when he fell due to defendants' negligent supervision of unruly skaters.

Defendants now move for summary judgment based on the doctrine of assumption of risk. The plaintiff opposes the motion.

The court shall deny the motion.

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):

In his complaint, plaintiff Kostkowicz claims that defendants breached their duty to supervise a skating rink open to the public and to take action to control any reckless conduct of the skaters of which defendants had been given notice. Plaintiff alleges that one half hour before the occurrence that caused his injuries he alerted rink security that a group of skaters were "slingshotting" each other across the floor in a manner that he and one of his companions considered dangerous. Defendants put forth no evidence that contradicts this claim in their moving papers.

Defendants argue that they are entitled to summary judgment dismissing this action as a matter of law based on the assumption of the risk doctrine. They assert that participants in athletic or sporting events are deemed as a matter of law to assume the known risks associated with the particular sport [Turcotte v Fell, 68 NY2d 432 (1986)]. With respect to ice skating, they urge the application of well settled case law that holds that sudden collisions between skaters, such as the one sustained by plaintiff in this case, are a common occurrence and a risk which all skaters assume. Zambrana v City of New York, 262 AD2d 87 (1<sup>st</sup> Dept 1999); Lopez v Skater Key, Inc, 174 AD2d 534 (1<sup>st</sup> Dept 1991)..

In Zambrana, plaintiff's deposition testimony was that moments before a teenage skater collided with her, causing her to

fall, she had complained to a skating rink guard that a "couple of teenage children . . . were skating rather fast." The Appellate Division held on those facts that "collisions between skaters, such as the one sustained here, are a common occurrence and a risk which all skaters assume" and that "this was an impact the guards could not have prevented, even with the most intensive supervision." *Id.*

Citing Zambrana, defendants argue that the court must dismiss the action at bar because there is no evidence that any level of supervision could have prevented plaintiff's sudden accident.

However, this court finds that the evidence that plaintiff proffers in opposition to the motion distinguishes this case from the facts in Zambrana. In Zambrana, plaintiff had alerted the attending skate guard only moments before her accident. In contrast, plaintiff Kostowicz testified that within a half hour before the incident, he alerted security personnel of the reckless skaters, and that the security guard promised that he would look into the problem. Plaintiff Kostowicz testified that other skaters at the rink also complained of the offending skaters before plaintiff suffered his injury. Further, while plaintiff Zambrano complained of "teenage children skating rather fast," he produced no evidence that they were engaged in "slingshotting", the activity that is at issue here.

On a summary judgment motion, the evidence must be viewed in the light most favorable to the opponent of the motion.

Valderrama v New York City Transit Authority, 18 AD3d 251 (1<sup>st</sup> Dept 2005). Viewed in that light, the evidence in the record on the motion does not establish that accident was caused by a sudden collision common to skating, as a matter of law. There are triable issues of fact, including whether defendants received notice about the reckless actions of another skater in sufficient time so that through proper supervision, they should have taken measures to prevent the accident. Williams v Skate Key, Inc., 240 A.D.2d 277 (1<sup>st</sup> Dept 1997).

Squarely on all fours with the facts of this case are those in Fritz v City of Buffalo, 277 NY 710 (1938). There the Court of Appeals affirmed the appellate division holding that the trial court properly submitted to the jury the question whether defendant [city] "should have appreciated the danger of crack-the-whip being played on the ice and whether it provided enough general supervision to prevent the playing of this game under such circumstances as would be dangerous." Likewise, here there are triable issues of fact concerning whether defendants were negligent in their supervision and control of the participants in the public skating session and whether in the exercise of reasonable care, they could have prevented the alleged misconduct that caused plaintiff's injury.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants THE ROXY ROLLER RINK, INC., THE BEER GARDEN, INC., and E.M.D. ENTERPRISE INC. is denied; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a Pre-Trial Conference on June 21, 2011 at 2:30 PM.

This is the decision and order of the court.

Dated: May 6, 2011

ENTER:

Debra A. James  
**DEBRA A. JAMES** J.S.C.

**FILED**

**MAY 11 2011**

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