

Levy v Town Sports Intl., Inc.

2011 NY Slip Op 32209(U)

August 9, 2011

Sup Ct, NY County

Docket Number: 102846/09

Judge: Saliann Scarpulla

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SCANNED ON 8/11/2011
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 102846/2009

LEVY, GAYLE

vs

TOWN SPORTS INTERNATIONAL

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

OR _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying memorandum decision.*

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

FILED
AUG 11 2011
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/9/11

Saliann Scarpulla
J.S.C.

SALIANN SCARPULLA

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

successfully completed the exercise a few times, but when she performed the exercise again at Lee's direction, she lost her balance and fell. As a result, Levy sustained a wrist fracture, which required her to undergo surgery to have a plate and screws inserted into her wrist.

TSI moves for summary judgment, asserting that Levy assumed all the risks associated with the workouts she performed while at TSI's facility. TSI also argues that Levy's membership agreement with TSI included a waiver of TSI's liability for any injury that Levy sustained on its premises, and that TSI had no notice of any defective or dangerous condition.

In opposition, Levy argues that assumption of risk is not applicable here because Lee increased the amount of risk ordinarily surrounding the activity. Levy also argues that the waiver in her membership agreement is void and unenforceable under New York General Obligations Law § 5-326.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

The doctrine of assumption of risk is "appropriately interposed only to shield a defendant from exposure to liability arising from risks inhering in athletic and

recreational activities.” *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392, 394 (2010). “[B]y freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk.” *Trupia*, 14 N.Y.3d at 395 (citing *Turcotte v Fell*, 68 NY2d 432, 438-39 (1986)).

It is appropriate to relieve “an owner or operator of a sporting venue from liability for [the] inherent risks of engaging in a sport [. . .] 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. State*, 90 N.Y.2d 471, 484 (1997) (internal citations omitted). However, the participant only 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.” *Morgan*, 90 N.Y.2d at 484. “Thus, if the risks of an activity are fully comprehended or perfectly obvious, one who participates in the activity is deemed to have consented to the risks. Furthermore, where the risk is open and obvious, the mere fact that a defendant could have provided safer conditions is irrelevant.” *Sajkowski v. YMCA*, 269 A.D.2d 105, 106 (1st Dept. 2000) (internal citations omitted).

Levy seeks to broadly define the activity she was engaged in as exercise, generally, and to allege that the addition of the bosu ball to her workout routine constitutes an additional hazard that Lee introduced and one that negates her assumption of risk. This argument is unavailing. Levy was injured while engaged in a particular exercise that utilized the bosu ball. It is undisputed that Levy had used the bosu ball on prior occasions and understood and appreciated the risks associated with exercising with a bosu ball. Thus, Levy assumed the risk of that particular exercise, not only the risk of

general exercise at the TSI facility. Levy chose to perform the bosu ball exercise and assume the risk inherently associated with it.

Levy relies on *Mathis v. New York Health Club*, 261 A.D.2d 345 (1st Dept. 1999) for the proposition that a health club may be held liable for the actions of a trainer who unreasonably increases the risks of the plaintiff. However, in *Mathis* the trainer continued to increase the amount of weight the plaintiff had to lift even after the plaintiff expressed doubts over his ability to do so. *Mathis*, 261 A.D.2d at 346. In contrast, Levy testified during her examination before trial that: (1) she had used the bosu ball during prior workouts with Lee; (2) while Lee encouraged her, he did not require Levy to continue the bosu ball exercise; (3) she had used the bosu ball earlier that evening; (4) she knew and understood that the bosu ball was used to work on balance; and (5) prior to her fall she completed the same exercise that eventually resulted in her injury. Here, Levy points to no evidence to show that she was pushed to engage in an unknown, additional unreasonable risk while exercising.

Further, Levy's claim that Lee was negligent in protecting Levy adequately to prevent injury is insufficient to raise an issue of fact. To support her argument, Levy submits the affidavit of Neil Dougherty, a physical education professor at Rutgers University. Dougherty opines that Lee should have, but did not, stand in a different spot to be in a better position to catch Levy, if needed, and prevent her from being injured. Dougherty bases his opinion solely upon his review of the deposition transcripts and incident report.

Dougherty's two-paragraph opinion, without any underlying explanation or analysis, is so speculative as to be without probative value. Moreover, "where the risk [of performing the activity] is open and obvious, the mere fact that a defendant could have provided safer conditions is irrelevant." *Sajkowski v. YMCA*, 269 A.D.2d 105, 106 (1st Dept. 2000), citing *Simoneau v. State of New York*, 248 A.D.2d 865 (3rd Dept. 1998).

The defendant hosting a sporting activity has a duty to "make the conditions as safe as they appear to be." *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (1986). But, "[i]f the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty." *Turcotte v. Fell*, 68 N.Y.2d at 439. Levy was well aware of the risks of using the bosu ball, as evidenced by her deposition testimony regarding her prior use of the ball, and she assumed the inherent risk of injury with its use. Therefore, TSI's motion for summary judgment dismissing the complaint is granted.²

² Because the Court grants summary judgment for the above-discussed reason, the Court does not reach TSI's alternate arguments of contractual waiver or lack of notice.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment of defendant Town Sports International, Inc. d/b/a New York Sports Club is granted in its entirety; and it is further

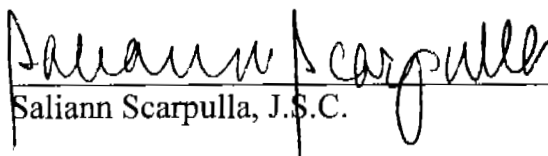
ORDERED that this action is dismissed and that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York

August 9, 2011

ENTER:


Saliann Scarpulla, J.S.C.

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NEW YORK