SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

HOPE FORMAN

Plaintiff,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 5/26/11

TOWN SPORTS INTERNATIONAL INC. d/b/a NY SPORTS CLUB,

INDEX NO.: 13847/09

Defendant.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Affidavit in Opposition.....2
Memorandum of Law.....3
Reply Affirmation.....4

Motion by defendant for summary judgment dismissing the complaint pursuant to CPLR §3212 is determined as follows.

In this action plaintiff seeks damages for injuries she sustained on February 9, 2009, during an aerobic step class at defendant's gym. Plaintiff had participated in step classes for approximately 10 years, and considered herself an "experienced stepper." At the time she was injured, plaintiff was performing a routine maneuver known as a "step-kick." She claims that because of the defective condition of the step, it slid out from under her causing her "to be propelled backwards, as if I had been shot out of cannon" (Forman affidavit, par. 18). In her bill of particulars plaintiff states "the bottom of the step was worn . . . Bottom did not contain rubberized discs to prevent step from moving." (Verified Bill of Particulars, par. 13-18).

Ellen Kapit, the step class teacher on the day of plaintiff's accident, did not see plaintiff fall. Iris Schwartz, the participant next to plaintiff in the class testified that she was facing plaintiff and saw her falling, but did not know what caused her to fall. Ms. Schwartz testified that on a couple of occasions she had noticed that the rubber stoppers on the bottom of the steps were pushed in, and the color of the steps with that problem was more

often turquoise than gray. Dana Goldthwaite, defendant's general manager, testified that since 2004 none of the steps have been discarded from the club, but approximately 25 to 30 steps have been added. The newer steps are gray; the older ones are turquoise. Christina Giffone, the group exercise coordinator, testified that she inspected the steps approximately every two weeks, and claimed that if the rubber stoppers on the bottom of the steps were not in place, the steps would not stack up evenly. Ms. Giffone did not notice any worn condition on any of the rubber stoppers on any of the steps.

The steps for use by participants in the step class are stacked in several columns against the wall of the exercise studio. Plaintiff states that turquoise steps had been in use at defendant's facility since she started taking step classes many years ago. Newer gray steps were purchased by defendant in 2006, to supplement the turquoise steps. On the morning of her accident, plaintiff took the step off the top of the stack, which was a turquoise step. Plaintiff did not examine the step, before the class or after her fall. According to defendant there were no prior complaints concerning the condition of the steps.

Defendant moves for summary judgment dismissing the complaint, *inter alia*, on the grounds that plaintiff has failed to raise a triable issue of fact that defendant was negligent, and that plaintiff is barred from recovery by the doctrine of assumption of risk. Defendant argues that plaintiff's fall was caused by her own misstep. Plaintiff opposes the motion on the grounds that genuine issues of fact exist as to the cause of her fall and her alleged assumption of risk. Plaintiff insists that her fall was caused by a defect in the step that she was using at the time of her fall.

Summary judgment is the procedural equivalent of a trial [*S.J.Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist [*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 (1994)]. The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law [*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)]. Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so [*Zuckerman v City of New York*, 49 NY2d 557, 562 (1980)]. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations [*Zuckerman*]. In determining a motion for summary judgment, the Court must view the evidence in the light most

favorable to the non-moving party (*Rizk v Cohen*, 73 NY2d 98, 103 [1989]; *Schafee* v *SimmsParris*, 82 AD3d 867 [2nd Dept 2011]).

To establish a *prima facie* case of negligence based on circumstantial evidence a plaintiff must prove that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (*Grob v Kings Realty Associates, LLC*, 4 AD3d 394 [2nd Dept 2004]; *Collins v City of New York*, 305 AD2d 529 [2nd Dept 2003]; *Nigri v City of New York,* 294 AD2d 477 [2nd Dept 2002]; cf *Gayle v City of New York*, 92 NY2d 936, 937 [1998]). In assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should be whether the condition caused by the defendant's alleged negligence is unique, and creates a dangerous condition over and above the usual dangers that are inherent in the sport (*Morgan v State*, 90 NY2d 471, 485 (1997]). A person who voluntarily participates in a sport or recreational activity consents to certain risks that are inherent in and arise out of the activity generally and flow from such participation (*Anand v Kapoor*, 15 NY3d 946 [2010]). However a participant will not be deemed to have assumed concealed or unreasonably increased risks (*Schmidt v Massapequa High School,* 83 AD3d 1039 [2nd Dept 2011]; *Gallagher v County of Nassau*, 74 AD3d 877 [2nd Dept 2010]; *Fithian v Sag Harbor Union Free School Dist.,* 54 AD3d 719 [2nd Dept 2008]; *Warren v Town of Hempstead*, 246 AD2d 536 [2nd Dept 1998]; see *Anand*; *Morgan* at 485).

In this case there is no record of complaints or prior incidents involving the turquoise steps. Defendant's group exercise coordinator, who inspected the steps every two weeks, testified that she had no notice of any wearing of the rubber stoppers on the steps used at defendant's facility. Plaintiff, herself, never inspected the step from which she fell, either at the beginning of the class, or after she fell. Nor did anyone else who was deposed. On this record, defendant has presented a *prima facie* case for summary judgment dismissing the complaint.

In opposition, viewing the evidence in the light most favorable to plaintiff, the Court finds she has failed to raise a triable issue of fact as to negligent conduct by defendant. Only Ms. Schwartz, a participant in the class, presents testimony that some of the turquoise steps had defective rubber stoppers as of the date of plaintiff's accident. Yet Ms. Schwartz specifically denied checking all of the steps, did not notice the color of plaintiff's step on the morning of her fall, and did not look at plaintiff's step after her fall.

Plaintiff cannot testify to any defect in the step from which she fell. She attempts to

get around this evidentiary hurdle with the affidavit of her expert, James Pugh. Mr. Pugh avers that his inspection of the turquoise steps revealed each and every one to be defective and in need of replacement, because the rubber foot pegs on the four corners of the turquoise steps had either worn away or receded into the hard plastic substance of the step. In such condition, Mr. Pugh opines that the rubber foot pegs were unable to anchor the step and prevent it from moving or sliding out from under the person using it.

The fatal flaw in this argument is that Mr. Pugh did not inspect the condition of the steps at issue at the time of plaintiff's injury. Defendant's attorney states, without refutation, that Mr. Pugh's inspection took place roughly 20 months after plaintiff's accident. An expert's summary conclusion that the subject of his inspection was in the same condition on the day he inspected it as the date on which plaintiff was injured is based upon speculation (*Hlenski v City of New York*, 51 AD3d 974 [2nd Dept 2008]; *Van Skyock v Burlington North-Santa Fe Co*, 265 AD2d 545, 546 [2nd Dept 1999]; see also *Goldin v Riverbay Corp.*, 67 AD3d 489 [1st Dept 2009]).

On this record the Court is compelled to conclude that plaintiff has failed to raise a triable issue of fact as to whether the step from which she fell contained a hidden defect, such as to present a concealed or unreasonably increased risk. Consequently, plaintiff has failed to raise a triable issue of fact that it is "more likely" or "more probable" that a defect in the bottom of the step she was using, rather than her own misstep, caused her to fall (see *Grob*; *Collins*; see generally *Costantino v Webel*, 57 AD3d 472 [2nd Dept 2008]). Under these circumstances defendant's motion for summary judgment must be granted.

The Court has examined the parties' remaining contentions and find them to be without merit.

This constitutes the Order of the Court.

Dated: Sept 23, 2011

J.S.C.

ENTERED
OCT 24 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE