

**Rueckert v Cohen**

2012 NY Slip Op 31488(U)

May 22, 2012

Sup Ct, Nassau County

Docket Number: 5693/10

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,  
Justice.

TRIAL/IAS PART 2  
NASSAU COUNTY

\_\_\_\_\_  
PAMELA RUECKERT,

Plaintiff,

ORIGINAL RETURN DATE: 02/14/12  
SUBMISSION DATE: 03/23/12  
Index No. 5693/10

-against-

GAIL COHEN,

Defendant.  
\_\_\_\_\_

MOTION SEQUENCE #002

The following papers read on this motion:

Notice of Motion .....	1
Affirmation in Opposition .....	2
Reply Affirmation .....	3

Motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant dismissing the complaint is determined as hereinafter set forth.

This action arises out of a contact between plaintiff and defendant. The first cause of action alleges common law assault and battery. The second cause of action alleges negligence. At the time of the incident plaintiff was employed by Equinox Gym (the "Gym") as a personal trainer while she was working with a client in the health club's indoor swimming pool. Defendant was also a member of the Gym and using the pool at the time of the incident.

The shallow end of the pool had a depth of approximately 3' 5". There were three swimming lanes. Each lane was approximately 6 to 6-1/2' across. The lanes were marked off with ropes. On the day of the incident plaintiff was working with Debbie Celebre, who was a first-time client, in a swim lane giving her aquatic and stretch exercises near the pool's edge. Plaintiff alleges that she advised defendant that defendant could not swim in lane one (1) for another 3-1/2 minutes as she was finishing the personal training session with her client and also there were other

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lanes available that defendant could use.

Plaintiff was aware that at the time of the incident there was "open swimming" and members were not precluded from swimming in lane one. Defendant asserts that when this information was relayed to her, the parties engaged in a "friendly," non-confrontational conversation. Defendant was swimming in the same lane in which plaintiff was giving her client lessons. Plaintiff alleges that as defendant swam in the lane her right knee was struck by the heel of defendant's foot. The front portion of plaintiff's knee was allegedly caused to strike the wall at the pool.

After the incident defendant contends that plaintiff did not advise defendant that there was any type of contact made between them; nor did plaintiff advise defendant that she felt any pain. Defendant indicated that she swam approximately four laps. As she traveled down the swim lane at a medium pace, defendant observed that plaintiff and her client had moved to the edge of the pool in the swim lane that defendant was using. In response, she slowed her pace down because the edge of the pool was now blocked by plaintiff and her client.

Defendant testified that she swam to the deep end and turned around and continued to swim towards the shallow end of the pool. When defendant started to swim toward the pool's shallow end, she then noticed that plaintiff and her client had moved into the swim lane that she was in. She then observed plaintiff and her client in the edge of the shallow end of the pool where they took up the entire lane that defendant was using.

Defendant testified that she stopped before reaching the wall of the shallow end, and performed what she described as a swimming turn to start her swim back to the pool's deep end, when she felt one of her feet touching something "fleshy" as she started back. After feeling what she described as something "fleshy" she turned her head to look back and saw plaintiff also turned to look at her.

Defendant asserts that neither of the women said anything to one another. According to defendant, after the "inadvertent contact" defendant looked back in the direction of where plaintiff and her client were, without having any conversation or interaction. Defendant continued to swim several more laps and exited the pool.

An assault is the intentional placing of another in apprehension of imminent

harmful or offensive contact. See *Bastein v Sotto*, 299 AD2d 432 [2d Dept. 2002]. Intent is an essential element of the assault cause of action. *Flamer v Yonkers*, 309 NY114 [1955] and what distinguishes an assault from negligence. The elements of battery are bodily contact, made with intent, and offensive in nature (see *Siegel v Herricks Union Free School Dist.*, 7 AD3d 607 [2d Dept. 2004]; *Tillman v Nordon*, 4 AD3d 467 [2d Dept. 2004]). The intent required for battery is "intent to cause a bodily contact that a reasonable person would find offensive." *Jeffreys v Griffin*, 1 NY3d 34 [2003].

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404 [1957]. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611 [2d Dept. 1987]; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133 [2d Dept. 1986]. Defendant has made an adequate *prima facie* showing of entitlement to summary judgment dismissing the first cause of action sounding in common law assault and battery.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgs., Inc.*, 46 NY2d 1065 [1979]. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240 [1st Dept. 1990], *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; see *Indig v Finkelstein*, 23 NY2d 728 [1968]; *Werner v Nelkin*, 206 AD2d 422 [2d Dept. 1994]; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781 [1st Dept. 1981], *app. dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868 [3d Dept. 1993], *lv app. den.* 82 NY2d 660.

In opposition, plaintiff asserts that defendant was "annoyed" with plaintiff prior to the contact. Plaintiff told defendant that there was only 3-1/2 minutes left to the session in lane 1 and that there were two other lanes that defendant could use. Defendant chose to swim in lane 1 rather than lane 2. The record does not support plaintiff's claim that defendant was "visibly agitated" with plaintiff prior to the incident. The record does not demonstrate evidence that defendant used profanity,

made any type of hand gestures or any other type of animated behavior to support the allegation of being “visibly agitated.” The documentary evidence submitted in opposition to the motion to dismiss the first cause of action (battery and assault) is speculative and conclusory. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are not sufficient to raise a triable issue of fact. *See Billordo v E.P. Realty Associates*, 300 AD2d 523 [2d Dept. 2002]; *Dunlop v Levine*, 271 AD2d 396 [2d Dept. 2000]. Accordingly, the motion to dismiss based upon the first cause of action is granted.

The court will next address the motion to dismiss the second cause of action sounding in negligence. Defendant’s attorney supports the motion to dismiss the negligence cause of action based on the doctrine of assumption of risk. Defendant’s attorney argues that defendant is entitled to summary judgment on the negligence cause of action since plaintiff voluntarily assumed the risk of contact with other swimmers when she entered the pool.

The doctrine of assumption of risk is to facilitate free and vigorous participation in athletic activities. *Benitez v New York City Bd. of Ed.*, 73 NY2d 650 [1989]. The courts have recognized that athletic and recreation activities enhance social values, even while they involve significantly heightened risks and have employed the notion that these risks may be voluntarily assumed to preserve those beneficial pursuits as against the prohibitive liability to which they would otherwise give rise.

The doctrine of assumption of risk has not been applied outside of this limited context. Its application must be closely circumscribed if it is not to seriously undermine and displace the principles of comparative causation. *Trupia v Lake George Central School District*, 14 NY3d 392, 395 [2010]. Compare, *Morgan v State of NY*, 90 NY2d 471 [1997] and *Siegel v City of New York*, a companion case to *Morgan*, where doctrine of primary assumption of risk was not applicable.

“[P]rimary assumption of risk is not a measure of plaintiff’s comparative fault, but a measure of the defendant’s duty of care. Primary assumption of risk eliminates or reduces the tortfeasor’s duty of care to the plaintiff and, in the former case, constitutes a complete bar to recovery.” *Lamey v Foley*, 188 AD2d 157, 162-163 [4<sup>th</sup> Dept. 1993] (internal citations omitted). *See also, Abato v County of Nassau*, 65 AD3d 1268; *Rivera v Glen Oaks Vil. Owners, Inc.*, 41 AD3d 817 [2d Dept. 2007]; *Salmon v Wendell Terrace Owners Corp.*, 5 AD3d 372 [2d Dept. 2004].

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The court finds swimming an activity worthy of protection under this doctrine.

Plaintiff was training a client as defendant was swimming laps during the Gym's "free swim," as was defendant's normal routine, when the contact occurred. Counsel for defendant submits that potential contact of an incidental nature is inherent in such aquatic activities and that plaintiff should have been aware of such risk when she entered the pool during "free swim."

Plaintiff asserts in her affidavit that "[i]n all my years of high school competitive swimming and country club competitive swimming/diving, there was never any contact between lane/lap swimmers or expected contact between lane/lap swimmers." The court notes that the incident did not occur during a competitive swim meet. "[F]or purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine qua non (citations omitted)." *Morgan v. State*, 90 N.Y.2d 471, 484 [1997]. The potential for contact in a swimming pool is an inherent risk of entering the pool.

Plaintiff argues that since she was not herself swimming at the time of the contact, she was not participating in a sporting event or recreational activity. This argument fails. "Pursuant to the doctrine of primary assumption of risk, one is deemed to have assumed, as a voluntary participant, spectator, or even bystander (citations omitted) certain risks occasioned by athletic or recreational activity" *Roberts v. Boys and Girls Republic, Inc.*, 51 AD3d 246, 247 [1<sup>st</sup> Dept. 2008].

Counsel for plaintiff's allegations that "in Segal v. St. John's University, 893 N.Y.S.2d 221, 69 A.D.3d 702 (2<sup>nd</sup> Dept. 2010), the Court held that the plaintiff as a matter of law did not assume the risk of injuring her back by her membership on the swim team," are inaccurate. In *Segal* the Court stated that "we **cannot** say, as a matter of law, based on the defendants' renewed moving papers, that the plaintiff assumed the risk of injuring her back by her membership on the swim team, inasmuch as those moving papers did not establish that her alleged injury and the manner in which it allegedly was caused, were inherent risks of swimming" (emphasis added) (Id. at 704). *Segal* can be distinguished from the case at bar as in *Segal* plaintiff was allegedly injured due to training methods employed by the coach and the coach continued to employ those methods after plaintiff complained of back pain.

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As plaintiff failed to demonstrate with regard to the first cause of action that the contact was intentional, she cannot now avail herself of that exception to the assumption of risk doctrine. Neither has plaintiff demonstrated that defendant engaged in reckless or risk enhancing conduct that would qualify as an exception to the doctrine.

Defendant demonstrated her prima facie entitlement to judgment as a matter of law by establishing that plaintiff assumed the risk of injury by voluntarily entering the pool during free swim and that plaintiff should have known that contact with other swimmers in the pool was a possibility.

Accordingly, the motion to dismiss based upon the second cause of action is also granted, and the complaint is dismissed in its entirety.

This decision constitutes the order of the court.

Dated: May 22, 2012

  
THOMAS P. PHELAN, J.S.C. XXX

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**ENTERED**  
MAY 24 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE