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SHORT FORM ORDER

INDEX No. 10-35396

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-11-12
ADJ. DATE 10-24-12
Mot. Seq. # 002 - MG; CASEDISP

SERINA INVERSA,

Plaintiff,

- against -

CHAMPS GYMNASTICS CORP. d/b/a GOLD MEDAL GYMNASTICS CENTER, OSCAR "DOE" and ROSA RACANELLI REALTY CO., INC.,

Defendants.

CHRISTOPHER J. CASSAR, P.C.
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Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12-15 ; Replying Affidavits and supporting papers 16-17 ; Other Defendant's Memorandum of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Champs Gymnastics Corp. for summary judgment dismissing the complaint against it is granted; and it is

ORDERED that the court, upon its own motion, searches the record pursuant to CPLR 3212(b) and awards defendant Rosa Racanelli Realty Co. Inc. summary judgment dismissing the complaint against it.

Plaintiff Serina Inversa commenced this action to recover damages for injuries she allegedly sustained on April 30, 2008 while performing gymnastics exercises in a gymnasium owned by defendant Champs Gymnastics Corp. d/b/a Gold Medal Gymnastics Center ("Gold Medal"). The complaint also names as defendants to the action, the personal trainer assigned to plaintiff at the time of the accident, "Oscar Doe," and the alleged owner of the premises, Rosa Racanelli Realty Co. Inc. Plaintiff, who was 30 years old at the time of the incident, allegedly injured herself when her knee "went out" shortly after she began performing straddle jumps on the tumbling track. Following the application of ice to her knee, the personal trainer assigned to plaintiff allegedly instructed her to perform several other exercises.

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Plaintiff allegedly continued these exercises until the pain in her knee became unbearable. Upon examination three weeks later, plaintiff allegedly was diagnosed with tears to her anterior cruciate and meniscus ligaments. By her complaint, plaintiff claims, inter alia, that the defendants were negligent in failing to ensure her safety during her gymnastic exercises, and in failing to provide a qualified personal trainer who would have anticipated the dangers of continuing to exercise on an injured knee.

Gold Medal now moves for summary judgment dismissing the complaint against it on the grounds it neither created nor had actual or constructive notice of any alleged defect or unsafe condition existing on its tumble track on the day of the alleged accident. Gold Medal's submissions in support of the motion include, among other things, copies of the pleadings, the transcripts of the parties deposition testimony, and an affidavit by its general manager, Noelle Miller. Plaintiff opposes the motion, arguing that a triable issue exists as to whether Gold Medal had actual or constructive notice that mats covering a section of the tumble track on the day of the accident constituted a dangerous condition. Plaintiff further asserts that a triable issue exists as to whether the personal trainer assigned to her by Gold Medal was negligent in failing to insist that she refrain from engaging in additional exercises after she injured her knee.

At her examination before trial, plaintiff testified that her experience in gymnastics consisted of two years she participated in gymnastics camp as a child between the ages of 8 to 10 years old, and another eight months of practice she received as an adult several months prior to the accident. Plaintiff testified that the accident occurred when her knee "gave out" during the straddle jump exercise on the gym's tumble track. Plaintiff testified that she did not notice any defect on the tumble track prior to her accident, and that she did not make any complaints regarding any purported defects. Plaintiff testified that she remained in one area of the tumble track during the straddle jump exercise, and that she believed that she jumped approximately three feet high before injuring herself. Plaintiff testified that there were mats covering one end of the tumble track approximately six feet away from where she injured herself, and that she was unsure whether the weight of the mats interfered with the intensity of the rebound springs beneath the tumble track. She further testified that she did not know how many mats were stacked on the other end of the tumble track, or how heavy they were at the time of her accident. Plaintiff testified that the personal trainer recommended that she ice her knee and walk around to assess her pain before she continued any more exercises. Plaintiff testified that she walked around for approximately five minutes before returning to the class, and that the personal trainer then suggested she try other exercises such as the uneven bar and "back walkover" flips to avoid placing too much pressure on her knee. Plaintiff testified that she attempted both exercises before she decided to stop the class and leave the gym.

At his examination before trial, Oscar Romero testified that he was plaintiff's personal trainer on the day of the alleged accident. He testified that he was a certified gymnastics instructor, and that he had received additional training from Gold Medal regarding the appropriate safety measures to be taken if a student is injured during a class. Romero testified that he ensured that plaintiff stretched before she started any of the exercises, and that he only learned that she injured herself when he heard her scream shortly after she began jumping on the tumble track. Romero testified that there may have been mats bordering the tumble track, but he did not recall that there were any mats laying on any portion of its surface at the time of plaintiff's accident. He testified that he made plaintiff apply ice to her knee, and

asked her to sit down and rest for a while. Romero further testified that he asked plaintiff if she believed that she could continue the class before he suggested she engage in any other exercises. Romero testified that he did not believe plaintiff was seriously injured, since she was able to walk on her own, and that she continued on the uneven bars for approximately 20 minutes after the incident without complaining about her knee. Romero testified that he asked plaintiff if she would like to try the "back walkover" exercise after the uneven bars, and that she assured him she was fine before he assisted her in doing the exercise. He testified that he helped to lift her during the maneuver, and that he did not recall her complaining of any pain before she left the class.

At her examination before trial, Gold Medal's general manager, Noele Miller, testified that the coaches were responsible for placing the mats used in the gym in their designated storage areas at the end of the classes. She testified that it was standard practice at the gym to keep mats off the tumble track, and that there were gym directors who inspected the equipment for safety throughout the day. She testified that all coaches working at the gymnasium, including Oscar Romero, were certified by the USAG, which is the sole national governing body for the sport of gymnastics in the United States. She testified that it was her experience that students would come into the gym's office and file either an accident or injury report if there is an incident during the gymnastic class. She testified that she did not recall receiving any accident or injury report on the day of the alleged accident. An affidavit by Noele Miller submitted in support of the motion further states, in pertinent part, that Gold Medal conducted routine daily inspections of all its gymnastic equipment, and that at no time prior to the alleged accident did she or any of the owners of the gym receive any complaints from anyone regarding any unsafe or defective condition with the mats or tumble track.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). While the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]), mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue warranting denial of the motion (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish liability for a dangerous or defective condition, a plaintiff must establish that the defendant either created the condition or had actual or constructive notice of its existence, such that the alleged defective or dangerous condition was apparent, visible and existed for a sufficient length of time to permit the defendant time to discover and remedy the situation (***Moss v JNK Capital Ltd.***, 85 NY2d 1005, 631 NYS2d 280 [1995]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Cafiero v Inserra Supermarkets***, 195 AD2d 681, 599 NYS2d 342 [1993]). The mere fact that a defendant may have a general awareness that a defective or dangerous condition exists is not legally sufficient to constitute notice of the particular condition that caused the plaintiff's injuries

(***Kennedy v Wegmans Food Mkts.***, 90 NY2d 923, 664 NYS2d 259 [1997]; ***Gordon v American Museum of Natural History***, *supra*). Moreover, where a plaintiff fails to submit any evidence that the condition alleged to have caused the injury was actually defective or dangerous, summary judgment must be granted in defendant's favor (*see* ***Przybyszewski v Wonder Works Constr.***, 303 AD2d 482, 755 NYS2d 435 [2003]).

Additionally, it is well established that a voluntary participant in a sporting or recreational event consents "to the risks that are commonly inherent, apparent and arise out of the nature of the sport itself and generally flow from such participation" (***Morgan v State of New York***, 90 NY2d 471, 484, 662 NYS2d 421 [1997]; *see* ***Marcano v City of New York***, 99 NY2d 548, 754 NYS2d 200 [2002]). "This includes those risks associated with the construction of the playing surface and any open and obvious condition on it" (***Welch v Bd. of Educ. of City of N.Y.***, 272 AD2d 469, 507, 707 NYS2d 506 [2d Dept 2000]; *see* ***Sklyer v County of Erie***, 94 NY2d 912, 707 NYS2d 374 [2000]). It is not necessary for the plaintiff to have foreseen the exact manner in which the injury occurred "so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (***Joseph v New York Racing Assoc.***, 28 AD3d 105, 809 NYS2d 526 [2d Dept 2006], *quoting* ***Maddox v City of New York***, 66 NY2d 270, 495 NYS2d [1985]). However, the level of the participant's risk awareness is to be assessed against the background of the participant's skill and experience and the participant is not deemed to have consented to any risk that results from reckless or intentional conduct or concealed or unreasonably increased risk (*see* ***Morgan v State of New York***, *supra*; ***Joseph v New York Racing Assoc.***, *supra*). Therefore, if the risks of the activity are fully comprehended or perfectly obvious to the plaintiff, then the plaintiff by engaging in such activity has fully consented to the known, foreseeable risk inherent in the activity (*see* ***Marcano v City of New York***, *supra*; ***Morgan v State of New York***, *supra*).

Here, Gold medal established its prima facie entitlement to summary judgment dismissing the complaint against it by demonstrating that it did not create, or have actual or constructive notice of any alleged defective or dangerous condition on the subject tumble track (*see generally* ***Gordon v American Museum of Natural History***, *supra*; *see also* ***Davila v City of New York***, 95 AD3d 560, 946 NYS2d 20 [1st Dept 2012]; ***Knickerbocker v Ulster Performing Arts Ctr.***, 74 AD3d 1526, 903 NYS2d 578 [3d Dept 2010]; ***Miskanic v Roller Jam USA, Inc.***, 71 AD3d 1102, 898 NYS2d 180 [2d Dept 2010]). Significantly, plaintiff testified that she did not notice any defect on the tumble track prior to her accident, and that she did not make any complaints regarding any purported defects. In addition, Gold Medal submitted evidence that the gym was inspected on a daily basis, that none of its employees observed or received any complaints about defects or dangerous conditions on the tumble track, and that the only mats located near the tumble track were mats that bordered the track in case of accidents.

Gold Medal also established that plaintiff voluntarily assumed the risk of injury to her knee, a risk inherent in gymnastics, and that she continued to participate in other exercises after her knee was injured (*see* ***Anand v Kapoor***, 15 NY3d 946, 917 NYS2d 86 [2010]; ***Morgan v State***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Benolol v City of New York***, 94 AD3d 414, 941 NYS2d 489 [2d Dept 2012]; ***Regan v State***, 237 AD2d 851, 654 NYS2d 488 [3d Dept 1997]; ***Beck v Scimeca***, 229 AD2d 555, 646 NYS2d 283 [2d Dept 1996]). In this regard, Gold Medal submitted evidence that plaintiff had approximately three years of gymnastic experience, including eight months of experience she gained as an adult shortly before participating in its gymnastics class. Gold Medal further adduced evidence that its instructor

repeatedly asked plaintiff if she was physically capable of continuing the class before he suggested she engage in other exercises, and that plaintiff voluntarily participated in the class for additional 20 minutes without making any complaints regarding the condition of her knee. The burden, therefore, shifted to plaintiff to raise triable issues warranting denial of the motion (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, *supra*).

Plaintiff failed in this respect. Even assuming, arguendo, that mats were stacked on the opposite end of the tumble track, plaintiff failed to submit any evidence, expert or otherwise, substantiating her speculatory claim that the mats increased the intensity of the rebound springs beneath the track (*see* ***Youmans v Maple Ski Ridge, Inc.***, 53 AD3d 957, 862 NYS2d 626 628 [3d Dept 2008]; ***Lamphier v Rome City School Dist.***, 284 AD2d 989, 726 NYS2d 884 [4th Dept 2001]; *see also* ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept 1994]), or that their mere presence on the track, six feet away from where she was injured, constituted a defective condition (*see* ***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 792 NYS2d 123 [2d Dept 2005]; ***Przybyszewski v Wonder Works Constr.***, *supra*). Accordingly, the motion by defendant Champs Gymnastics Corp. for summary judgment dismissing the complaint against it is granted. The action is severed and continued against the remaining defendants.

Dated: 2/22/13

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION