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SHORT FORM ORDER

INDEX No. 10-11711
CAL. No. 12-00825OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

***PRESENT*:**

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 002 - MG

ANTHONY VITERITTI, Plaintiff, - against - BASEBALL HEAVEN, LLC, Defendant.	DAVIS & FERBER, LLP Attorney for Plaintiff 1345 Motor Parkway, Suite 201 Islandia, New York 11749 STEVEN F. GOLDSTEIN, LLP Attorney for Defendant One Old Country Road, Suite 318 Carle Place, New York 11514

Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 16-20; Replying Affidavits and supporting papers 21-22; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries sustained by plaintiff Anthony Viteritti on April 6, 2008 when the plaintiff was injured while playing a game of baseball on a field owned by the defendant Baseball Heaven, LLC. It is alleged that plaintiff was injured while sliding into second base, headfirst, when another player jumped to catch the ball and cut his face with metal cleats. This action was initially brought by his mother and natural guardian Antonietta Viteritti. However, upon reaching his majority, the prior action was discontinued as to Antonietta and the caption amended to read as stated above.

Defendant now moves for summary judgment dismissing plaintiff's complaint, alleging that there was no breach of any duty owed to plaintiff which was the proximate cause of plaintiff's injuries and that the plaintiff voluntarily assumed the risk that he might be injured while playing baseball. In support of the motion defendant submits, *inter alia*, its attorney's affirmation in support, the pleadings,

plaintiff's bill of particulars and plaintiff's deposition transcript, the deposition transcript of Antonietta Viteritti testifying on behalf of plaintiff, the deposition transcripts of Frank Zitiglio, Jr. and Sunita Gera, the Baseball Heaven Rules and Regulations and the affidavit of Sunita Gera, sworn to on May 15, 2012. In opposition, plaintiff submits his attorney's affirmation, the affidavit of plaintiff and the affidavit of Antonietta Viteritti, both sworn to on October 26, 2012.

Plaintiff testified that at the time of the accident, April 6, 2008, he was attending ninth grade at Harborfields High School. Prior to that he attended Oakfields Middle School where he played baseball in seventh and eighth grade. He started playing with the Huntington Angels in 2007 and was on the 13U travel team. During the summer of 2007 he played baseball in the Huntington Tri-Village Little League. At the time of the accident in April 2008, he was on the Huntington Angels 14U travel team. Both years he had the same coach, Bobby DeMichael. Plaintiff testified that his coach told the Huntington Angels 13 U team that metal cleats were prohibited. Neither Coach DeMichael nor anyone else from the league told them anything about cleats before the 14U season started. Plaintiff believed that pitchers were allowed to wear metal cleats. The game in which plaintiff was injured took place on April 6, 2008. The Huntington Angels were playing a team called the Brentwood Bandits. It was the first game of the spring league. After arriving at the field with his parents, plaintiff warmed up by stretching, throwing the ball around and having infield practice. He was present when the Brentwood Bandits warmed up but did not see the footwear they were wearing. Plaintiff's injury occurred in the first inning. His team batted first. He was third in the batting lineup. While the first two batters were up, plaintiff watched the action out in the field, but did not notice the type of footwear the Brentwood team was wearing. When plaintiff batted, he hit a ground ball to the third baseman who overthrew the first baseman. Plaintiff rounded first base and headed to second. As he was running toward second base, he saw the person who was covering the base was in the process of catching the ball. Plaintiff was in the process of sliding, headfirst, into second base. He was wearing a batting helmet, but did not keep his head down. As he did so, he felt the foot of the player covering second base come into contact with his head. Plaintiff alleges that the player he collided with was wearing metal cleats. He saw the cleats as the player was walking toward the pitcher's mound. Plaintiff testified that, prior to this game, he had performed headfirst slides during games and had come into contact with the person covering the base. He was aware that collisions between players could occur.

Antonietta Viteritti testified that, when plaintiff became a member of the Huntington Angels, she had to pay a fee for every season he played, including the 2008 season. In addition to the fee, there was a registration form which she filled out and signed so that her son could play. She did not know if there were any waiver forms that had to be signed and she did not have copies of any of the documents she had signed. She did not recall any discussions with the coach of the Huntington Angel's team or anything online with respect to the rules and regulations of the league, including the use of metal cleats. She did not recall any team meetings with regard to this issue. She had seen Anthony play baseball prior to the 2008 season and had seen physical contact between Anthony and other players who were covering the base he was trying to steal. Collisions with regard to base stealing were a part of the game. She testified that on the night of the game in which the plaintiff was injured, she could hear the sound of metal cleats on cement. A lot of kids were wearing them. No one ever told her that metal cleats were not allowed.

Frank Zitaglio Jr. testified that he was the General Manager of the defendant. Defendant was sold in 2011. He was an employee of the defendant prior to its sale in 2011, holding the position of tournament director and supplying the staff that ran the tournaments. He was also the owner of a company that supplied umpires to the defendant. He began working for defendant in 2004. He was familiar with rules and regulations in place in 2004, having helped draw them up with the prior General Manager. With respect to player's footwear, in 2004, age groups 9U to 12U were to wear molded rubber cleats. The age groups 13U to 18U had no restrictions on shoes. The rules regarding footwear were still in effect in 2008. The rules regarding footwear were not changed until 2010, when metal cleats were prohibited. The reason for the rule change had to do with the maintenance of the turf fields. Sunita Gera, the owner of defendant at the time, was responsible for the change. He testified that the defendant's Rules and Regulations pertained to both in-house and tournament games. At the beginning of a season, a meeting was held by defendant at which all team managers were required to be present. At these meetings the Rules and Regulations were given to the team managers. This would have included the Huntington Angels. At the 2008 preseason meeting, the Rules and Regulations were handed out to the team representatives. These rules were in effect for the 2008 season and the rule regarding no restrictions on footwear for groups 13U and above were in effect in 2008. He also testified that there is a national little league rule. No metal cleats are allowed up to 12 years old. After that, in the "senior" league, he believed that metal spikes were allowed. It was the responsibility of each baseball team's manager to give the Rules and Regulations to the players on their respective teams. The rules were also posted online.

Sunita Gera was testified on behalf of the defendant. In 2005 she was a member of defendant Baseball Heaven, LLC, with her husband and other members. She sold her interest in 2011. She was actively working for the defendant in 2008. Before each season there was a meeting held with team managers for registrations and explaining the rules. The rules were changed in 2010 when artificial turf was installed in the four 90 foot fields. After that was done, no metal cleats were allowed on the "big" fields. This was done for maintenance purposes. She also testified that a waiver document had to be signed by the manager and one parent.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]).

It is well settled that by engaging in a sport, a participant 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 v State of New York***, 90 NY2d 471, 484-486, 662 NYS2d 421 [1997]; *see*

Anand v Kapoor, 61 AD3d 787, 877 NYS2d 425 [2d Dept 2009]; ***Fithian v Sag Harbor Union Free School Dist.***, 54 AD3d 719, 864 NYS2d 456 [2d Dept 2008]; ***Mendoza v Village of Greenport***, 52 AD3d 788, 861 NYS2d 738 [2d Dept 2008]; ***Joseph v New York Racing Assn.***, 28 AD3d 105, 809 NYS2d 526 [2d Dept 2006]). The assumption of risk doctrine is not an absolute defense to liability, but a measure of the duty of care owed by the defendant (***Turcotte v Fell***, 68 NY2d 432, 439, 510 NYS2d 49 [1986]; ***Taylor v Massapequa Intl. Little League***, 261 AD2d 396, 397, 689 NYS2d 523 [2d Dept 1999]). Under the doctrine, a plaintiff will be barred from recovering damages for injuries sustained during a voluntary sporting activity if it is established that the injury-causing conduct, event or condition was known, apparent or reasonably foreseeable (*see* ***Morgan v State of New York***, *supra*; ***Turcotte v Fell***, *supra*; ***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]). Thus, a defendant seeking to be relieved from liability based on the assumption of risk doctrine must establish that the injured plaintiff was aware of the risks, appreciated the nature of the risks, and voluntarily assumed the risks (***Morgan v State of New York***, *supra*, at 484, 662 NYS2d 421; *see* ***Turcotte v Fell***, *supra*; ***Carracino v Town of Oyster Bay***, 247 AD2d 501, 669 NYS2d 328 [2d Dept], *lv denied* 92 NY2d 809, 680 NYS2d 54 [1998]).

However, a negligence claim will not be dismissed if the defendant's negligent action or inaction "created a dangerous condition over and above the usual dangers" inherent in the sport (***Owen v R.J.S. Safety Equip.***, 79 NY2d 967, 970, 582 NYS2d 998 [1992]; *see* ***Morgan v State of New York***, *supra*; ***Rosenbaum v Bayis Ne'Emon, Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]). In assessing the risks assumed by a plaintiff when he or she elected to participate in the sport and the duty of care owed by the owner or operator of the property used for such activity, a court must consider the skill and experience of the particular plaintiff (***Morgan v State of New York***, *supra*, at 486, 662 NYS2d 421; ***Maddox v City of New York***, *supra*, at 278, 496 NYS2d 726), as well as the nature of the defendant's conduct (*see e.g.* ***Turcotte v Fell***, *supra* [plaintiff does not assume risk of reckless or intentional conduct]; ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989] [plaintiff does not assume concealed or unreasonably increased risks]). "[I]f the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" to make the conditions as safe as they appear to be (***Turcotte v Fell***, *supra*, at 439).

The defendant's submissions establish it's prima facie entitlement to judgment as a mater of law (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Risks which are commonly encountered or inherent in a sport are risks for which the various participants are legally deemed to have accepted personal responsibility ***(O'Connor v Hewlett- Woodmere Union Free School District*** 103 AD3d 862; ***Bukowski v Clarkson University***, 19 NY3d 353, 948 NYS2d 568 [2012). Sliding into base is an integral part of the game of baseball (***Totino v Nassau County Council of Boy Scouts of Am.***, 213 AD2d 710, 711, 625 NYS2d 51 [2d Dept 1995], *lv denied* 86 NY2d 708, 634 NYS2d 442 [1995]). Here, the evidence submitted by the defendant demonstrated that plaintiff, an experienced baseball player, voluntarily assumed the risk of an injury from sliding headfirst into second base. Plaintiff had played baseball in seventh and eighth grade, in Little League and the prior year with the 13U team of the Huntington Angels. He was aware that collisions occurred while sliding into base. This was the second year that plaintiff played under defendant's Rules and Regulations that allowed the wearing of metal cleats. In addition, Antonietta Viteritti's testimony establishes that there were many players wearing metal cleats on the day of the accident (*see* ***Martinelli v Town of E. Fishkill***, 300 AD2d

551, 752 NYS2d 569 [2d Dept 2002]; ***Swan v Town of Grand Is.***, 234 AD2d 934, 652 NYS2d 166 [4th Dept 1996]; ***Castello v County of Nassau***, 223 AD2d 571, 636 NYS2d 817 [2d Dept 1996]; *see also* ***Joseph v New York Racing Assn.***, *supra*; ***Morlock v Town of N. Hempstead***, 12 AD3d 652, 785 NYS2d 123 [2d Dept 2004]). Furthermore, defendant has shown that it was not defendant's negligent action or inaction which "created a dangerous condition over and above the usual dangers" inherent in the sport (*see* ***Owen v R.J.S. Safety Equip.***, *supra*). Defendant disseminated it's Rules and Regulations to the coaches of each team with the directive that the coaches pass them onto the players on their individual team. The Rules and Regulations were also posted online. Thus, even if it is assumed the plaintiff was unaware of the rule with regard to metal cleats, it was not due to the negligence of the defendant.

In opposition, plaintiff failed to present competent evidence sufficient to raise a triable issue of fact. The affidavits submitted by plaintiff and plaintiff's mother do not raise bonafide issues of fact. In the case of plaintiff's affidavit, it contains multiple contradictions of his prior testimony at his deposition. As such, they are insufficient to raise a triable issue of fact. (*see* ***Steinvaag v City of New York***, 96 AD3d 932, 947 NYS2d 536 [2d Dept 2012]; ***Nai Ren Jiang v Yeh***, 95 AD3d 970, 944 NYS2d 200 [2d Dept 2012]).

In light of the foregoing, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: April 19, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION