

Spiteri v Bisson

2013 NY Slip Op 31006(U)

April 29, 2013

Supreme Court, Suffolk County

Docket Number: 09-43180

Judge: Joseph C. Pastorella

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09-43180

INDEX No. ~~07-28251~~

CAL No. 10-01572MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-13-12 (#002)
MOTION DATE 2-27-13 (#003 & #004)
ADJ. DATE 3-27-13
Mot. Seq. # 002 - MG
003 - MG
004 - MG; CASEDISP

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HODA SPITERI AND SAL SPITERI, :
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 Plaintiff, :
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 - against - :
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 LAURA BISSON as Administratrix of the Estate of :
 EDWARD T. BISSON, JR., Deceased; :
 CHARLES WILLIAM SCHWALBE, as Guardian Ad :
 Litem of Infant ED BISSON, NORTH BABYLON :
 ATHLETIC CLUB, INC., TOWN OF BABYLON, :
 SUFFOLK COUNTY POLICE ATHLETIC :
 LEAGUE, INC. d.b.a NORTH BABYLON Lacrosse :
 AND NORTH BABYLON Lacrosse, Individually, :
 :
 Defendants. :
----- X

ELAN WURTZEL, P.C.
Attorney for Plaintiffs
527 Old Country Road
Plain view, New York 11803

SCHONDEBARE & KORCZ
Attorney for Defendants Schwalbe, as Guardian
Ad Litem of Infant Ed Bisson
3555 Veterans Memorial Highway, Suite P
Ronkonkoma, New York 11779

JERRY GUARINO, Esq. of Counsel
Babylon Town Attorney
Attorney for Defendant Town of Babylon
200 East Sunrise Highway
Lindenhurst, New York 11757

RIFKIN RADLER, LLP
Attorneys for Defendants Laura Bison as
Administratrix of the Estate of Edward T. Bisson,
North Babylon Athletic Club, Inc., Suffolk
County Police Athletic League d/b/a North
Babylon Lacrosse and North Babylon Lacrosse,
Individually
926 RXR Plaza
Uniondale, New York 11556-0926

Upon the following papers numbered 1 to 20 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-13 (003) 14-23 (004) 24-45; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 46-52; Replying Affidavits and supporting papers 53-55; 56-60; 61-62; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendant, Charles William Schwalbe as guardian ad litem of infant Ed Bisson, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against the infant plaintiff is granted; and it is further

ORDERED that motion (003) by defendant Town of Babylon for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against it is granted; and it is further

ORDERED that motion (004) by defendants Laura Bisson as administratrix of the estate of Edward T. Bisson, Jr., North Babylon Athletic Club, Inc., Suffolk County Police Athletic League, Inc. s/h/a Suffolk County Police Athletic League, Inc. d/b/a North Babylon Lacrosse, and North Babylon Lacrosse, individually, pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against them is granted.

This action arises out of an incident which occurred at approximately 7:00-7:30 p.m. on May 19, 2009, at the Phelps Lane Park, in N. Babylon, New York. Located within the park is a multi-use turf field used for multiple sporting activities, including, but not limited to track, running, football, lacrosse, soccer, field-hockey and other sports. While the twelve year old infant defendant, Edward Bisson, was practicing lacrosse with a number of other players on the field, he hit the lacrosse ball with his lacrosse stick, striking the plaintiff with the ball while she was jogging on the field in the area of the net and goal posts.

The plaintiffs assert in the amended complaint that Edward Bisson's conduct was unexpected, negligent, careless and reckless. Edward T. Bisson, Jr., the father of infant defendant Edward Bisson, died subsequent to the commencement of this action. It is asserted that he failed to use reasonable care and failed to properly supervise the lacrosse activities, permitted the practice/play of lacrosse on the field after the time in which such activities were permitted, and was otherwise negligent, careless and reckless in causing the plaintiff's injuries. As to the North Babylon Athletic Club, the plaintiff asserts they were negligent in permitting the use of lacrosse equipment, failed to provide adequate supervision of the lacrosse players, failed to set up barriers and warnings, allowing a dangerous condition to exist, permitted lacrosse players to use the field after the time in which such activities were permitted, failed to use reasonable care in the ownership, operation, management and control of the premises and programs, among other things. The plaintiff asserts that the Town of Babylon negligently maintained the field, permitted lacrosse players to play without supervision, permitted inconsistent multi-uses of the field creating hazards and dangers to the users of the field, negligently operated, supervised and managed the premises which it owns, and negligently permitted the use of lacrosse equipment, among other things. As to the Suffolk County Police Athletic League Inc. (PAL), it is asserted that on May 19, 2009, it was using the field for lacrosse practice and/or play, and that it was careless, negligent, and reckless in permitting lacrosse to be played without proper and adequate supervision of the players and field, among other things. A derivative claim has been asserted on behalf of the plaintiff's spouse, Sal Spiteri. Cross claims have been asserted in the answers served by the defendants, each against their co-defendants, for indemnification and contribution.

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]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [1981]).

In support of motion (002), defendant, Charles William Schwalbe as guardian ad litem of infant Ed Bisson has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, the amended summons and complaint, defendants’ answers and amended answers; copies of photographs; and the transcripts of the examinations before trial of Hoda Spiteri dated July 26, 2011, Edward Bison dated October 5, 2011, non-party Gary Meigel dated July 18, 2012 (unsigned), non-party Chris Keegan dated July 18, 2012 (unsigned), and non-party Joseph Recine dated July 18, 2012 (unsigned). The unsigned copies of the deposition transcripts of the non-party witnesses are not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2008]; *McDonald v Maus*, 38 AD3d 727 [2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772 [2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered on this motion. Schwalbe seeks summary judgment dismissing the complaint and all cross claims asserted against the infant defendant as a matter of law on the bases that the infant was not negligent and that the plaintiff assumed the risk of injury and is barred from recovery.

In support of motion (003), defendant Town of Babylon has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, its answer, the answer served by Ed Bisson Sr., supplemental summons and amended complaint, amended answers to the amended complaint served by defendants Laura Bisson and North Babylon Athletic Club, Suffolk County Police Athletic League and North Babylon Lacrosse individually, Charles William Schwalbe as guardian ad litem of infant Ed Bisson; copies of photographs; copy of the 50h transcript of Hoda Spiteri dated September 23, 2009; and copies of transcripts of the examinations before trial of Hoda Spiteri dated July 26, 2011 (unsigned and without proof of mailing), Stephen Walsh on behalf of North Babylon Athletic Club dated October 25, 2011 (unsigned and without proof of mailing), Edward Bisson dated October 5, 2011 (unsigned and without proof of mailing), Leo Sottlie on behalf of Town of Babylon dated May 3, 2012; and the affidavit of Jennifer Taus, an employee of the Town of Babylon. The unsigned party transcripts have not been objected to by any party and are considered on this motion (see *Zalot v Zieba*, 81 AD3d 935 [2d Dept 2011]). The Town of Babylon seeks summary judgment dismissing the complaint and cross claims asserted against it as a matter of law on the issue of liability on the basis that it did not breach its duty of reasonable care, and on the basis that the plaintiff assumed the risk of injury and is barred from recovery.

In support of motion (004), defendants Laura Bisson as administratrix of the estate of Edward T. Bisson, Jr., deceased, North Babylon Athletic Club, Suffolk County Police Athletic League, and North Babylon Lacrosse, individually, have submitted, inter alia, an attorney’s affirmation; summons and complaint, defendants’ answers, supplemental summons and amended complaint, answers to amended complaint by North Babylon Athletic Club, and Suffolk County Police Athletic League, and North Babylon Lacrosse, individually, amended answer of Laura Bisson and North Babylon Athletic Club, and Suffolk County Police Athletic League, and North Babylon Lacrosse, individually, amended answer of infant Ed Bisson by Charles William Schwalbe; plaintiffs verified bill of particulars; Letters of

Administration dated February 7, 2011 appointing Laura Bisson as administratrix of the estate of Edward T. Bisson, Jr.; copies of the transcripts of the 50 (h) hearing of Hoda Spiteri dated September 23, 2009 (unsigned), copies of the transcripts of the examinations before trial of Hoda Spiteri dated July 26, 2011, Stephen Walsh dated October 25, 2011, Laura Bisson dated May 10, 2012 (unsigned); photographs; and the affidavit of Margaret Pugh, Assistant to the Executive Director of the Suffolk County Police Athletic League (Suffolk County PAL). These moving defendants seek summary judgment dismissing the complaint on the basis that they are afforded protection from liability by the Volunteer Protection Act of 1997, and the plaintiff assumed the risk of her injury by electing to jog in close proximity to an area where boys were playing lacrosse.

Hoda Spiteri testified to the extent that on May 19, 2009, she was at the Phelps Lane Park, in N. Babylon, New York, a multi-sport field, public park, pool, as her son had a baseball game and her two younger children had lacrosse practice. She stated that there is a rectangular wire fence around the lacrosse field, and the fence posts are higher on the ends. Nets were used for lacrosse, which were set up at the time, and were aligned with the goal post, just before the goal line, but before the post. The injury occurred at the turf field, or multipurpose field, where about three or four boys were practicing lacrosse, tossing the ball back and forth, and using the net. There were adults, a combination of coaches and parents on the field. After her children finished their practice, she started to jog a mile on the field, which would be five times around the field. She stated that common sense would tell her not to jog when three teams were on the field practicing, and she would never disrupt a practice. If the players were taking shots, she would cut the field short and just run a square instead of a triangle so the team and coach would not know she was on the field, and she would never jog behind a net when the players were throwing balls. She had previously jogged in the field after practice was over but the kids were still on the field tossing the lacrosse ball. She had never made any complaints to the North Babylon Athletic Club, or anyone else, with regard to the manner in which any of the lacrosse players were supervised during practice or games, and was not aware of anyone else making such complaints. Prior to this incident, she had never been told not to jog on the field or its perimeter.

Ms. Spiteri continued that at the time of the incident, she was listening to music, wearing earphones in both ears, had completed one full lap and was about to do her second. She did not inquire if it was alright to jog around the field. Her five year old daughter rode her bicycle around the track with her as she jogged the first lap. Ms. Spiteri continued that while she was jogging with her daughter, she told her a couple of times to watch out for the balls when they were in the area, as there was a possibility that the ball could come in their direction, and she kept telling her daughter to stay to her right. Her daughter exited the field after the first lap. Ms. Spiteri stated that she continued to jog toward the fence behind the goal post. She observed the boys throwing the ball back and forth with each other and aiming at the net, which they did not hit each time. One of the boys held a shot, and she told him "thank you." She was facing the front of the goal post. The boys were in the area of a square yellow box. The net was set up below the goal post, within the yellow box. She ran past the net, looking straight ahead. She was jogging in place waiting for the boys to take the shot, as a courtesy, and so she would not be hit. When the ball was hit into the net, she sprinted past the net and continued to jog. She suddenly had a severe headache and turned to hold onto the fence. Coach Bisson, the Commissioner of the football league, approached her, asking if she was alright. She later found out that her left eye was injured. She learned from Coach Bisson that his son, Ed Bisson, was the player who threw the ball which hit her.

In her affidavit submitted in opposition to defendant's respective motions, Hoda Spiteri set forth that she was jogging counterclockwise in the out-of-bounds area at the back of the end zone toward the

football goal posts on the westerly-portion of the field, and had completed one lap. She noticed a group of three or four boys who were playing around on the field before their official practice began, and that they were not playing in the area she was jogging. No one warned her not to run in this area or anywhere on the field and she had previously seen another woman fast walking around the field. When she reached the area about ten or fifteen steps from the goal posts, she jogged in place to allow the boys to finish their play, then sprinted toward the goal posts and passed the goal posts completely in about ten to fifteen steps, passing the out-of-bounds area behind the net at the back of the end-zone in the out of bounds area very close to the tall fencing heading towards the direction of the concession stand. Suddenly, she felt a severe headache and realized she was injured.

Sal Spiteri did not witness the incident. He was aware his wife was jogging on the field and had seen three or four lacrosse players throwing the ball around prior to the incident. He remembered an adult, Bisson being there, but the kids were not wearing their uniforms. He never made any complaints to Mr. Bisson, the athletic club, PAL, the Town of Babylon, or any defendant in this action concerning the manner in which the kids played on the field, either during lacrosse practice, after practice, during the games, or at any time.

The infant defendant, Edward Bisson, testified to the extent that he was born January 19, 1996, and while attending middle school, he played lacrosse on the school team and also for the Town (of Babylon). His coach with the Town of Babylon was Mike Hart. John Heegan, and his now deceased father, defendant Edward Bisson, were his assistant coaches. Town games and practices took place at Phelps Lane, on the football field, which is a multipurpose field with artificial turf. The incident involving the plaintiff occurred in the evening around 7-7:30 p.m. at the field while he was with Christian Miller and Chris and Evan Keegan (sons of John Keegan), and others whose names he could not remember, totaling seven to ten players. John Trama, an assistant coach/college student, was also present but was not playing. He stated the incident occurred as he and his friends were warming up to shoot the net before the team began practicing. When he arrived, a younger team was already engaged in a practice session on the field. Only two teams use the field at a time. There was a six-foot wide net being used for practice and another net against the fence. Coach Casaburi and his father were present on the field while they were warming up. Their instructions were not to shoot while someone is in the net retrieving a ball. They were shooting the net that was against the fence, and running and passing the ball to each other for about ten to fifteen minutes prior to the incident in the area located to the left of the field goal, about ten to fifteen yards from the net located next to a fence which was taller than the remainder of the fences. They were not wearing equipment or helmets. While he was warming up, he did not notice anyone jogging on the field, or anyone using the field other than the lacrosse players, and he had never, on any other occasion, observed people other than lacrosse players using the field during practice time. When the incident occurred, he was standing about ten yards in front of the net in the end zone, shot the ball with his stick toward the net, looked up, and saw the plaintiff who was behind the net, get hit with the ball by her left eye. He stated that he saw her coming from his right and cross the goal by striding over the back of the net which was in front of the fence, just as he released the ball with his stick. At first it looked like she was behind the fence, until she got hit. She had just passed the left post when the ball struck her. She fell, and his father and a bunch of parents rushed to her. He had not observed her running on the field that evening. Bisson continued that afterwards, John Trama told him that he almost hit the plaintiff and told her not to run around the field and not behind the net. The infant defendant stated that when he went over to her, she said, "I should have listened to them. They warned me not to jog on the field." The incident occurred just prior to the scheduled practice.

Stephen Walsh testified on behalf of defendant North Babylon Athletic Club to the extent that he was Commissioner of the Club, and was responsible for the finances, setting up teams, registrations, and other things having to do with the teams. He obtained the permits and insurance needed for the field. He was also considered to be a Director by Suffolk County Police Athletic League, and was one of the people representing the Town of North Babylon. He ran the kindergarten through 8th grade lacrosse for participants in the North Babylon Athletic Club. Other coaches were Joe Racine, and Mark Hart. Hart was the head coach for the 7th and 8th grades, and his assistants were Ed Bisson, John Trama, and Angelo Casaburi. Players could practice on the east side of the field by the end zone if it did not interfere with what was going on before the field became available from the previous group of players. He was not present at the field on the date of the accident. Mike Hart was there, but did not see the incident when it occurred. He never observed anyone jogging or running around the perimeter of the field at any time. After the incident, he spoke to another coach, Gary Meigle, who advised him that he saw the plaintiff moving around the perimeter of the field, across the back of the field where the girls were practicing and lacrosse balls were flying, and told her that she should not be on the field. Right after that, she got hit. John Trama advised him that the kids wanted to shoot, so they moved the cage back to the fence to keep it away from the kids who were exiting the field. He further advised him that there was a woman walking the perimeter of the field, and he told her that it was not a good idea to be there, but she waved him off and kept walking. She came around again, and he approached her again and told her it wasn't a good idea. He advised that she had to jump over the back of the goal to pass it. Walsh further testified that the North Babylon Lacrosse League did not take direction from anyone at the Town of Babylon; no officials from the Town would be present at the practices; and no personnel would be stationed at the premises.

Leo Sottile testified to the extent that he is employed by the Town of Babylon as the Public Works Coordinator to supervise all the trades and skilled trades in the Town, including carpentry, plumbing, painting, and fence crew. The Town maintained the fencing around Phelps's Park. There were no specific responsibilities concerning the field unless there was a problem, such as a fence being bent or ripped, or the building adjacent to it needed repair. He stated that anyone can use the field. On no occasion has he seen people run or jog on the field. It is up to the League to keep people off the field, and the Town has no written rule about it. There is a fence around the entire perimeter of the field, twelve feet high in some sections behind the goal post areas. The Town has no written rules that prohibit the shooting of lacrosse balls towards the fence, but if he were there and saw that being done, he would tell the players not to hit the ball against the fence as it could damage the fence.

Jennifer Taus set forth in her supporting affidavit that she is employed by the Town of Babylon as a Clerk Typist in the Babylon Town Clerk's Office, and caused a search of the records for any complaints or written notices regarding the multi-use athletic field at Phelps Lane Park, and those records contain no prior complaints or written notices concerning lacrosse games, practice, equipment, or conduct of the lacrosse players. It is uncontroverted that the Town of Babylon did not receive prior written notice of a dangerous condition relative to the facts set forth in this action.

Laura Bisson testified to the extent that her husband, Edward Bisson passed on September 4, 2010 from cancer. In 2009, her son, Edward Bisson III, was thirteen years old. He had played lacrosse since he was five years old, and her husband coached him through 2009. Her son's practice at the field was from 7:30 to 9:00 p.m., two to three times a week. On the occasions which she took her son to practice, she would see other North Babylon teams practicing on the field from about 6:30 to 7:30 p.m. in 2009, and it could be the younger and older teams practicing at the same time. The time was not reserved for any particular age group. When her son arrived at the field just prior to 7:30 p.m., he would put on his gear,

talk to his friends, and warm up by throwing the ball back and forth either on the field or on the basketball court, and shooting on the goal on the field. Two teams could split the field to practice, but there would be no more than two teams at a time, and there would be no team mid-field as it would be too dangerous. She was not present at the field on the date of the incident. Her husband told her that her son hit a woman with the lacrosse ball while she was jogging the perimeter of the field and jumped over the back of the cage which was against the fence. She learned that Gary Meigel was on the field at the time and warned the plaintiff not to jog around the field while she was jogging with her child. When she spoke with John Trama, the assistant coach, he advised her that he pushed the net against the fence and told the woman who was jogging that it was dangerous. and if she got hit with the ball, it would be a bad day for her.

Margaret Pugh set forth in her affidavit that she is the Assistant to the Executive Director of the Suffolk County Police Athletic League (PAL), a domestic, not-for-profit corporation, incorporated in 1973, to support juvenile crime prevention and promote recreational sports programs for minors throughout Suffolk County. The North Babylon Athletic Club, Inc. (NBAC) is a member of the Suffolk County PAL and is also a domestic, not-for-profit corporation, and has teams for boys and girls in grades kindergarten through 8th grade that play in a lacrosse league organized by PAL. Pugh averred that Suffolk County PAL does not organize, schedule, supervise, manage, or run any of the lacrosse practices for NBAC, including the practices that were conducted by the NBAC at the Phelps Lane Park on May 19, 2009 where the plaintiff was injured. She continued that all coaches affiliated with PAL are volunteers and are not paid by Suffolk County PAL for their time or services. All coaches affiliated with the individual leagues that are members of PAL, such as NBAC, are volunteers and are not paid by the Suffolk County PAL for their time or services.

Pursuant to the doctrine of primary assumption of the risk, one is deemed to have assumed, as a voluntary participant, spectator, or even bystander, certain risks occasioned by athletic or recreational activity, and to the extent of such an assumption, any legally enforceable duty to reduce the risks of such activity is limited. Although the scope of a plaintiff's assumption and the consequent limitation upon a defendant's duty may vary depending upon a particular plaintiff's capacity to appreciate the risks of an activity, generally, one is deemed to have assumed those commonly appreciated risks which are inherent in and arise out of the nature of the sport and generally flow from such participation. This description is not exhaustive, for pursuant to the primary assumption of risk doctrine, a plaintiff also assumes risks attributable to any open and obvious condition of the place where the sporting activity is carried on (*see Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246 [1st Dept 2008]).

Assumption of the risk applies to not only participants of sporting events but to spectators and bystanders who are not actively engaged in watching an event at the time of injury (*Sutton v Eastern New York Youth Soccer League*, 8 AD3d 855 [3d Dept 2004]; *Gotz v The State of New York*, 13 Misc3d 1151(a) [Ct. of Claims 2006]). In *Keoenig v Town of Huntington*, 10 AD3d 632 [2d Dept 2004], plaintiff, while a spectator at a children's baseball game, was struck in the eye by a baseball thrown from an adjacent ball field. Summary judgment was granted for the defendant because the plaintiff voluntarily placed herself in close proximity to a dangerous situation. The court stated that the risk of being injured by the apparatus of a sport is an inherent risk assumed by spectators of the sport, and the spectator need not have been observing a formal, organized recreation activity since even watching a casual game of catch may trigger the assumption of the risk doctrine, citing *Sutfin v Scheuer*, 74 NY2d 697 [1989]. In *Gotz v The State of New York*, supra, the plaintiff was at the park specifically to watch her grandchildren and was aware that other people were on the hill and field sledding, and observed some participants coming very near her position on the sidewalk. The court found that the plaintiff's presence at the

sledding hill rendered her a voluntary spectator to the sledding which was in progress throughout the day. Here, it is determined that the plaintiff was a voluntary bystander who placed herself at risk of injury from a thrown or shot lacrosse ball. She placed herself in close proximity to a dangerous situation by jogging into the area where the players were warming up throwing and shooting lacrosse balls.

Appreciation of the risk of being struck by a lacrosse ball does not require thorough knowledge of the sport because the risk is obvious (*Roberts v Boys & Girls Republic, Inc., supra*). In the instant action, the record established that the plaintiff's children had finished their games, which she observed. She then decided to jog around the perimeter of the field five laps, inside the fence, where a group of boys were throwing and shooting lacrosse balls into a net by the goal posts located by the fence. The players did not approach her, instead, she voluntarily jogged closer to where they were playing and was struck by a ball. By the plaintiff's own testimony, she was aware of the danger of being hit by a lacrosse ball, and even warned her five year old daughter to stay to her right side while bicycling so she would not get hit by the ball. The plaintiff was also aware that the players were engaging in a warm up or practice prior to their scheduled session. Thus, she was aware of the dangers, and voluntarily placed herself in a dangerous situation in the area where the players were engaging in sport. Here, the plaintiff argues that she had jogged the field on other occasions and even saw another woman walking in the field, and that her jogging in the field during practice was permitted as no one told her not to jog in the field. However, whether a risk is assumed does not depend upon a plaintiff's entitlement to be in a particular location. Spectator plaintiffs in assumption of risk cases are invariably injured in places where they have "every right" to be. Classically, they are injured in some way upon an area spectators have been invited to sit in, stand in, or pass through. The viability of their claims in these situations turns not upon their right to be where they are, but upon whether, in situating themselves as they have, they have consented, or at least impliedly, to assume the complained of risk (*see Roberts v Boys & Girls Republic, Inc., supra*). The plaintiff in this action was not invited to jog on the field during a time when the players were warming up, practicing, or playing. Instead, the plaintiff voluntarily placed herself in an area where players were throwing or shooting the lacrosse ball, and impliedly assumed the risk of being struck by the ball or even an errant lacrosse stick (*see Honohan v Turrone, 297 AD2d 705 [2d Dept 2002]*).

Although plaintiff argues that the defendants failed to exercise reasonable care, thus causing her to sustain injury, the very essence of a primary assumption of the risk is to relieve a defendant from the obligation of using reasonable care to guard against a risk which might be reasonably anticipated. In its most basic sense, the assumption of the risk doctrine means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone (*see Roberts v Boys & Girls Republic, Inc., supra*). It is undisputed that the owner of Phelps Park is the Town of Babylon. It is noted that an owner of a sport field is not an insurer of the safety of its spectators. Rather, like any other owner or occupier of land, the Town is under a duty to exercise reasonable care under the circumstances to prevent injury to those who come to watch the games played on its field, such as screening areas to provide a protected area. Here, the Town of Babylon provided fencing around the playing field, of higher height in the goal areas, to protect spectators or bystanders. However, the plaintiff was jogging inside of the fence while players were practicing, affording herself no protection from balls being thrown or shot, and not availing herself to the protection of the fence provided by the Town. The plaintiff has proffered no proof that the defendant Town of Babylon failed to exercise reasonable care to guard against risk of injury from a thrown or shot lacrosse ball, as it maintained a suitable fence in the appropriate areas. Thus, while the Town of Babylon had a duty to plaintiff, the Town of Babylon did not breach that duty and did not proximately cause injury to the plaintiff (*see Atkins v Glens Falls City School District, 53 NY2d 325*

[1981], *see also Starke v Town of Smithtown*, 155 AD2d 526 [2d Dept 1989]; *Procopio v Town of Saugerties*, 20 AD3 860 [2005]). It is further noted that the condition complained of by the plaintiffs was not unique and did not create a dangerous condition over and above the usual dangers that are inherent in the sport. There was an open and obvious condition of the players on the field throwing or shooting a lacrosse ball. The plaintiff created a dangerous condition for herself by jogging into the trajectory of the infant defendant's shot ball while the players were warming up. Thus, the actions of the plaintiff proximately caused her own injury, as she was aware of the obvious risks which she assumed (*see Morgan v State of New York*, 90 NY2d 471 [1997]; *Cannavale v City of New York*, 257 AD2d 462 [1st Dept 1999]).

Once the plaintiff has assumed a risk, recovery premised on injury attributable to the risk assumed is barred. Recovery may not, in such a circumstance, be had on a theory of negligent supervision. Negligent supervision remains a viable theory only insofar as the risk upon which the action is based has not been assumed (*see Roberts v Boys & Girls Republic, Inc., supra*). In the instant action, it has been determined as a matter of law that plaintiff Hoda Spiteri assumed the risk of being struck by the lacrosse ball. Moreover, the plaintiffs have not demonstrated that the defendants were negligent, nor have they controverted the testimony that the infant defendant was acting in a manner consistent with warming up for lacrosse practice. It was the plaintiff, instead who negligently and intentionally jogged into the path of the players on the field whom she knew were throwing and shooting the ball. The plaintiffs offered no testimony or proof that once the plaintiff jogged in place to permit a ball to be thrown, she let the players know that she was going to jog into their area of practice and the pathway of the balls. She was a seasoned observer of lacrosse and well aware of the risks associated with the game. The plaintiffs have submitted no expert testimony to demonstrate that the coaches negligently supervised the infant defendant or that their actions, or lack thereof, was the proximate cause of the plaintiff's injury, or that the infant defendant was acting in a negligent, reckless manner. Participants and spectators of sporting events are not deemed to have consented to reckless or intentional acts, but it is questionable whether it is "even arguably negligent" for youngsters participating in sporting events to make an errant throw or kick (*Sutton v Eastern New York Youth Soccer League, supra*). In light of the finding as a matter of law that the plaintiff, Hoda Spiteri, assumed the risk of injury while jogging on the field in the area of players throwing and shooting lacrosse balls, this court need not address the issue of whether Laura Bisson as administratrix of the estate of Edward T. Bisson, Jr., North Babylon Athletic Club, Suffolk County Police Athletic League, and North Babylon Lacrosse, are exempt from liability pursuant to the Volunteer Protection Act of 1997.

Based upon the foregoing, it is determined as a matter of law that the plaintiff assumed the risk of injury of being struck by a lacrosse ball while she jogged in the area where players were warming up, throwing the lacrosse ball and shooting it with a lacrosse stick. Thus, recovery against any of the defendants is barred by the doctrine of assumption of the risk.

Accordingly, motions (002), (003), and (004) are granted and the complaint and any cross claims asserted by the defendants are dismissed.

Dated: April 29, 2013


 HON. JOSEPH C. PASTORELLA, J.S.C.

 X FINAL DISPOSITION _____ NON-FINAL DISPOSITION