Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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VINCENT TARANTINO,

Plaintiff,

-against-

Index No. 8674/12
Mot. Cal.: 12/13/12
3/15/13
Mot. Seq. 1 & 2

QUEENS BALLPARK COMPANY, L.L.C., STERLING METS, L.P., STERLING METS OPERATIONS, L.L.C., STERLING PROJECT DEVELOPMENT GROUP, LLC, STERLING EQUITIES, INC., HOK GROUP, INC., POPULPOUS GROUP, LLC, POPULOUS ARCHITECTS, P.C., ARAMARK SPORTS AND ENTERTAINMENT GROUP, LLC, ARAMARK SPORTS AND ENTERTAINMENT SERVICES, LLC, ARAMARK SPORTS, LLC, CAESARS ENTERTAINMENT OPERATING COMPANY, INC., NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY and THE CITY OF NEW YORK,

Defendants.

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The following papers numbered 1 to 43 read on these motions by defendants **QUEENS BALLPARK COMPANY, LLC ("Queens Ballpark"), STERLING METS OPERATIONS, LLC, STERLING PROJECT DEVELOPMENT GROUP, LLC, STERLING EQUITIES, INC. (collectively "The Sterling Entities"), NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY (NYCIDA) and THE CITY OF NEW YORK** pursuant to CPLR 3211(a)(1), (5) and (7) dismissing the complaint or alternatively, pursuant to CPLR 3211(c) treating this motion as a summary judgment motion and dismissing the complaint and the cross-motion by defendants **ARAMARK SPORTS AND ENTERTAINMENT GROUP, LLC, ARAMARK SPORTS AND ENTERTAINMENT SERVICES, LLC AND ARAMARK SPORTS, LLC** pursuant to CPLR 3211 dismissing the complaint and/or pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims and the motion by defendants **HOK GROUP, INC., POPULOUS ARCHITECTS, P.C. AND POPULOUS GROUP LLC** dismissing the plaintiff's complaint and all cross-claims pursuant to CPLR 3211(a)(7) or, in the alternative,

granting summary judgment pursuant to CPLR 3212 and the cross-motion by plaintiff **VINCENT TARANTINO**, pursuant to CPLR 3025(b), for leave to amend the complaint to add Mets Development Company, LLC and HOK Sports Facilities Architects, P.C. as defendants. These motions and cross-motions, enumerated as Motions Sequences Nos. 1 and 2, are consolidated for purposes of disposition.

	PAPERS NUMBERED
Notices of Motion - Affidavits - Exhibits.....	1-10
Notices of Cross Motion - Affidavits - Exhibits.....	11-19
Answering Affidavits - Exhibits.....	20-32
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Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

This is an action to recover money damages for personal injuries allegedly suffered by the plaintiff when he was struck by a foul ball at CitiField during the course of a baseball game on April 22, 2011. The plaintiff alleges that while he was seated at a table inside a luxury suite watching a basketball game on television, he has struck in the eye by a foul ball. The luxury suite is located behind home plate on the Empire Level of the stadium.

The defendant NYCDIA has moved to dismiss the complaint, pursuant to CPLR 3211(a)(5), based upon on the statute of limitations. The complaint must be dismissed against NYCIDA as it is untimely. Under General Municipal Law § 880(2), the plaintiff had one year to commenced the action against NYCIDA. Here, the action was commenced more than a year after the accident.

In order to be successful on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of the claim (*see Held v Kaufman*, 91 NY2d 425 [1998]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]). On a motion to dismiss pursuant to CPLR

3211(a)(7) for failure to state a cause of action, a court must accept as true all the allegations in the complaint (*see Goldman v Metro. Life Ins. Co.*, 5 NY3d 561 [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2d Dept 2004]).

Even applying that liberal standard in the case at bar, each of the defendants' motions to dismiss the complaint must be granted. The pleadings, along with the documentary evidence submitted including the affidavits submitted by the defendants and the plaintiff and the seating chart establish that the plaintiff was seated inside a luxury suite located on the Empire Level of the stadium.

Based upon the doctrine of assumption of the risk of an open and obvious condition, the allegations in the complaint are not sufficient to allege that any of the defendants breached any duty owed to the plaintiff (*see Honohan v Turrone*, 297 AD2d 705 [2d Dept 2002]). The doctrine of assumption of the risk has an extensive application in cases involving attending sporting events (*see Akins v Glens Falls City School Dist.*, 53 NY2d 325 [1981]; *Murphy v Steeplechase Amusement Co.*, 250 NY 479 [1929]; *Newcomb v Guptil Holding Corp.*, 31 AD3d 875 [3d Dept 2006]; *Procopio v Town of Saugerties*, 20 AD3d 860 [3d Dept 2005]; *LaRocca v Pleasant Val. Little League*, 15 AD3d 628 [2d Dept 2005] *Koenig v Town of Huntington*, 10 AD3d 632 [2d Dept 2004]).

Defendant's duty was merely to make the conditions as safe as they appear to be. Risks of the activity which are fully comprehended or perfectly obvious are deemed to be consented to by the plaintiff, and hence, the defendant has performed its duty with respect to those risks (*Turcotte v Fell*, 68 NY2d 432 [1986]). This duty is fulfilled by the providing of sufficient screening behind home plate, where the danger of being struck by a ball or bat is the greatest (*see Davidoff v Metropolitan Baseball Club*, 61 NY2d 996 [1984]; *Akins*, 53 NY2d at 331; *Rosenfeld v Hudson Val. Stadium Corp.*, 65 AD3d 1117 [2d Dept 2009]; *Sparks v Sterling Doubleday Enters.,* 300 AD2d 467 [2d Dept 2002]).

Here, the plaintiff was not seated in a protected area and thus, there was no duty to insure his safety in this unprotected area of the stadium (*see Pira v Sterling Equities, Inc.*, 16

AD3d 396 [2d Dept 2005]). Therefore, there are no allegations in the complaint sufficient to state a cause of action against any defendant.

The plaintiff argues that his seat in the luxury box was behind home plate and therefore he should have been protected by the screen. The luxury box, however, was located on the Empire Level, which was a tier above the field. Simply because the suite was located behind home plate is not sufficient to require protective netting. The duty to provide protective netting does not extend to the upper levels of a stadium, as these are not in the area where the danger of being struck by the ball was the greatest. Inasmuch as the plaintiff was not seated in an area that requires protection, the plaintiff's reliance on *Correa v City of New York* (66 AD3d 573 [1st Dept 2009]) is misplaced. In *Correa*, a foul ball came through an improperly secured camera hole in the netting (*Id.*). Here, the plaintiff was not sitting in area that was protected by the netting, but instead was sitting in an Empire Level suit outside the area were netting was required.

Furthermore, the plaintiff's argument that he did not assume the risk of injury as he was seated at a table watching a television in a luxury suite is without merit. The fact that the plaintiff was seated in a luxury suite rather than a different party of the stands does not prevent the application of the assumption of the risk doctrine. The plaintiff's alleged lack of knowledge of the specific risk of injury is also unavailing. A spectator at a sporting event is deemed to have consented to those risks commonly appreciated which are inherent in and arise out of the nature of the event (*see Morgan v State*, 90 NY2d 471 [1997]; *Cannavale v City of New York*, 257 AD2d 462 [1st Dept 1999]). While the plaintiff may have been watching a basketball game while seated in the luxury suite, he was still in attendance at a baseball stadium. Inasmuch as a foul ball being hit into the stands is such an inherent risk of attending a baseball game, the fact that the plaintiff may have been distracted by the television does not obviate the assumption of the risk doctrine (*see Clapman v New York*, 63 NY2d 669 [1984]; *Ray v Hudson Val. Stadium Corp.*, 306 AD2d 264 [2d Dept 2003]). Here, the plaintiff

was a spectator who chose to occupy an unprotected seat at a baseball stadium, and therefore he is prevented from recovery by the assumption of the risk doctrine.

In light of the above discussion dismissing the complaint, the cross motion by the plaintiff for leave to amend the complaint to add Mets Development Company, LLC and HOK Sports Facilities Architects, P.C. as defendants is denied.

Accordingly, the motion by defendants Queens Ballpark, the Sterling Entities, NYCIDA and the City of New York to dismiss is granted and the complaint is dismissed against those defendants. The cross motion by defendants Aramark Sports and Entertainment Group, LLC, Aramark Sports and Entertainment Services, LLC and Aramark Sports, LLC to dismiss is granted and the complaint is dismissed against those defendants. The motion by defendants HOK Group, Inc., Populous Architects, P.C. and Populous Group LLC to dismiss is granted and the complaint is dismissed against those defendants. The cross motion by plaintiff for leave to amend the complaint is denied.

Dated: April 3, 2013

TIMOTHY J. DUFFICY, J.S.C.