SHORT FORM ORDER

COPY

INDEX No. 08-30894
CAL. No. 12-02406OT

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

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-10-13
ADJ. DATE 8-2-13
Mot. Seq. # 004 - MD

SYDNEY NOEL POUPIS, an infant by her mother and natural guardian, LORI POUPIS and LORI POUPIS, Individually,

Plaintiffs,

- against -

CYNTHIA LASKOW, DAVID DURAN, CRYSTAL BROOK STABLES and CYNTHIA LASKOW AND DAVID DURAN d/b/a CRYSTAL BROOK STABLES,

Defendants.

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 16; Replying Affidavits and supporting papers 17 - 18; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This action was commenced to recover damages, personally and derivatively, for personal injuries sustained by the infant plaintiff, Sydney Noel Poupis (Sydney), on December 1, 2007, when she was thrown from a horse during a riding lesson held at Crystal Brook Stables, 141 Hammond Lane, Centereach, N.Y. The defendant Cynthia Laskow (Laskow) was the trainer conducting the subject riding lesson. She, and the defendant David Doran (Doran), sued herein as David Duran, own Crystal Brook Stables (CBS) which consists of a number of horse barns, riding rings and paddocks. The plaintiffs allege, among other things, that the defendants permitted a horse, "who they knew to be of temperamental nature and disposition" and who they observed "bucking and rearing," to injure Sydney, and that they allowed Sydney to continue the lesson after Sydney expressed concern for her safety.

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The defendants now move for summary judgment on the grounds of assumption of risk, and that no duty to the plaintiffs was breached. In support of their motion, the defendants submit, among other things, the deposition testimony of Sydney and Laskow, and the deposition transcripts of three nonparty witnesses who were participants in the subject riding lesson. The depositions of the various nonparty witnesses are unsigned, and the defendants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). Under the circumstances, the deposition testimony of the nonparty witnesses is not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).

In considering this motion, it is appropriate to set forth some background information and relevant definitions regarding horseback riding as set forth in the defendants' submission. "Bucking" is the term used when a horse kicks up its rear legs, and "rearing" is when a horse kicks up its front legs. A horse that is overly energetic, rambunctious and difficult to control is said to be "up." In order to calm a horse which is up or acting up, and to reduce some of its excess energy, a rider or trainer will "lunge" the horse. That is, he or she will hook the horse to a long lead line (rope or tether) and allow the horse to run around him or her in a circle, while standing still. "Tacking" is the process of dressing the horse with saddle and bridle to enable it to be ridden safely.

At her deposition, Sydney testified that she began taking horseback riding lessons when she was seven years old, that she attended riding lessons at two other stables before starting lessons at CBS when she was 11 or 12 years old, and that she had fallen off of horses prior to this incident. She went to CBS almost every day for the two years before this incident, and most often rode a horse by the name of Shady. Prior to her accident, she had ridden Shady when he bucked or reared, and she had been thrown off by him on occasion. She also had lunged Shady, always asking permission from Laskow to do so. Sydney further testified that she arrived at CBS at approximately 9:30 a.m. on the day of her accident, that it was a cold and windy morning, and that the ground was somewhat damp. In preparation for her lesson, she groomed and tacked Shady, and walked him out to the main ring at CBS. As she walked Shady to the ring, she noticed that he had a lot of energy. There were approximately ten riders in the lesson that morning. She does not remember how many times that she rode around the ring, but at one point she asked Laskow if she should "get off and lunge him first because he was acting up." Laskow said to "work him through it," which she took to mean to keep riding him "to get some of his energy out." Sometime thereafter, Shady got "spooked" and took off bucking, causing her to fall off to her knees. She does not recall anything after her fall, except that she was holding the reins while on her knees. She did not recall any instruction to drop the reins. Her next memory is lying in someone's lap with a towel over her head.

Laskow testified that she has co-owned CBS with Doran since approximately 1997, and that the facility has a main ring which is 220 feet long by 180 feet wide. She was the only trainer at CBS in 2007, giving lessons to approximately 15 to 20 students during that year. She stated that the main ring would be used for group lessons of two to nine riders, the higher number during lessons for advanced riders. She indicated that the main ring could accommodate up to ten riders. Laskow further testified that there were six to seven riders in the ring during the incident when Sydney was injured, that it was

sunny and warm that morning, and that it was a "little breezy," with no wind gusts. She stated that if it was really gusty that she would cancel a lesson, and that one indicator that the wind was too strong is if the horses act up in their paddocks. At the time of Sydney's accident, she was standing in the middle of the main ring, approximately 20 to 25 feet away. The accident happened approximately 30 minutes into the one hour lesson. She stated that Shady was "quiet" during the first 20 minutes, and that she did not see him act up, buck, or rear. She indicated that, at one point, Sydney said Shady was a little up, and that she told Sydney "let's let him trot around a bit, let's see how he is." Sydney then trotted Shady around and "at that point he was fine still." She does not remember if she instructed Sydney to bring Shady into the middle of the ring, which she would normally do if there were too many riders cantering their horses at the time or if a horse was acting up. Laskow further testified that Sydney never asked to get off of Shady, or to lunge him. She watched Sydney canter once or twice around the ring, and saw for the first time Shady "let out a buck." Sydney got off balance and ended up more towards the middle of the ring where she fell off onto her knees facing Shady. Laskow further testified that she yelled for Sydney to let go of the reins, that Shady wanted to turn around to trot away, and that he then kicked Sydney in the face with his rear hoof. She indicated that she instructs her students to let go of a horse's reins if they fall, and that at least one student, Danielle Pavelka, indicated that she had witnessed Sydney's accident. Laskow acknowledged that she had received complaints that Shady was "bratty" when riders placed a saddle on him, and that one rider had complained that Shady had bucked and thrown her off of him.

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. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

As a general rule, a plaintiff who voluntarily participates in a sporting or recreational event is held to have consented to those commonly-appreciated risks that are inherent in, and arise out of, the nature of the sport generally and flow from participation therein (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Paone v County of Suffolk***, 251 AD2d 563, 674 NYS2d 761 [2d Dept 1998]), including the injury-causing events which are the known, apparent, or reasonably foreseeable risks of the participation (*see* ***Rosenbaum v Bayis Ne'Emon Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]; ***Colucci v Nansen Park, Inc.***, 226 AD2d 336, 640 NYS2d 578 [2d Dept 1996]). Although awareness of the risks involved in a particular sport is an essential element of the primary assumption of risk doctrine, it is not necessary that the injured plaintiff have foreseen the exact manner in which his or her injury occurred; all that is required is an awareness of the injury-causing potential of the mechanism from which the injury results (***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]). In addition, the plaintiff's awareness of risk is to be assessed against the background of the skill and experience of the particular plaintiff (*see* ***Maddox v City of New York***, *id.*; ***Gahan v Mineola Union Free School Dist.***, 241 AD2d 439, 660 NYS2d 144 [2d Dept 1997]).

The assumption of risk doctrine has been applied by the courts to grant summary judgment in cases involving horses and horseback riding (***Tilson v Russo***, 30 AD3d 856, 818 NYS2d 311 [3d Dept 2006]; ***Eslin v County of Suffolk***, 18 AD3d 698, 795 NYS2d 349 [2d Dept 2005]; ***Becker v Pleasant Val. Farms***, 261 AD2d 427, 690 NYS2d 76 [2d Dept 1999]; ***Rubenstein v Woodstock Riding Club***, 208 AD2d 1160, 617 NYS2d 603[3d Dept 1994]). "A participant in a recreational activity such as horseback riding assumes risks which are inherent in and arise out of the nature of the activity and it is well established that an inherent risk in sporting events involving horses is injury due to the sudden and unintended actions of the animals, including those actions which result in the participant being thrown or falling" (***Corica v Rocking Horse Ranch, Inc.***, 84 AD3d 1566, 923 NYS2d 739 [3d Dept 2011], citing ***Dalton v Adirondack Saddle Tours, Inc.,*** 40 AD3d 1169, 836 NYS2d 303 [3d Dept 2007]). The courts have additionally held that horses are large, strong, unpredictable animals and therefore, there is always an inherent risk of being injured by a horse while riding one (***Eslin v County of Suffolk***, *supra*; ***Norkus v Scolaro***, 267 AD2d 666, 719 NYS2d 723 [3d Dept 1999]).

However, participants in sporting events will not be deemed to have assumed risks of reckless or intentional conduct or of concealed or unreasonably increased risks (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Anand v Kapoor***, 61 AD3d 787, 877 NYS2d 425 [2d Dept 2009]; ***Ribaudo v La Salle Inst***., 45 AD3d 556, 846 NYS2d 209 [2d Dept 2007]; ***Rosenbaum v Bayis Ne'Emon, Inc.***, *supra*; ***Huneau v Maple Ski Ridge, Inc.***, 17 AD3d 848, 794 NYS2d 460 [3d Dept 2005]). In addition, it has been held that the instructions of a superior can overcome a party's assumption of the risk by requiring action despite his or her initial cautionary concerns (*see* ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]; ***Petretti v Jefferson Val. Racquet Club***, 246 AD2d 583, 668 NYS2d 221 [2d Dept 1998]; ***Verduce v Board of Higher Educ. in City of N.Y.,*** 9 AD2d 214, 192 NYS2d 913 [1st Dept 1959], *revd* 8 NY2d 928, 204 NYS2d 168 on dissenting opn. below [1960]; *see also* ***Kelly v Warner Bros.***, 230 AD2d 829, 646 NYS2d 631 [2d Dept 1996]; *but see* ***Roots v Claremont Riding Academy, Inc.***, 20 AD2d 536, 245 NYS2d 172 [1st Dept 1963]).

Here, there are issues of fact whether Laskow should have cancelled the lesson due to the wind conditions, and whether she exceeded her self-imposed limitation on the number of riders permitted in a given lesson. More importantly, there are issues of fact whether Sydney asked to dismount Shady and lunge him, and whether Laskow's instruction to ride Shady without lunging him increased the risk inherent in the sport of horseback riding. The court' s function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Whether Laskow's actions were reckless or unreasonably increased the risks of injury in this instance is for the trier of fact to resolve (***Anand v Kapoor***, *supra*; ***Jacobs v Kent***, 303 AD2d 1000, 757 NYS2d 408 [4th Dept 2003]; ***Laboy v Wallkill Cent. School Dist.***, 201 AD2d 780, 607 NYS2d 746 [3d Dept 1994]). The failure of the defendants to make a prima facie showing of entitlement to summary judgement requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; *see also* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008];

Bozza v O'Neill, 43 AD3d 1094, 842 NYS2d 88 [2d Dept 2007]).

In any event, the plaintiffs have raised additional issues of fact in their opposition to the motion which would have required its denial. The plaintiffs submit, among other things, the affirmation of their attorney, who incorporates the deposition transcripts of the three nonparty witnesses into his opposition to the defendants motion. Therefore, the Court now will consider, the unsigned deposition transcripts submitted in opposition to the motion as the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]). Although they vary in their personal knowledge of all of the relevant events, the three nonparty witnesses give similar testimony while varying in some minor details. In summary, the three testified that the weather was cold and windy that day. Danielle Pavelka testified that there were ten girls riding in the lesson that day, that Shady was acting up for approximately 15 minutes before Sydney's accident, and that Sydney asked if she could get off of Shady and lunge him before the accident. Kaitlin Foster testified that there were ten or eleven girls riding in the lesson that day, and that it was really windy that day and all the horses were "going crazy," especially Shady because "he was so young." Kaitlin's sister, Karli Foster testified that Shady was really up and bucking "long enough for all of us to stop," and that Sydney asked to get off of Shady and lunge him but that Laskow said "no."

In addition, the plaintiffs submit the affidavit of Katherine Houpt (Houpt), a licensed veterinarian and author on, and researcher of, equine behavior who states that cold weather and windy weather invigorates horses, making them act up. She references a certified copy of climatological data for December 1, 2007 from the United States Department of Commerce, National Climatic Data Center which reveals that the temperature was 34 to 35 degrees fahrenheit, with wind at 21 to 22 miles per hour and gusts to 32 miles per hour. Houpt opines that Laskow failed to provide a safe training session in that she did not take into consideration the weather and Shady's behavior, and that Laskow recklessly told Sydney to ride through to calm Shady. She further opines that Laskow's actions "exacerbated the risks of horseback riding beyond what is normally encountered."

It is determined that there are issues of fact requiring a trial of this matter. Accordingly, the defendants' motion for summary judgment is denied.

Dated: 10·16·13

Hon. Denise F. Molia
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**