Mamati v City of New York Parks & Recreation
2013 NY Slip Op 33830(U)
September 9, 2013
Supreme Court, Queens County
Docket Number: 13927/11
Judge: Kevin J. Kerrigan
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Tashin Mamati,

Plaintiff,

- against -

The City of New York Parks & Recreation and The City of New York,

Defendants.

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Index Number: 13927/11

Motion Date: 8/27/13

Motion Cal. Number: 71

Motion Seq. No.: 2

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The following papers numbered 1 to 10 read on this motion by the City of New York (sued herein as the City of New York Parks & Recreation and the City of New York) for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibit.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint is granted.

Plaintiff was injured as a result of falling off his BMX trail bicycle while performing stunts on a BMX bike trail at Cunningham Park in Queens County on August 26, 2010. Cunningham Park contains several mountain bike trails of various levels of difficulty. An entity known as CLIMB produced a trail map which is available at the entrances of the Park showing the locations, names and levels of difficulty of the trails. There are also warning signs posted at the trails, which plaintiff testified in his deposition that he saw. The sine qua non of BMX cycling is trick riding by, inter alia, riding and jumping over bumps, obstacles and other irregular topographic features. The BMX trails in Cunningham Park were designed with such features specifically for BMX riders, in varying

grades of difficulty. The trail on which plaintiff was injured is graded as an expert trail.

Plaintiff testified in his deposition that he was going off a dirt bump when his accident occurred. He explained that he walked his bike to the top of a hill that was perhaps 50 feet high and at a 30-40 degree slope. At the bottom of the hill there is a dirt bump divided into a beginning bump and a landing bump. He explained that "the first and the second bump are the same...one bump is the bump you go off and then the other bump is the bump that you land on." He rode down the hill, went off the first bump and landed on the second bump. However, instead of landing on both wheels as he was supposed to, he landed on his front wheel and flipped over.

He testified in his 50-h hearing and deposition that he considered himself an expert BMX biker and that he had qualified as an expert in BMX bike handling in competitions. He considered the subject trail to be an expert trail.

Although he had never ridden on the subject trail before the date of the accident, he had ridden hundreds of times in areas designated for BMX biking, including expert trails. He had also ridden on other expert trails in Cunningham Park six or seven times prior to the date of the accident and had done similar types of hills. He had also gone over the same bump on the date of the accident approximately two times before the accident with no problem, landing, as he was supposed to, and as he also had done on the six or seven prior occasions that he had gone over similar bumps in Cunningham Park, on both wheels at the same time.

The City moves for summary judgment upon the grounds that plaintiff assumed the risk of injury by engaging in the sport of BMX biking on the subject trail, that the City did not have prior written notice of the allegedly defective and dangerous condition of the trail and that the City did not create the condition.

The doctrine of assumption of risk as applied to a sporting activity provides that "by engaging in a sport or recreational activity, 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 NY 2d 471, 484 [1997]). The Court of Appeals has recognized that the doctrine exists to safeguard "free and vigorous participation in athletic activities" (Trupa v Lake George Central School Dist., 14 NY 3d 392, 395 [2010] [quoting Benitez v New York City Bd. Of Educ., 73 NY 2d 650, 657 [1989]). It has observed, "We have recognized that athletic and recreative activities possess enormous social value, even while they involve significantly

heightened risks, and have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise" (id. at 395).

Jumping over bumps and landing on bumps and other irregular features is an inherent part of the sport of BMX biking (Totino v Nassau County Council of Boy Scouts of Am., 213 AD 2d 710, 711 [2nd Dept 1995], lv denied 86 NY 2d 708 [1995]). Falling off the bicycle while performing such stunts is a risk inherent in and which arises out of the nature of the sport.

The doctrine of assumption of risk applies to any readily observable condition or defect in the area where the sport was played (see Sanchez v. City of New York, 25 AD 3d 776 [2nd Dept 2006]), including the playing surface (see Cevetillo v Town of Mount Pleasant, 262 AD 2d 517 [2nd Dept 1999]). The bumps which allegedly caused plaintiff to fall were readily observable and, in fact, were observed by plaintiff. And while a player may not be held to have assumed the risk with respect to a dangerous condition over and above the usual dangers inherent in the sport (see Clark v. State of New York, 245 AD 2d 413 [2nd Dept 1997]), bumps and obstacles are common BMX trail features that not only do not transcend the usual dangers inherent in the game of BMX biking but are integral to it. The subject bumps were, thus, not "defects" at all but were what attracted plaintiff to the trail. Plaintiff not only observed the subject bumps before his accident but he rode over them deliberately, and successfully, as part of his sport, twice before his third unsuccessful jump, and he had ridden over similar bumps on other trails.

Plaintiff did not testify that the trail's features, specifically, its bumps, were in any way dangerous or unusual or deviated from the norm in such a way as to cause his accident. Rather, his testimony expressed nothing other than that the trails' features were the usual set-up of a take-off bump at the bottom of a hill and a landing bump, and that his fall was the result of nothing other than merely a bad landing.

Plaintiff's counsel's opposition papers fail to raise any triable issue of fact. The only evidence purporting to show that the trail design was dangerous is the affidavit of plaintiff's expert civil engineer, Nicholas Bellizzi, in which he opined that the slope of the first hill was not what it appeared to be because it appeared to be less than 20 degrees but varied from 22-25 degrees, which was not obvious. He opined that the non-uniform slope of the first jump or mound resulted in different launch angles and positions of the bicycle determining whether the bicycle

would land on one wheel or both wheels. Plaintiff, however, did not testify that the bump was not what it appeared to be or that he had any difficulty in making the jumps because of the varying angle of the bump, or that the angle of the bump changed his launch angle, or that the spot on the bump where he launched himself was not the same spot or the same slope on the bump where he successfully launched the first two times, or that his landing on the front wheel was caused by a different launch angle resulting from a different slope wheich had not been apparent to him. Bellizzi's opinion is purely conclusory and speculative. He provides no objective basis for concluding that the varying slopes of the take-off mound necessarily would cause plaintiff to land, or would make him more likely to land, on his front wheel. Indeed, Bellizzi avers that he is a civil engineer. He does not aver that he has any knowledge or expertise concerning the sport, or techniques, of BMX biking. He does not express any knowledge of how a BMX rider controls his bike while taking off from a mound or while airborne or how differing slopes would make any difference in a biker's ability to land on both wheels. Indeed, plaintiff himself, the only one whose testimony in this regard could be considered that of an expert, did not allege that the slope of the take-off mound was not what it appeared to be or that he was in any way surprised by it or that it had anything to do with his landing on his front wheel. He offered no testimony that would indicate an opinion that the take-off mound was anything out of the ordinary. Indeed, irregular features, slopes and unimproved surfaces are what is required for the sport of BMX cycling and constitutes the very challenge that differentiates BMX cycling from cycling on paved, regular surfaces (see Cotty v Town of Southampton, 64 AD 3d 251 [2nd Dept 2009]).

Therefore, not only is Bellizzi's opinion expressed in his affidavit speculative, it is incompetent, and is therefore of no probative value.

Accordingly, the motion is granted and the action is dismissed.

This Court need not reach, and will not address, the alternative grounds of the motion, to wit, that the City did not have prior written notice of the condition and that it did not create the condition.

Dated: September 9, 2013

KEVIN J. KERRIGAN, J.S.C.