| **Bakkensen v City of New York** |
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| 2014 NY Slip Op 31965(U) |
| July 28, 2014 |
| Sup Ct, New York County |
| Docket Number: 115883/08 |
| Judge: Carol R. Edmead |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD, Justice

PART 35

Tamala Bakkensen

-v-

City of New York

INDEX NO. 115883/08

MOTION DATE 6-13-14

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that the City serve a copy of this order with notice of entry within 30 days of entry.

This constitutes the decision and order of the Court.

FILED

JUL 29 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7-28-14

_____, J.S.C.
HON. CAROL EDMEAD

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TAMALA BAKKENSEN,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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Index No.: 115883/08

Motion Seq. No. 001



HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries, plaintiff Tamala Bakkensen ("plaintiff") moves to set aside the jury's verdict rendered on April 11, 2014, and for a new trial.

*Factual Background*

On February 25, 2008, at approximately 7:00 p.m., plaintiff was sledding down a hill on Dongan Lawn (an area of Fort Tryon Park in Manhattan), which is maintained by defendant City of New York (the "City"). While sledding, plaintiff was misdirected and was headed toward fencing that surrounded a tree. Plaintiff believed that based upon what she could see that she would be able to kick off of the fencing with her leg and re-direct her position so she could continue down the hill. She believed that she could do this safely based on the speed she was traveling as well as the type of fence toward which she was headed.

However, as plaintiff attempted to re-direct her position, her right leg became impaled and ensnared on a seam of the fence, which was pieced together with twisted metal protruding outward. Plaintiff argued at trial that the fence condition was created by the City (which was also responsible for maintaining the fence) and was not readily discoverable by the public *via* reasonable inspection.

The witnesses who testified at trial were plaintiff, Michael Bakkensen (plaintiff's husband), Dr. Ohannes Nercessian (plaintiff's treating physician), and Richard Hauser and Marechal Brown (both on behalf of the City). The charge conference was conducted on April 10, 2014. Summations, jury charge, and deliberations and verdict occurred the following day.

After summations, the court heard argument on the City's motion for a directed verdict to dismiss the action based on the assumption of the risk doctrine, as well as its motion regarding the application of General Obligations Law 9-103. Following argument, the court reserved decision on the motions, and permitted the case to go to the jury. Also, the court determined that the doctrine of the primary assumption of risk applied to the action and charged the jury accordingly.[1]

And, after a lengthy discussion as to the proposed verdict questionnaires presented by respective counsel, the court permitted the inclusion of the following question as Question # 1: "Did the plaintiff Tamala Bakkensen assume the risk of injury from sledding on Dongan Lawn?"[2] After deliberations, the jury answered "yes" to this question, thus reaching a defense verdict.

*Arguments*

Plaintiff argues that she has been denied substantial justice mandating a new trial by the court's inclusion of the assumption of risk question in the verdict questionnaire. The implied assumption of the risk doctrine provides that where the defendant owes a duty of reasonable care

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[1] The court's jury charge was based on Pattern Jury Instruction 2:55. The specific charge used in the action as tailored to contain the relevant facts of the case was attached to the moving papers as Exhibit "J."

[2] The parties disagree as to whether plaintiff objected to the inclusion of this question. For purposes of this decision, the court will assume that plaintiff in fact objected to this question.

to plaintiff, but plaintiff voluntarily engages in an activity involving a risk of harm, and plaintiff knows and fully understands (or should have known and fully understood) the risk of harm, the jury must apportion fault between plaintiff and defendant for the accident.

Thus, to plaintiff, the doctrine should considered by a factfinder when assessing the presence of comparative negligence of the plaintiff, and therefore bears no relevance to the presence of a duty of care. The doctrine is not a mandatory element of proof that a plaintiff must prove to obtain a recovery. Instead, it is something the jury may consider only when assessing whether the plaintiff was comparatively negligent. As such, by including this question, the jury was left with no reasonable alternative but to answer the question in the affirmative.

Plaintiff contends that with respect to the doctrine, the jury charge that was presented to the court by defense counsel is based on the *Arbegast* case (*Arbegast v. Board of Educ. of South New Berlin Cent. Sch.*, 65 N.Y.2d 161 [1985]), which concluded that CPLR 1411 requires diminishment of damages when the doctrine is applicable. The charge as given stated the following: "If you find that [plaintiff] did assume the risk, you will state to the Court on the form I will provide to you the respective degrees of fault of the plaintiff and the defendant."

Despite the charge, however, the court permitted, over objection, an overbroad threshold question on assumption of risk crafted by the City's counsel to be presented to the jury. And, based on the *Arbegast* decision, a separate jury question should not be given in implied risk of assumption matters.

During deliberations, the jury presented a question to the court relative to whether plaintiff assumed the risk of "this injury" or of any injury while sledding. Thus, the essential problem with the question is that there is no doubt plaintiff assumed *a* risk of injury while

sledding. However, there are some risks of injury that she did not assume. Because the questionnaire included the improper question, the jury, no matter what the facts were, had no choice but to answer that she did assume the risk of injury from sledding and thus the City was bound to obtain a defense verdict. As such, plaintiff was deprived of her right to a fair trial.

Here, the risk of impalement was unknown to plaintiff (or anyone else), as the subject metal wiring was not easily seen and was buried under snow. The defendant has the burden of proof on this issue. The *Arbegast* case set forth that the assumption of risk doctrine was not founded on express contract, but on plaintiff's voluntarily encountering the risk of harm from defendant's conduct with full understanding of the possible harm to himself or herself. But here, plaintiff had no awareness of the risk of harm from the metal wiring on the fence, and thus could have had no understanding of the possible harm of becoming impaled. As such, there was no evidence to support the court's giving of the assumption of risk charge to the jury.

In opposition, the City notes that plaintiff did not present a transcript of: (a) the court's charge conference with the parties; (b) the jury charge; or (c) the proceedings surrounding the submission of the verdict sheet to the jury. Also, the City's request as to the jury charge at issue (and in turn, Question #1 on the verdict questionnaire) was for a charge on *primary* assumption of risk, not one based on implied assumption of risk.

As to its substantive arguments, the City contends that the court properly allowed the jury to consider primary assumption of risk, based on the known and obvious risks assumed by plaintiff, an admittedly experienced sledder who chose her sledding equipment (a flimsy, smooth plastic sled without any steering or stopping mechanism) and chose to sled in an unsupervised area at night. Also, there was no proof presented at trial of defective maintenance of the fence, or

a defective condition. The small, fenced-in tree in the middle of the lawn was an open and obvious hazard, and plaintiff admitted she saw the tree and its fencing before the accident. When plaintiff lost control and veered toward the tree, she did not roll off the sled to avoid injury, but chose to stay on the sled and slow her forward momentum and re-direct her course by using her unprotected leg as a rudder.

There is no evidence that the subject fencing was defective or improperly maintained, and there is no evidence that the City had prior notice of any alleged dangerous condition. Plaintiff proffered no expert testimony to support a theory of a defective condition or defective maintenance. As such, at the City's request, the court specifically instructed the jury that such issues were not presented in this case, to which plaintiff took no exception. Here, the evidence showed that the tree barrier functioned exactly as intended; it prevented plaintiff from colliding with and damaging the tree.

The primary assumption of the risk doctrine applies. Under the doctrine, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions and risks which are inherent in the activity. Inherent risks are those which are known, apparent, natural, or reasonably foreseeable consequences of participation in the activity. Because determining the existence and scope of a duty of care requires an examination of plaintiff's reasonable expectations of the care owed her by others, the plaintiff's consent does not merely furnish the defendant with a defense; it eliminates the duty of care that would otherwise exist. Thus, when a plaintiff assumes the risk of participating in a sporting event like sledding, the defendant is relieved of the legal duty to the plaintiff and therefore cannot be charged with negligence. As long as the defendant's conduct does not

unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk.

In this case, the subject fencing was readily observable and a foreseeable and obvious hazard. It is clearly not a hidden defect or concealed hazard. Moreover, the City need not show that injury was foreseeable.[3]

In reply, plaintiff argues that the *Weinberger* decision (*Weinberger v. Solomon Schechter School of Westchester*, 102 A.D.3d 675, 961 N.Y.S.2d 178 [2d Dept 2013]) -- cited by defendants for illustration of the doctrine of primary assumption of risk[4] -- is controlling and indistinguishable from the case at bar. Here, plaintiff has acknowledged that she was aware of inherent risks to sledding, such as falling off a sled due to icy conditions or a bump on the hill. However, plaintiff did not assume that the City would improperly erect a wire fence around a tree in the middle of a sledding hill and that the metal wiring would protrude out toward her, leading to impalement. In other words, a dangerously erected fence is not an inherent risk of sledding down a small public hill.

*Discussion*

At the outset, the court declines to revisit the City's motions for a directed verdict, as the jury's verdict rendered such motions moot (*see Karanikolas v. Wengert*, 2005 WL 6766473 [Sup Ct Queens Cty 2005]).

Further, plaintiff's motion to set aside the verdict is denied. As pointed out by plaintiffs,

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[3] The City also argues for immunity under General Obligations Law 9-103, and that plaintiff failed to timely object under CPLR 4110-b. Due to reasons articulated in this decision, the court declines to recite, in their entirety, the City's arguments as to these issues.

[4] Plaintiff concedes that the jury charge at issue pertains to the doctrine of primary assumption of risk.

under "CPLR 4404(a), the motion court has the discretion to set aside the verdict and order a new trial 'in the interest of justice" "when the aggrieved party is deprived of substantial justice" (*Selzer v. New York City Transit Auth.*, 100 A.D.3d 157, 952 N.Y.S.2d 26 [1st Dept 2012]).

It is noted that plaintiffs' moving papers are based entirely on the contention that the implied assumption of risk doctrine is inapplicable to the case. As conceded by plaintiff in reply, however, the jury charge at issue was based on the *primary* assumption of risk doctrine. Thus, plaintiff failed to meet its burden in the moving papers, warranting denial of the motion.

In any event, even assuming the court considers plaintiff's arguments in reply regarding the primary assumption of risk doctrine, the motion must be denied.[5]

Plaintiff assumed the risk of injury under the primary assumption of risk doctrine. An experienced skier assumes the risks of personal injury caused by, among other things, terrain, weather conditions, ice, natural objects and *man-made objects* that are incidental to the provision or maintenance of a ski facility, all of which are inherent in the sport of downhill skiing (*see Giordano v. Shanty Hollow Corp.*, 209 A.D.2d 760, 617 N.Y.S.2d 984 [3d Dept 1994]; *Calabro v. Plattekill Mt. Ski Center, Inc.*, 197 A.D.2d 558, 602 N.Y.S.2d 655 [2d Dept 1993] (emphasis added)). Therefore, likewise here, plaintiff, with experience sledding down a hill, assumed the risk of personal injury caused by the terrain, weather conditions, and man-made objects (such as the subject fencing) readily observable that was, according to the testimony, incidental to the maintenance of the park and its trees (*see also Bedder v. Windham Mountain Partners, LLC*, 86 A.D.3d 428, 927 N.Y.S.2d 47 [1st Dept 2011] ("Personal injury caused by hitting a stump on the

[5] Before delving into the merits of the parties' submissions, the court notes it will disregard the contentions in the moving papers regarding the *Arbegast* case and the doctrine of implied assumption of risk.

side of the trail, while swerving to avoid another person using the trail, is one of the risks inherent in downhill snowboarding")).

*Weinberger v. Solomon Schechter School of Westchester* (102 A.D.3d 675, 678-679, 961 N.Y.S.2d 178 [2d Dept 2013]), discussed by plaintiff, is not binding case law; in any event, it is inapposite to the facts of this matter. In *Weinberger*, the court explicitly based its decision on, *inter alia*, findings that the defendant school provided "faulty equipment" that contained a "defect" ("The faulty equipment provided by the School and the decreased distance between [the infant plaintiff] and the batter, from which she was pitching at the direction of [her coach] without the benefit of the L-screen, did not represent risks that were inherent in the sport of softball and, instead, enhanced the risk of being struck by a line drive")).

In the case at bar, it is undisputed that there was *no* evidence at trial that the subject fencing was defective or improperly maintained, or that the City had prior notice of any alleged dangerous condition. Moreover, plaintiff supplied no expert testimony to support a theory of a defective condition or defective maintenance. And, the court specifically instructed the jury that such issues were not presented in this case.

Thus, plaintiff's contention that a "dangerously erected fence is not an inherent risk of sledding down a small public hill" is unsupported by the record and is therefore speculative at best. As such, it is insufficient to warrant the setting aside of the jury's verdict (*see Marino v. Rodi*, 2005 WL 6591104 [Sup Ct Westchester Cty 2005]).

Accordingly, the court finds that plaintiff was not denied substantial justice so as to warrant a new trial by the court's inclusion of the assumption of risk question in the verdict questionnaire. Therefore, the complaint remains dismissed with prejudice.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that the City serve a copy of this order with notice of entry within 30 days of entry.

This constitutes the decision and order of the Court.

Dated: July 28, 2014

Hon. Carol Robinson Edmead, J.S.C.