SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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ARTHUR PISANY,

Plaintiff,

-against-

Index No. 158071/13

CITY OF NEW YORK and BRYANT PARK MARKET EVENTS, LLC,

Motion Sequence Nos. 001 & 002

Defendants.

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NANCY M. BANNON, J.S.C.:

I. INTRODUCTION

In this action to recover damages for personal injuries, plaintiff, Arthur Pisany, alleges that he was injured on January 27, 2013, at an ice skating rink located in Bryant Park in Manhattan after colliding with another skater when the rink became overcrowded. Plaintiff moves, pursuant to CPLR 3126, to strike the answer of defendant Bryant Park Market Events, LLC (BPME), or, in the alternative, for a negative inference at trial, for BPME's alleged spoliation of video surveillance footage of the accident (motion sequence number 001). Defendants City of New York and BPME separately move for summary judgment dismissing the complaint (motion sequence number 002).

II. BACKGROUND

On the date of the accident, Bryant Park was owned by the City, and was maintained by nonparty Bryant Park Corporation (BPC) pursuant to an agreement with the City. BPC retained BPME

to operate the ice skating rink.

On April 19, 2013, plaintiff served a notice of claim upon the City. The City scheduled a hearing pursuant to General Municipal Law § 50-h to be conducted on July 11, 2013, but the records of the New York City Comptroller's Office indicate that plaintiff did not appear for the hearing, and did not request an adjournment of the hearing.

Plaintiff commenced this action against the City and BPME on September 4, 2013. Plaintiff alleges that defendants negligently managed, controlled, repaired, and maintained the Bryant Park ice rink, specifically, that "he was caused to fall and sustain serious and permanent injuries as a result of the overcrowding on the ice rink and the aggressive unsupervised skaters." In its answer, the City asserted numerous affirmative defenses, including primary assumption of the risk and failure to satisfy a condition precedent based on plaintiff's failure to submit to a hearing pursuant to General Municipal Law § 50-h. BPME also asserted several affirmative defenses, including primary assumption of the risk. Plaintiff's verified bill of particulars alleges that defendants were negligent "in failing to provide the claimant with proper protection, supervision and safe place to skate without overcrowding and/or aggressive skaters."

Plaintiff testified at his deposition that he arrived at the Bryant Park ice rink at about 11:30 a.m. on January 27, 2013,

with his wife, Julita, and his cousins, Michael, Urszula, and Hendryk. He asserted that he first skated for approximately 40 to 45 minutes, at which time the rink was "a little crowded." Plaintiff further testified that, at approximately 2 p.m., when he was again skating, "somebody pushed [him] because [he] was going in a circle and [he] fell." Plaintiff explained that, without warning, a 10-year-old skater "cut [him] off skating," and that he "felt it." He averred that he saw the child skate off in front of him, and that the child was skating fast. Plaintiff testified that there were three to five ice monitors on the ice rink at the time of his accident and that, at that moment, the rink was "[c]rowded," as additional skaters had begun to use the rink after it was resurfaced subsequent to plaintiff's morning skate.

Plaintiff claims that he saw "[m]aybe two" other collisions between skaters prior to the accident, but neither plaintiff nor any of his family members made any complaints to BPME about reckless skaters. Plaintiff, who is originally from Poland, testified that he went skating three or four times per year on a pond as a teenager and also played ice hockey two or three times with friends. Plaintiff stated that he fell "[m]any times" while ice skating in Poland, and that he considered himself to be a "[m]iddle"-experienced ice skater.

Plaintiff's relatives testified at their depositions that

the ice skating rink was crowded at the time of the accident. His cousin, Michael Pisany, testified that a "couple of kids bump[ed] into" Michael, but Michael did not make any complaints about the conduct of other skaters.

Vanessa Morales, an emergency medical technician employed by BPME, testified that she was on duty when plaintiff was injured, having arrived on the ice a couple of minutes after the accident. She asserted that several ice monitors employed by BPME surrounded plaintiff to assure that no one bumped into him while he was on the ice. Both Morales and BPME rink manager Michael Schulman testified that the rink was equipped with surveillance cameras that were positioned over the ice, including the location where plaintiff's accident occurred, that a security supervisor would sit in a booth observing the live video feed, and that, whenever the supervisor witnessed a potential hazard, he would notify the ice monitors. According to Morales, if someone were injured on the ice, other security personnel in addition to the ice monitors would be able to observe it. Morales averred that she filled out an accident report indicating that there were approximately 180 attendees on the date of the accident, and she testified that the rink was crowded that day.

Schulman testified that the video surveillance equipment was working in January 2013. According to Schulman, it was customary practice for security personnel to "bookmark" or save the video

of an incident on the ice. Schulman asserted that the last skating session available to the public at the rink during the 2012-2013 season was on March 3, 2013, which he considered to be the close of the rink's 2012-2013 skating session. Schulman also testified that the ice rink has a maximum capacity of 350 persons.

In an affidavit dated June 12, 2015, submitted in support of defendants' motion, Itai Schoffman, a principal and executive director of BPME, asserts that BPME maintained security cameras at numerous locations at or near the ice rink. According to Schoffman, the video from the security cameras is recorded on a hard drive, but the video is not saved in perpetuity. Schoffman avers that the video from a particular season is deleted after the conclusion of the season in order to provide recording capacity for security video to be taken during the subsequent season, since there is only sufficient space on the hard drives for one season's worth of security video. Schoffman asserts that the security video from the entire 2012-2013 season at the rink was likely deleted, unless a video from a particular date or time was saved, and that any video would be preserved only in digital form and saved on a separate hard drive in BPME's offices. Schoffman avers that BPME conducted a search for the security video from January 27, 2013, but that it is not in possession of the video from that date, inasmuch as it was deleted in

accordance wiith BPME's regular procedures and practices.

III. DISCUSSION

A. Standards Applicable to a Summary Judgment Motion

"[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Ostrov v Rozbruch, 91 AD3d 147, 152 (1st Dept 2012); see also Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action." Cabrera v Rodriguez, 72 AD3d 553, 553-554 (1st Dept 2010). "On a motion for summary judgment, issue-finding, rather than issue-determination, is key." Shapiro v Boulevard Hous. Corp., 70 AD3d 474, 475 (1st Dept 2010). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. See Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1st Dept 1992).

Since defendants established their prima facie entitlement to judgment as a matter of law, and plaintiff failed to raise a

triable issue of fact in opposition, their motion must be granted.

B. Defendants' Motion for Summary Judgment (Motion Sequence No. 002)

1. Primary Assumption of Risk

Defendants argue that plaintiff assumed the risks of colliding with other skaters, and that plaintiff's testimony establishes that his accident was caused by a common collision that could not have been avoided by even the most intensive supervision. Defendants further contend that plaintiff's testimony also demonstrates that he was aware that another skater might bump into him. Additionally, defendants assert that they did not create or have notice of any condition which caused plaintiff's accident, and that their negligence was not a proximate cause of the accident, since the accident occurred due to the conduct of an unknown child over whom they had no control.

In opposition, plaintiff argues that BPME has failed to make a prima facie showing of entitlement to judgment as a matter of law but that, in any event, there are triable tissues of fact as to whether BPME breached its duty to adequately supervise the ice skating rink by allowing it to become overcrowded, thus causing plaintiff to be obstructed by another skater and fall to the ice. In this regard, plaintiff argues that he did not assume the risk of conduct by other skaters when the rink became overcrowded,

since the overcrowding that occurred on the date of the accident increased the risk of collisions over and above that which inheres in recreational skating. Plaintiff also asserts that, in light of the fact that defendants refused to provide the surveillance video of the accident, there is a triable issue of fact as to whether BPME inadequately supervised the rink, causing it to become overcrowded.

Defendants reply that the accident was the result of a common collision between ice skaters, a risk which all skaters assume, and that there is no evidence that defendants increased that risk. Defendants also note that plaintiff did not oppose the portion of their motion which sought dismissal of the complaint insofar as asserted against the City. Furthermore, according to defendants, the surveillance video was deleted on March 3, 2013, and thus prior to the date that they obtained notice of the commencement of this action, which, at the earliest was on March 5, 2013, when plaintiff's counsel sent a letter to BPME indicating that he intended to commence this action.

It is well established 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 NY2d 471, 484 (1997). "The duty owed in these situations is 'a duty to exercise care to make the

conditions as safe as they appear to be.'" Custodi v Town of Amherst, 20 NY3d 83, 88 (2012), quoting Turcotte v Fell, 68 NY2d 432, 439 (1986). Nevertheless, a participant "'will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks.'" Anand v Kapoor, 15 NY3d 946, 948 (2010), quoting Morgan v State of New York, supra, at 485.

Application of the doctrine of primary assumption of the risk is justified "when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks." Morgan v State of New York, supra, at 484. The awareness, appreciation, and assumption of risks known, apparent, or reasonably foreseeable, are not to be determined in a vacuum, but are rather to be "'assessed against the background of the skill and experience of the particular plaintiff.'" id. at 486, quoting Maddox v City of New York, 66 NY2d 270, 278 (1985). "[I]t is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results." Maddox v City of New York, supra, at 278.

Collisions between ice skaters are a common occurrence, and thus an inherent risk of ice skating. See Newcomb v Guptill

Holding Corp., 31 AD3d 875, 876 (3rd Dept 2006); Bleyer v Recreational Serv. Mgt. Corp., 289 AD2d 519, 520 (2nd Dept 2001); Lozito v City of New York, 283 AD2d 251, 251 (1st Dept 2001); Engstrom v City of New York, 270 AD2d 35, 35 (1st Dept 2000); Zambrana v City of New York, 262 AD2d 87, 87 (1st Dept 1999), affd 94 NY2d 887 (2000); Lopez v State Key, 174 AD2d 534, 534 (1st Dept 1991). Thus, a recreational skater assumes the risk of being obstructed, shoved, jostled, or struck by another skater where he or she "is an experienced skater, and the crowded conditions on the rink were apparent," and "the collision with the other skaters was a sudden precipitous event and 'could not have been anticipated or avoided by the most intensive supervision.'" Engstrom v City of New York, supra, at 35. Even complaints to management that other skaters are skating in an excessively fast or reckless manner are usually insufficient to demonstrate "a prevailing level of risk on defendants' public ice rink beyond that ordinarily assumed by those undertaking the sport of skating at such a facility." Zambrana v City of New York, supra, at 87; cf. Ballan v Arena Mgt. Group, LLC, 41 AD3d 1015, 1015 (3rd Dept 2007) (rink patron does not assume the risk of dangerous behavior of unsupervised group of young boys who were purposely attempting to knock each other onto the ice); Reid v Druckman, 309 AD2d 669, 670 (1st Dept 2003) (rink patron does not assume the risk of being bowled over by rink safety personnel

who were acting recklessly).

Inasmuch as the rink was not operated beyond its capacity so as to present a condition of dangerous overcrowding, the risks to skaters were not increased above and beyond those that inhere in the activity of recreational ice skating, plaintiff was a reasonably experienced skater who fully appreciated the risk of falling due to the conduct of fellow skaters, the risk of collision with another skater was not concealed, and the conduct of the young skater who suddenly cut off plaintiff could not have been prevented by even the most intense supervision, the doctrine of primary assumption of risk bars this action. In his submissions, plaintiff has not shown that any exception to the doctrine is applicable.

2. Plaintiff's Failure to Submit to Hearing Pursuant to General Municipal Law § 50-h

Defendants assert that since plaintiff failed to appear for a hearing pursuant to General Municipal Law § 50-h, the complaint in this action must be dismissed as against the City. The court agrees.

General Municipal Law § 50-h provides as follows:

> "Where a demand for examination has been served as provided in subdivision two of this section no action shall be commenced against the city . . . against which the claim is made unless the claimant has duly complied with such demand for examination, which compliance shall be in addition to the requirements of section fifty-e of this chapter. If such examination is not conducted within ninety days of service of the demand, the claimant may commence the action. The action, however, may not be

commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period . . ." General Municipal Law § 50-h(5) (emphasis added).

"The law is well established that, until a potential plaintiff has complied with General Municipal Law § 50-h(1), he [or she] is precluded from commencing an action against a municipality." La Vigna v County of Westchester, 160 AD2d 564, 565 (1st Dept 1990). Defendants offer uncontroverted evidence that a 50-h hearing was scheduled to be conducted on July 11, 2013, but plaintiff did not appear for the scheduled hearing, and did not request an adjournment of the hearing. In addition, plaintiff does not offer evidence of any exceptional circumstances, such as extreme physical or psychological incapacity, warranting excusing this requirement. See e.g. Steenbuck v Sklarow, 63 AD3d 823, 824 (2nd Dept 2009).

3. City's Liability Based on Its Status as Out-of-Possession Landlord

The City further argues that it was an out-of-possession landlord and that, as such, it may only be held liable for a dangerous physical condition at the rink if it had a right of re-entry, and was obligated by contract, statute, or course of dealing to maintain the premises in a safe condition. The City established its prima facie entitlement to judgment as a matter of law by establishing that plaintiff sought to impose liability

upon it for the negligent operation of skating activities, and not for a defective or dangerous physical condition inherent in the premises, and that it was not obligated by contract, statute, or course of dealing to maintain the premises. In opposition, plaintiff failed to raise a triable issue of fact. See DeJesus v Tavares, 140 AD3d 433, 433 (1st Dept 2016).

C. Plaintiff's Motion for Spoliation Sanctions (Motion Sequence No. 001)

Since defendants are entitled to summary judgment, plaintiff's motion to strike BPME's answer or for a negative inference at trial, based upon BPME's deletion of the video surveillance footage of the accident, has been rendered academic. In any event, BPME apparently deleted the video prior to acquiring notice that plaintiff would commence an action against it. Therefore, plaintiff's motion is denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (sequence number 001) to strike the answer of defendant Bryant Park Market Events, LLC, or for a negative inference at trial against it based upon spoliation of evidence is denied; and it is further,

ORDERED that the motion of defendants City of New York and Bryant Park Market Events, LLC (sequence number 002), for summary judgment dismissing the complaint is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: 9/12/16

ENTER:

JSC

HON. NANCY M. BANNON