

<b>Falcaro v American Skating Ctrs., LLC</b>
2017 NY Slip Op 33511(U)
June 29, 2017
Supreme Court, Westchester County
Docket Number: Index No. 66217/2015
Judge: Orazio R. Bellantoni
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513{a}), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. ORAZIO R. BELLANTONI**  
**JUSTICE OF THE SUPREME COURT**

-----X  
ROBERT FALCARO,

Plaintiff(s),

- against -

AMERICAN SKATING CENTERS, LLC, AMERICAN  
SKATING ENTERTAINMENT CENTERS, LLC, and  
MICHAEL G. FLORU,

Defendant(s).

**ORDER**

Index No. 66217/2015  
Motion Date: 4/26/2017

-----X  
Plaintiff moves (#001) for an order, striking defendants' Answer for spoliation of evidence necessary to the prosecution of this action or, in the alternative, granting plaintiff an adverse inference charge at the time of trial and precluding defendants from offering any evidence or testimony about 1) plaintiff contributing, in any way, to his injuries, 2) how defendants officiated and/or enforced the league rules during the match, and 3) any sudden and unexpected occurrence. Defendants move (#003) for an order, granting summary judgment in their favor.

The following papers were read:

Notice of Motion (#001)-Affirmation-Affidavit-Exhibits (A-R)	1-21
Affirmation in Opposition-Exhibit (A)	22-23
Affirmation in Reply	24
Notice of Motion (#003)-Affirmation-Exhibits (A-E)	1-7
Affirmation in Opposition-Exhibits (A-D)	8-12
Affirmation in Reply	13

By way of background, plaintiff commenced this action for personal injuries, allegedly suffered on April 1, 2015 during the course of a men's ice hockey league game being played on an ice skating rink known as the Westchester Skating Academy, located at 91 Fairway Park Drive, Elmsford, New York. Plaintiff's complaint alleges, among other things, that during the third period of the game, an altercation broke out in front of his

team's net involving members of plaintiff's team, *i.e.* Team Mustangs, and members of the opposing team, *i.e.* Team Budmen. Plaintiff was not initially involved in the altercation. However, as the altercation ensued and plaintiff witnessed one of his teammates pinned down by members of the opposing team, plaintiff skated towards the net in an attempt to pull his teammate out of the pile. As plaintiff skated towards the net, defendant referee, Michael G. Floru (Floru), allegedly approached plaintiff from behind, and, without warning, grabbed plaintiff by the neck and took him down to the ice, causing plaintiff's injuries. The ice rink was equipped with video cameras to record the entire game. On April 3, 2015, plaintiff, through counsel, sent a letter to the ice rink demanding that defendants preserve all video and/or surveillance tapes which might have recorded the accident or accident location and that failure to do so would subject defendants to damages for spoliation. Thereafter, during discovery, plaintiff learned that the videotape was edited to only show the altercation. Now, plaintiff moves for an order granting him damages for spoliation of evidence and defendants move for an order granting them summary judgment. The Court addresses the motions in reverse order.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining such a motion, the Court must view the evidence in the light most favorable to the non-moving party (*see Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). The movant makes a *prima facie* case by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In support of their motion, defendants proffer their answer, amended answer, plaintiff's bill of particulars, plaintiff's deposition testimony, and defendant Floru's deposition testimony. Based hereon, defendants contend, among other things, that the doctrine of assumption of risk is applicable and bars plaintiff's recovery. Specifically, defendants assert that the evidence demonstrates that plaintiff, an experienced ice hockey player, assumed the risks of his injuries when he skated towards a group of ice hockey players, who were in the midst of a physical altercation, and attempted to insert himself in the melee while the referees were trying to break it up. As to defendants American Skating Center, LLC and American Skating Entertainment Centers, LLC (the Skating Defendants), defendants contend that because Floru testified that he was hired as an independent contractor to officiate the subject game, they are not liable for Floru's negligent acts.

Defendants have failed to make their *prima facie* showing entitling them to summary judgment. A defendant moving for summary judgment on the affirmative defense of assumption of risk must show that plaintiff "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes th[ose] [commonly

appreciated] risks' ” inherent in and which generally arise out of the sport and flow from such participation (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012], quoting *Bukowski v Clarkson Univ.*, 19 NY3d 353, 356 [2012]; see also *Morgan v State of New York*, 90 NY2d 471, 484 [1997]). As such, “participants may be held to [only] have consented to those injury-prone risks that are ‘known, apparent or reasonably foreseeable’ ” (*Custodi*, 20 NY3d at 88, quoting *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 657 [1989]). “[P]articipants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced” (*Custodi*, 20 NY3d at 88). Further, in evaluating whether a defendant has violated a duty of care within the scope of tort-sports activities and their inherent risks, “the applicable standard should include whether the conditions caused by the defendants’ negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport” (*Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc.*, 134 AD3d 887, 889 [2d Dept 2015]). Here, defendants have failed to demonstrate, *prima facie*, that the conduct of Floru was inherent in the game of ice hockey and that plaintiff appreciated and voluntarily assumed that risk.


As to the Skating Defendants, they have similarly failed to make a *prima facie* showing entitling them to summary judgment. Although landowners generally have a duty to act in a reasonable manner to prevent harm to those on their property, “ ‘an owner’s duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control’ ” (*Bisignano v Raabe*, 128 AD3d 751, 752 [2d Dept 2015], quoting *Millan v AMF Bowling Ctrs., Inc.*, 38 AD3d 860, 860-61 [2d Dept 2007]). Here, no competent evidence was submitted by the Skating Defendants in order to make their *prima facie* showing (see *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]). As such, defendants’ motion for summary judgment is denied. The Court next addresses plaintiff’s spoliation motion.

Under the common-law doctrine of spoliation, the Court may sanction a party if the party is found to have negligently lost or intentionally destroyed crucial evidence, which would deprive its adversary of the ability to prove a claim or defense (see *Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009, 1011 [2d Dept 2010]). The determination of whether the movant has clearly established the need for a sanction rests within the broad discretion of the Court (see *Gotto v Eusebe-Carter*, 69 AD3d 566, 568 [2d Dept 2010]). Here, the Court finds that the Skating Defendants possessed an obligation to preserve the entire video recording at the time the recording was edited, that the video was edited with a culpable state of mind, and that the video recording of the entire match was relevant to plaintiff’s claim as to the Skating Defendants, namely, that they were reasonably aware of the rough play occurring throughout the game and thus had a duty to act in a reasonable manner to prevent harm. To the extent not specifically addressed herein, the Court finds defendants’ arguments to be without merit. As such, plaintiff’s motion seeking sanctions for spoliation is granted to the extent that at trial, plaintiff is entitled to an adverse inference charge only

as to the Skating Defendants (*see Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 1085-86 [2d Dept 2012]).

Based on the foregoing, defendants' motion for summary judgment (#003) is denied and plaintiff's motion for spoliation (#001) is granted to the extent as outlined above. This matter is scheduled for a Settlement Conference on August 1, 2017 at 9:15 a.m. in Courtroom 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York.

Dated: June 29, 2017  
White Plains, New York

  
HON. GRAZIO R. BELLANTONI  
Justice of the Supreme Court

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