Min-Sun Ho v Steep Rock Bouldering, LLC
2018 NY Slip Op 30006(U)
January 2, 2018
Supreme Court, New York County
Docket Number: 150074/2016
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

MIN-SUN HO,

Plaintiff,

- v -

STEEP ROCK BOULDERING, LLC

Defendant.

INDEX NO. 150074/2016

MOTION DATE 11/21/17

MOTION SEQ. NO. 002

The following papers, numbered 58–73 and 79–86, were read on this motion for summary judgment.

Notice of Motion—Affirmation in Support—Affidavit of Service—Exhibits A–L—Memorandum of Law in Support	Nos. 58–73
Affirmation in Opposition—Exhibits 1–2—Nussbaum Affidavit Exhibits 1–2	Nos. 79–84
Reply Affirmation in Support—Reply Memorandum of Law in Support	Nos. 85–86

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

Motion by Defendant Steep Rock Bouldering, LLC pursuant to CPLR 3212 for an order granting summary judgment against Plaintiff Min-Sun Ho is granted.

BACKGROUND

I. Overview

Plaintiff brought this action seeking damages for injuries she sustained on October 12, 2015, while at Defendant's bouldering gym, Steep Rock Bouldering. Plaintiff alleges, in sum and substance, that, due to the negligence of Defendant, she fell from Defendant's gym's indoor climbing wall and landed on her right arm, tearing ligaments and breaking a bone in the arm and elbow area, which required surgery. Defendant argues, in sum and substance, that Plaintiff assumed the risk of injury from a fall at its gym and that its gym provided an appropriate level of safety and protection for boulderers through warnings, notices, an orientation, equipment, and the nature of the climbing wall itself. As such, Defendant argues it had no further duty to Plaintiff. Plaintiff argues, in sum and substance, that she did not assume the risk of an injury from falling off of the climbing wall.

II. Procedural History

Plaintiff commenced the instant action against Defendant on January 5, 2016, by e-filing a summons and a complaint alleging a negligence cause of action. (Goldstein affirmation, exhibit A.) Defendant answered on March 28, 2016, denying all the allegations in the complaint and asserting 21 affirmative defenses, including Plaintiff's assumption of the risk. (Goldstein affirmation, exhibit B.)

The examination before trial ("EBT") of Plaintiff was held on February 14, 2017. (Goldstein affirmation, exhibit E [Ho EBT].) The EBT of Defendant, taken of witness Vivian Kalea ("Kalea"), was held on February 23, 2017. (Goldstein affirmation, exhibit F [Kalea EBT].) Plaintiff provided Defendant with her liability expert's disclosure pursuant to CPLR 3101 (d) on or about March 27, 2017. (Goldstein affirmation, exhibit G.) Plaintiff filed the note of issue in this action on May 4, 2017. (Goldstein affirmation, exhibit J.)

On or about May 25, 2017, Defendant moved to strike Plaintiff's note of issue. On or about May 30, 2017, Plaintiff cross-moved to preclude certain expert and medical testimony from Defendant at trial due to Defendant's alleged failure to provide timely disclosures. Defendant provided Plaintiff with its liability expert's disclosure pursuant to CPLR 3101 (d) on or about June 16, 2017. (Goldstein affirmation, exhibit H.) On June 29, 2017, Defendant noticed the instant motion On July 14, 2017, this Court ordered Defendant's motion to strike and Plaintiff's cross motion to preclude withdrawn per the parties' stipulation, dated July 6, 2017.

Defendant now moves for an order pursuant to CPLR 3212 granting it summary judgment and dismissing this action with prejudice.

III. Plaintiff's EBT

Plaintiff Min-Sun Ho stated that she and her roommate intended to climb the indoor wall at Steep Rock Bouldering on October 12, 2015. (Ho EBT at 12, lines 17–23.) Plaintiff further stated that her roommate had joined Defendant's gym several weeks prior to October 12, 2015. (*Id.* at 13, lines 12–13; at 14, lines 2–3, 13–25.) Plaintiff further stated that, prior to October 12, 2015, in high school, she took a rock climbing class once a week for a semester. (*Id.* at 15, lines 16–25.) Now in her thirties, Plaintiff stated that she was able to recall the class, the basic commands for climbing, and the techniques for climbing. (*Id.* at 20, lines 5–21; at 22, lines 17–21.)

Plaintiff stated that, on October 12, 2015, she looked up Defendant's gym's facebook page and observed people climbing at Steep Rock Bouldering without ropes or harnesses. (*Id.* at 27, lines 7–11; at 29, lines 15–20.) Plaintiff further stated that she then signed up online for a one-month membership at Steep Rock Bouldering. (*Id.* at 28, lines 15–20.) Plaintiff further stated that she had also heard from her roommate, before October 12, 2015, that there were no harnesses or ropes at Steep Rock Bouldering. (*Id.* at 30, lines 6–13.) Plaintiff further stated that, on October 12, 2015, Plaintiff's roommate again explained that Defendant's gym does not have harnesses or ropes. (*Id.* at 29, line 25; at 30, lines 2–5.) Plaintiff stated she was not aware, prior to October 12, 2015, that the term "bouldering" refers to a form of rock climbing without harnesses or ropes. (*Id.* at 85, lines 2–7.)

Plaintiff stated that, upon arriving at Steep Rock Bouldering on October 12, 2015, she observed a reception desk and a climbing wall to her left where she saw more than three people climbing. (*Id.* at 31, lines 17–23; at 32, line 25; at 33, lines 2–3.) Plaintiff further stated that she believed the climbing wall was about 15 feet tall. (*Id.* at 32, lines 4–20.) Plaintiff further stated that the receptionist asked if Plaintiff had rock climbed before and that she answered that she had, a long time ago. (*Id.* at 47, lines 2–8.) Plaintiff stated she signed an electronic waiver form at the reception desk. Plaintiff, at the time of the EBT, stated she did not recall having read any of the waiver except for the signature line. (*Id.* at 43, lines 11–19.)

Plaintiff stated that, after signing the waiver, she waited while the receptionist called a man over to Plaintiff and her roommate. Plaintiff stated she herself believed the man who came over was another Steep Rock Bouldering employee. (*Id.* at 45, lines 10–25; at 46, lines 2–4.) Plaintiff stated that the man told Plaintiff "something along the lines of 'that's the wall as you can see, it's self-explanatory.'" (*Id.* at 46, lines 11–12.) Plaintiff further stated that the man also told her "[t]hose are the bathrooms." (*Id.* at 49, lines 2–3.) Plaintiff further stated that the man asked her if she had rock climbed before and that she answered "yeah, a while ago." (*Id.* at 49, lines 7–10.) Plaintiff stated that the man did not say he was an instructor or take Plaintiff anywhere and that neither the man nor the receptionist said anything about an instructor. Plaintiff further stated that she did not have an orientation or an instructor at Defendant's gym. (*Id.* at 47, lines 15–23; at 48, lines 21–25.) Plaintiff further stated she that did not see any instructional videos. (*Id.* at 80, lines 19–22.) Plaintiff further stated that she had felt comfortable not having an instructor and climbing the walls without any harnesses or ropes. (*Id.* at 81, lines 17–22.)

Plaintiff stated that, after speaking with the man, she changed into climbing shoes which she stated she recalled borrowing from Steep Rock Bouldering. (*Id.* at 48, lines 5–20.) Plaintiff further stated that she then put her and her roommate's belongings away in a cubby and started getting ready to climb. (*Id.* at 49, lines 13–18.) Plaintiff stated that she had observed mats in front of the climbing wall on the floor. (*Id.* at 49, lines 19–24.) Plaintiff stated that she had further observed "quite a few" people who she thought were other climbers and their friends climbing the wall or watching and giving tips on holds. (*Id.* at 50, lines 5–21; at 55, lines 6–10.)

Plaintiff stated she was told before she started climbing that the holds on the climbing wall are tagged according to their difficulty and that the levels of difficulty marked "V0 or V1" are the "easiest." (*Id.* at 54, lines 2–20.) Plaintiff further stated that, after waiting a few minutes, she herself climbed to the top of the climbing wall on level V1 on her first attempt. (*Id.* at 55, lines 16–19, 24–25; at 56, lines 2–9.) Plaintiff further stated that she did not think it took very long to make the climb. (*Id.* at 56, lines 10–11.) Plaintiff stated she and her roommate took turns climbing the wall. (*Id.* at 63, lines 12–16.) Plaintiff further stated that, while she herself was climbing, her roommate was on the mat watching her climb. (*Id.* at 63, lines 17– 22.) Plaintiff stated that she herself climbed again once or twice without incident. (*Id.* at 56, lines 16–19; at 57, lines 18–21.) Plaintiff stated that, on her third or fourth climb, she herself had made it about a couple of feet from the top of the wall before she fell. (*Id.* at 57, lines 3–10, 15–25; at 58, lines 2–9.) Plaintiff stated that her roommate was watching her when she fell. (*Id.* at 63, line 22.)

Plaintiff stated that she had not fallen from a climbing wall prior to October 12, 2015. (*Id.* at 59, lines 2–7.) Plaintiff further stated she did not think she could fall, nor did she think about falling, when she bought her membership, when she first saw the wall when she entered the building, or when she first started climbing. (*Id.* at 59, lines 13–25; at 60, lines 2–8, 17–19.) Plaintiff further stated that did not see anyone else fall at Steep Rock Bouldering prior to her own fall, but did see people jumping down from "[s]omewhere above the middle" and "closer to the top" of the climbing wall instead of climbing down. (*Id.* at 60, lines 9–16.)

Plaintiff stated she herself climbed down the wall after her first climb, but then became more "confident" and climbed down halfway and then jumped in subsequent successful climbs. (*Id.* at 60, lines 22–25; at 61, lines 2–6.) Plaintiff further stated that, immediately before she fell, she was climbing up the wall and reaching to the side. (*Id.* at 61, lines 7–13.) Plaintiff further stated that she then grabbed onto a knob, looked down, and saw a man looking up at her. (*Id.* at 62,

lines 2–7.) Plaintiff was asked at the EBT "[w]hen you looked down, did you think about falling or if you could fall?" In reply, Plaintiff stated "I was a little scared. When I looked down, I was a lot higher than I thought I was." (*Id.* at 62, lines 12–15.) Plaintiff stated that she had wanted to come back down at this time. (*Id.* at 62, lines 24–25; at 63, lines 2–4.) Plaintiff further stated that she fell after she saw the man looking up at her. (*Id.* at 62, line 8.) Plaintiff was asked at the EBT "[d]o you know why you fell?" and answered, "I don't know exactly." (*Id.* at 62, lines 5–6.)

IV. Defendant's EBT

Vivian Kalea stated that, at the time of her EBT, she was the general manager of Steep Rock Bouldering. (Kalea EBT at 6, lines 4–7.) Kalea further stated that, on October 12, 2015, she was a closing manager and youth team coach at Steep Rock Bouldering. (*Id.* at 6, lines 8–12.)

Kalea stated that she was at Steep Rock Bouldering when Plaintiff was injured and filled out the related injury report form. (*Id.* at 13, lines 19–21.) Kalea stated that the injury report indicated that Plaintiff was a member of Steep Rock Bouldering and had paid a fee to use the gym prior to her injury. (*Id.* at 16, lines 12–13.) Kalea stated that the injury report further indicated that Plaintiff fell from a yellow V1 level of difficulty, about three moves from the top, and landed on her right side. (*Id.* at 19, lines 6–9; at 31, lines 15–21; at 34, line 25.)

Kalea stated that V1 is a beginner's level of difficulty. (*Id.* at 34, lines 13–15.) Kalea further stated that, the higher the number is after the "V," the greater the level of difficulty. Kalea stated that the "V" designation is not a description of a specific height or location. (*Id.* at 33, lines 9–14.) Kalea further stated that V2 is also a beginner's level. (*Id.* at 33, lines 23–25, at 34, lines 2–4.) Kalea further stated that the wall Plaintiff was on had a "slight incline" but was "mostly vertical" and "[c]lose to 90 degrees. (*Id.* at 41, lines 11–25; at 42, lines 2–4.)

Kalea stated that Steep Rock Bouldering offered climbing shoe rentals and chalk for climbers on October 12, 2015. (*Id.* at 9, lines 20–21; at 10, line 14.) Kalea further stated that the climbing shoes provide support for climbing activities by improving friction and power to the big toe and that the chalk gives the climbers a better grip on whatever it is they are holding onto. (*Id.* at 21, lines 18–25; at 22, lines 2–25; at 23, lines 2–4.) Kalea further stated that the padded area in front of the climbing wall was over a foot thick on October 12, 2015, and was there to help absorb the shock from a fall. (*Id.* at 23, lines 5–18.) Kalea further stated that a

spotter, "somebody who guides a climber to fall down," was not required at Steep Rock Bouldering on October 12, 2015. (*Id.* at 49, lines 19–25.)

Kalea stated that the climbing walls at Steep Rock Bouldering are 14 feet high and that the holds do not all go to the top. (*Id.* at 24, lines 17–19.) Kalea further stated that the holds are of different textures, sizes, and appearances and that their locations can be changed to create varying paths up the wall and establish the difficulty of a given level. (*Id.* at 24, lines 16–25; at 25, lines 2–17; at 29, lines 2–5.) Kalea further stated that climbers at Steep Rock Bouldering do not climb with ropes or harnesses. (*Id.* at 40, line 25; at 41, line 2.)

Kalea stated that Steep Rock Bouldering employees ask whether it is a new member's first time bouldering "to clarify that they understand the risk of bouldering." (*Id.* at 21, lines 13–17.) Kalea further stated that every climber is supposed to receive an oral safety orientation from Steep Rock Bouldering staff prior to climbing that consists of the following:

> "It consists of understanding the person's climbing experience, their experience bouldering. That they understand that bouldering is a dangerous sport. How every fall in a bouldering environment is a ground fall. It goes over how the climbs are kind of situated, so everything is by color and numbers. It goes over that we do encourage down climbing in the facility. So that means when you reach the top of the problem, which is not necessarily the top of the wall, but the finishing hold, you climb down about halfway before you jump, if you do want to jump. It goes over how to best fall."

(*Id.* at 46, lines 2–24; at 47, lines 3–16.) Kalea stated that the giving such an orientation is standard in the climbing industry and was required at Steep Rock Bouldering on October 12, 2015. (*Id.* at 48, lines 3–10.) Kalea further stated that "[i]t is made clear to everyone who walks in the door that they are going to receive a safety orientation" and that staff's failure to do so would be breaking Steep Rock Bouldering's rules. (*Id.* at 48, lines 17–21.) Kalea was asked at the EBT to assume that Plaintiff was told "essentially . . . there is the wall, it's self explanatory [sic] and that's all the person did" and was then asked "[i]f that is all that was said, is that a proper safety instruction orientation?" (*Id.* at 49, lines 3–17.) Kalea replied, "[i]t is not."

V. Plaintiff's Liability Expert

Plaintiff retained Dr. Gary G. Nussbaum as its liability expert. Dr. Nussbaum has a Masters of Education and an Education Doctorate in Recreation and Leisure Studies from Temple University. Dr. Nussbaum has 45 years of experience in the adventure education, recreation, and climbing field with a variety of teaching credentials related specifically to climbing. In forming his opinion, Dr. Nussbaum reviewed photographs of the climbing wall used by Plaintiff on the date of her injury, the injury report, the waiver form, and the EBT transcripts.

After his review, Dr. Nussbaum opined that Plaintiff should have been provided with the following: a harness, a rope, or some similar safety device; a spotter; an orientation; and an introductory lesson. Dr. Nussbaum opined further that the only time a harness or similar device is not required is "when the wall is low, less than 8 feet[,] and where it is angled so that a [climber] cannot fall directly down[,] but simply slides down the angled wall. Here, the wall was high and not angled, and therefore the safety devices including the harness and rope are required." (Broome affirmation, exhibit 1 [aff of Nussbaum], at 3.)

Dr. Nussbaum opined that a person of Plaintiff's skill level was a novice and needed to be taught "how to climb, how to come down, and even how to fall safely. None of this was done or provided." (*Id.* at 4.) Dr. Nussbaum opined further that "[a]s a new climber, [Plaintiff] did not appreciate the risk" involved with bouldering. (*Id.*) Dr. Nussbaum opined further that the reading Steep Rock Bouldering waiver form, which Plaintiff did not, would not mean that the reader understands or assumes the risk. (*Id.*) Dr. Nussbaum opined further that the padding "likely" gave Plaintiff a "false sense of security" and "no appreciation of the risk here." (*Id.*)

Dr. Nussbaum opined that, because Steep Rock Bouldering does not offer rope climbing, its climbing wall requires that the climber "climb down, climb partway down and jump the remainder, fall down in a controlled manner, or simply fall down if he or she loses control." (*Id.* at 5.) Dr. Nussbaum cited to the Climbing Wall Association's ("CWA") Industry Practices § 4.06 and opined further that Defendant's gym should have provided "a thorough orientation to bouldering and how to mitigate the risk of predictable falls" per the CWA guidelines. (*Id.*)

Citing to CWA's Industry Practices § 4.01, Dr. Nussbaum opined further:

> "[Plaintiff's] 'level of qualification or access to the climbing should [have been] checked upon entering and prior to climbing in the facility.' In the absence of demonstrated proficiency in climbing, [Plaintiff] should have been 'supervised by staff or a qualified climbing partner, or her access to the facility must [have] be[en] limited accordingly.' In the case at hand, there was a cursory transition from the street into the gym and the commencement of climbing. [Plaintiff] was simply asked if she had previous climbing experience and essentially told 'here's the wall, have at it.'"

(*Id.* at 6.)

Citing to CWA's Industry Practices § 4.02, Dr. Nussbaum opined further:

> "[T]he climbing gym staff should [have] utilize[d] a screening process before allowing potential clients to access the climbing wall/facility. The purpose of the screening is to determine the 'new client's ability to climb in the facility' and 'to assess the client's prior climbing experience, knowledge and skills (if any).' [Plaintiff] was not asked about how long she had been climbing, whether or not she had experience at a climbing gym or facility, how often or how recently she had climbed, and/or the type of climbing she had done. She was not asked if she had knowledge of or experience bouldering. Again, she was simply asked if she had prior climbing experience, reflecting a wholly inadequate screening process."

(*Id.*)

Dr. Nussbaum opined that spotting is an advanced skill requiring training for the spotter to spot effectively and safely. As such, Dr. Nussbaum stated, Plaintiff's roommate "was not a spotter and had no skill and no training to be one." (*Id.* at 3.) Dr. Nussbaum opined further that Steep Rock Bouldering was required to enforce its spotter requirement by providing an adequately skilled spotter or ensuring that an intended spotter has the requisite skill set. (*Id.* at 5.) Dr. Nussbaum opined further that, if Steep Rock Bouldering chooses not to require spotting, it is then required to "emphasize, encourage and instruct in the safest ways to descend, including falling

techniques. . . . [It] did not enforce its spotting requirement nor [sic] provide proper instruction in falling techniques." (*Id.* at 7.)

VI. Defendant's Liability Expert

Defendant retained Dr. Robert W. Richards as its liability expert. Dr. Richards is a founding member of the CWA and is currently affiliated with CWA as an expert in risk management. Dr. Richards has been involved in the climbing wall industry since 1992. Dr. Richards stated that, as there are no set regulations for climbing facilities, the CWA intends to assist the industry in defining, understanding, and implementing a set of responsible management, operational, training, and climbing practices. (Goldstein affirmation, exhibit I [aff of Richards], ¶ 2.) Dr. Richards further stated that the CWA's Industry Practices is a sourcebook for the operation of manufactured climbing walls. (*Id.* ¶ 3.)

In forming his opinion, Dr. Richards performed a site inspection of Steep Rock Bouldering's climbing wall on June 22, 2017. (*Id.* ¶ 20.) Dr. Richards observed at the site inspection that Defendant's gym had "Climb Smart" posters, indicating the risks of bouldering, displayed in multiple locations. Dr. Richards stated that these signs were also present on October 12, 2015. (*Id.*) Dr. Richards observed further that the climbing wall is approximately thirteen feet, six inches tall when measured from the top of the padded area around the wall. (*Id.* ¶ 30.) Dr. Richards stated that this was also the height of the wall on October 12, 2015. (*Id.*)

Dr. Richards describes the sport of bouldering as follows:

> "Bouldering is the form of climbing that is performed without the use of safety ropes and typically on a climbing surface that is low enough in height that a fall from the wall will not be fatal. Bouldering walls in climbing gyms may range from ten to twenty feet in height. The [CWA] states that average bouldering wall heights in the climbing wall industry are between twelve and fifteen feet. Climbers who boulder are referred to as boulderers . . . ."

(*Id.* ¶¶ 13–14.) Dr. Richards stated "[a] specific climb is referred to as a . . . 'problem' and is usually marked with colored tape or colored holds which are attached to the artificial climbing wall." (*Id.* ¶ 7 [punctuation omitted].)

Dr. Richards opined that bouldering entails an inherent risk of injury from falls. (*Id.* ¶ 4.) Dr. Richards opined further that it is not possible to eliminate this risk "without altering the very essence of the sport." (*Id.*) Dr. Richards opined further that the most common injuries in climbing gyms are to the extremities which can result from falls of any height. (*Id.* ¶ 15.)

Dr. Richards opined further that the risk inherent to bouldering was communicated to Plaintiff by means of a written liability release and an orientation. (*Id.* ¶ 17.) Dr. Richards stated that Plaintiff signed a liability release form and completed an orientation. (*Id.* ¶¶ 17, 31.) Dr. Richards stated further that the liability release form included the following language: "I have examined the climbing wall and have full knowledge of the nature and extent of the risks associated with rock climbing and the use of the climbing wall, including but not limited to: [injuries] resulting from falling off or coming down from the climbing wall . . . ." (*Id.* ¶ 17.)

Dr. Richards opined further that, having visited approximately "200 gyms" since 1992, he has never been to a gym that requires climbers to have spotters and strictly enforces that requirement. (*Id.* ¶¶ 1, 22–23.) Dr. Richards stated that spotting was developed for outdoor bouldering to guide the fall of boulderers in an environment where there are typically little or no padded surfaces to protect the head. (*Id.* ¶ 24.) Dr. Richards stated that the CWA does not require spotters when bouldering on artificial climbing walls and that it is not a common practice in the industry to require such spotters. (*Id.* ¶ 25.) Dr. Richards further stated that the padded landing surfaces in gyms reduce many of those dangers that a spotter would help to mitigate outdoors. (*Id.*) Dr. Richards opined that, as such, use of a spotter in an indoor climbing gym is of "limited benefit" and "may cause injury to the boulderer and spotter if the climber were to fall directly on the spotter." (*Id.*)

Dr. Richards opined further that the purpose of Defendant gym's padded landing surface around its climbing wall is "to mitigate potential injuries to the head and neck." (*Id.* ¶ 26.) Dr. Richards opined further that, while the padding may "provide some cushioning for falls," per Annex E to the CWA's Industry Practices, "[p]ads are not designed to mitigate or limit extremity injuries, although they may do so." (*Id.*) Dr. Richards stated that, while there was no industry standard regarding the type, amount, or use of such padding in October 2015, a typical surface in October 2015 would have "consisted of four to six inches of foam padding or other impact attenuation

material with a top layer of gymnastic carpet or vinyl that covers the underlying padding." (*Id.* ¶¶ 27–28.) Dr. Richards further stated that Defendant's gym used foam pads of a twelve-inch depth that ran continuously along the climbing wall and extended twelve feet out from the wall on October 12, 2015. (*Id.* ¶ 29.)

ARGUMENT

I. Defendant's Affirmation in Support

Defendant alleges in its papers that it has a place of business that includes a bouldering climbing gym in New York City on Lexington Avenue. (Affirmation of Goldstein ¶ 14.) Defendant further alleges that its gym has a continuous climbing wall that is approximately 30 to 40 feet wide and 14 feet tall and has climbing holds which are textured objects bolted into the wall which climbers can grab onto with their hands and stand upon with their feet. (*Id.* ¶¶ 14, 16.)

Defendant argues, in the main, that Plaintiff assumed the inherent risk associated with climbing an indoor wall and with bouldering when she chose to climb Defendant's gym's bouldering wall. (Memorandum of law of Goldstein, at 1.) Defendant argues Plaintiff was able to make an informed estimate of the risks involved in bouldering and that she willingly undertook them. (*Id.* at 3–4.) Defendant further argues that Plaintiff was aware of the potential for injury from a fall because she is an intelligent adult familiar with the laws of gravity and had prior wall climbing experience in an indoor setting (albeit with ropes). (*Id.* at 4.) Defendant further argues that Plaintiff was aware of the risks associated with climbing because, before she was injured, Plaintiff watched other climbers ascend and descend its climbing wall and climbed up and down the wall herself without incident several times, even feeling comfortable enough to jump from halfway down the wall as opposed to climbing all the way down. (*Id.* at 8–9.) Defendant further argues that Plaintiff voluntarily and knowingly engaged in the bouldering activity and that her fall was a common, albeit unfortunate, occurrence. (*Id.* at 10.)

Defendant argues that falling is inherent to the sport of climbing, that falling cannot be eliminated without destroying the sport, and that injuries resulting from falling from a climbing wall are foreseeable consequences inherent to bouldering. (*Id.*) Defendant further argues that the risk of falling from Defendant's gym's climbing wall was open and obvious to Plaintiff. (*Id.* at 5.) Defendant further argues that Plaintiff did not request further instruction beyond what Steep Rock

Bouldering provided on October 12, 2015, and that Plaintiff was comfortable climbing without ropes or a harness. (*Id.* at 5–6.) Defendant argues that Plaintiff's allegation that she did not receive proper instruction is pure conjecture and will only invite the jury to speculate about what further instruction Plaintiff would have received had she sought it out. (*Id.* at 6.)

Defendant argues that there was no unique risk or dangerous condition in Defendant's gym on October 12, 2015, over and above the usual dangers inherent to bouldering. Defendant further argues that Defendant has the right to own and operate a gym that offers bouldering, only, and not rope climbing. (*Id.* at 7.) Defendant further argues that the height of its gym's climbing wall and the depth of its surrounding padding were well within what was typical of other climbing facilities in October 2015. (*Id.*) Defendant further argues that it had no duty to provide a spotter or supervise Plaintiff's climbing. (*Id.* at 7–8.)

Defendant argues that Plaintiff's expert has not cited to any standards or rules that would have required that Defendant provide Plaintiff with a spotter or supervise Plaintiff's climbing or that would justify an opinion that negligence on the part of Defendant proximately caused Plaintiff's accident. (*Id.* at 8, 10.) Defendant further argues that Plaintiff's expert fails to acknowledge that Plaintiff engaged in a rope climbing class every week for a semester. (*Id.* at 10.) Defendant further argues that Plaintiff's expert has never visited Steep Rock Bouldering and that therefore any assertions that Plaintiff's expert will make are conclusory and insufficient to demonstrate Defendant's negligence.

II. Plaintiff's Affirmation in Opposition

Plaintiff argues in her papers that the affidavit of her liability expert, Dr. Gary G. Nussbaum, establishes Defendant's negligence and Plaintiff's lack of appreciation and understanding of the risk. (Affirmation of Broome, at 1.) Plaintiff further argues that she had a false sense of security because of the thick mats around the climbing wall and that she therefore did not appreciate the risk. (*Id.* at 1–2.) Plaintiff further argues that her climbing experience at Steep Rock Bouldering was very different from her prior experience with climbing, which was limited to one semester of indoor climbing class 12–13 years prior to the incident, in high school, involving a rope, harness, spotter, and instructor. (*Id.* at 2; aff of Ho, at 2.) At the time of the incident, Plaintiff was age 30 and had never done any rock climbing again after the high school class. (Aff of Ho, at 2.)

Plaintiff argues that she believed the padding beneath the climbing wall would prevent "any injury whatsoever." (*Id.* at 4.) Plaintiff further argues that this was her belief even though she signed a release of liability because she did not read it. (*Id.* at 3.) Plaintiff further argues that she was given no orientation or instructor on October 12, 2015, but was only told where the wall was and that it was "self-explanatory." (*Id.*) Plaintiff further argues that the release she signed is void and unenforceable because she paid a fee to use Defendant's gym. (Affirmation of Broome, at 2.)

Plaintiff argues that Defendant was negligent in failing to provide Plaintiff with a rope, a harness, instruction, an orientation, and a spotter. (*Id.* at 3.) Plaintiff further argues that the assertions of Defendant's liability expert, Dr. Robert W. Richards, regarding posters on the wall at Steep Rock Bouldering are irrelevant and erroneous because he visited the facility 1.75 years after Plaintiff's accident and claims the posters were in place on the date of the accident. (*Id.*)

III. Defendant's Reply Affirmation in Support

Defendant argues in its reply papers that Plaintiff did not have a false sense of security because Plaintiff: (1) was aware that Defendant's gym only supplied climbing shoes and climbing chalk; (2) observed that none of the other climbers were asking for a rope or a harness; (3) testified that she felt comfortable climbing without harness, a rope, or an instructor; (4) knew prior to her injury that the climbing paths have different difficulty levels and that she was at a beginner level; and (5) had already, prior to her injury, climbed the wall two to three times without incident, reached the top of the wall, and jumped from the wall to the floor from halfway up the wall. (Reply affirmation of Goldstein, at 1–2; reply memorandum of law of Goldstein ¶ 3.) Defendant further argues that Plaintiff's claim of having a false sense of security is disingenuous because she plainly observed the conditions of the climbing wall and the padded mats, was able to approximate the height of the wall, and, at age 30, was fully aware of, paid to engage in, and voluntarily undertook a form of climbing that involves neither ropes nor harnesses. (Reply memorandum of law of Goldstein ¶ 4.)

Defendant argues that Plaintiff has overlooked Dr. Richards' explanation that a spotter has limited benefit and may cause injury to the climber and spotter if the climber were to fall directly onto the spotter. (*Id.* ¶ 5.) Defendant further argues that climbers utilizing a rope and harness may also sustain injury from falls when climbing. (*Id.* ¶ 6.)

Defendant argues that Plaintiff cannot prove by a preponderance of the evidence that Defendant proximately caused Plaintiff's injury because Plaintiff herself testified that she does not know why she fell, and mere speculation regarding causation is inadequate to sustain a cause of action. (*Id.* ¶ 5.)

Defendant further argues that Plaintiff was aware of and assumed the risk that, in climbing a wall without ropes and harnesses—or a spotter—she could sustain an immediate physical injury from a fall. (*Id.* ¶¶ 4–5, 9.)

IV. Oral Argument

On November 13, 2017, counsel for the parties in the instant action appeared before this Court for oral argument on Defendant's instant motion for summary judgment. Stephanie L. Goldstein, Esq. argued on behalf of Defendant and Alvin H. Broome, Esq. argued on behalf of Plaintiff.

Defendant argued that this is an assumption of the risk case in which Plaintiff fell during participation in a sport—bouldering—which, by definition, is rock climbing without ropes or harnesses. (Tr at 2, lines 23–25; at 3, lines 8–18.) Defendant further argued that Plaintiff had no reasonable expectation there would be ropes or harnesses at Steep Rock bouldering. Plaintiff stated that her roommate told her that climbing at Steep Rock Bouldering would involve no ropes or harnesses. (*Id.* at 4, lines 5–13.) Plaintiff further stated that she observed photographs of people using the gym on facebook at parties—prior to going to Defendant's gym—without ropes or harnesses. (*Id.* at 4, lines 15–19.) Plaintiff further stated that she saw people climbing at the gym in person before she climbed and that none of them were using ropes or harnesses. (*Id.* at 4, lines 20–24.)

Defendant argued that Plaintiff was additionally noticed as to the dangers inherent to bouldering by the electronic waiver, which she signed. (*Id.* at 5, lines 3–18.) Defendant clarified that it is not moving to dismiss the instant action on waiver grounds and acknowledged that Plaintiff's signing the waiver did not absolve Defendant of liability. (*Id.* at 5, lines 13–14.) Defendant argued that Plaintiff was further noticed by an individual, an employee of Defendant, who explained to Plaintiff prior to her climbing about the wall and the climbing paths. (*Id.* at 5, lines 19–23.) Defendant argued that Plaintiff was further noticed by her own experience of climbing up and down the wall two to three times without any

incident and with jumping off of the wall prior to her fall. (*Id.* at 5, line 26; at 6, line 2; at 7, lines 11–16.) Defendant was comfortable climbing without equipment or an instructor. (*Id.* at 7, lines 6–10.)

Defendant argued that it cannot enforce a statement on its waiver that a climber is not to climb without a spotter. Defendant argued that this is for four reasons: because spotting does not prevent injury, because spotting was developed when bouldering was outside, because spotting can only act to attempt to protect the head and neck outdoors—and indoors the padding provides this function—and because spotting may endanger the spotter. Defendant stated that spotting is not enforced at its gym. Defendant further stated that its liability expert has not seen this requirement enforced at any of the 200 gyms he has traveled to which do have this requirement on paper. (*Id.* at 6, lines 7–26; at 7, lines 2–5.)

Defendant argued that falling when climbing a wall is a common, foreseeable occurrence at a climbing facility. (*Id.* at 8, lines 3–5.) Defendant further argued that Plaintiff is an intelligent woman, 30 years old at the time of her injury, with a degree in biology. As such, Defendant argued that Plaintiff knew the laws of gravity: what goes up, must come down. (*Id.* at 8, lines 6–9.) Defendant further argued that a person is said to have assumed the risk if he or she participates in an activity such as climbing where falling is an anticipated and known possibility. (*Id.* at 9, lines 9–13.) Defendant further argued that Plaintiff testified that she does not know what caused her to fall. (*Id.* at 7, lines 21–23.)

Plaintiff argued in opposition that Defendant's own rules required a spotter for climbers and that Defendant broke its rule and therefore proximately caused Plaintiff's injury. (*Id.* at 9, lines 24–26; at 10, lines 2–6; at 11, lines 11–16, 24–25; at 12, lines 15–21.) Plaintiff further argued that "in every kind of climbing you are required to have a rope, a harness, something to prevent an injury and a fall." (*Id.* at 12, lines 11–13.) Plaintiff further argued that a spotter "will say lift your arms, turn to the side" as a person begins to fall. (*Id.* at 11, lines 24–25.)

Plaintiff further argued that proximate cause has been established and the real question for the Court is whether Plaintiff assumed the risk. (*Id.* at 12, lines 22–25.) Plaintiff argued that "unusually thick" mats around the climbing wall gave Plaintiff a false sense of security. (*Id.* at 13, line 8.) Plaintiff further argued that Plaintiff saw people fall onto the soft matted floor without getting hurt, and therefore assumes this is a safe sport, but it is not. Plaintiff argued that assumption of risk is a subjective standard and that Plaintiff was a novice who had only

climbed with ropes and harnesses prior to the day of her injury and thus did not assume the risk of "falling on a soft mat and breaking an elbow." (*Id.* at 10, lines 7–10; at 14, lines 13–16.)

Plaintiff argued that there is a distinction between assuming the risk that one could fall from a climbing wall and assuming the risk that one could be injured from the fall. Plaintiff further argued that Plaintiff assumed the former, not the latter, in part because of a false sense of security due to the mats and not having a spotter. (*Id.* at 14, lines 23–26; at 15, lines 2–23; at 16, lines 2–9.) Plaintiff further argued that the mats that are placed by the climbing wall are "extremely substantial," "for the sole purpose of preventing injury," and "designed supposedly to prevent injury from a fall, and . . . didn't." (*Id.* at 16, lines 16–20.)

Plaintiff argued that, as a matter of law, because the mats were there, Plaintiff cannot be held to the belief that she was going to get hurt when she went up the climbing wall. (*Id.* at 16, lines 22–24.) Plaintiff clarified that she is not claiming the mat was inadequate. (*Id.* at 16, line 21.) Plaintiff argued that there was no assumption of injury from climbing or falling normally from the Defendant's gym's climbing wall. (*Id.* at 17, lines 13–14.) Plaintiff argued further that Plaintiff "did not assume the risk of being injured by a fall, period." (*Id.* at 18, line 20.)

Defendant argued in reply that Plaintiff was bouldering, which by definition involves no ropes or harnesses, and did so voluntarily. (*Id.* at 23, lines 11–12.) Defendant further argued that Plaintiff's liability expert cites to no regulations, standards, or rules that would quantify his reasoning why there should have been ropes, harnesses, or a spotter, or why the mat gave Plaintiff a false sense of security. (*Id.* at 23, lines 17–22.) Defendant further argued that the law says that when someone assumes the risk, they are assuming the risk inherent to the activity, and that assumption of injury specifically is not required. (*Id.* at 23, line 26; at 24, lines 2–5.) Defendant further argued that, in the instant case, the risk inherent to bouldering is falling, and that falling from a height may result in injury. As such, Defendant argued, Plaintiff assumed the risk. (*Id.* at 24, lines 4–18.)

Defendant further argued that there was no negligent hidden condition and nothing wrong with the wall or the mats. (*Id.* at 24, lines 20–21, 24–25.) Defendant argued that a climbing wall of 13 to 14 feet and mats of 12-inch thickness, as here, are typical. (*Id.* at 24, lines 25–26; at 25, lines 2–3.) Defendant further argued that stating that Plaintiff fell because she did not have a rope or harness is speculation insufficient to defeat a motion for summary judgment. (*Id.* at 25, lines 4–6.)

DISCUSSION

I. The Summary Judgment Standard

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

II. The Assumption of Risk Doctrine

"Under the doctrine of primary assumption of risk, 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." (*Cruz v Longwood Cent. School Dist.*, 110 AD3d 757, 758 [2d Dept 2013].) "Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation." (*Id.*) However, "[s]ome of the restraints of civilization must accompany every athlete onto the playing field. Thus, the rule is qualified to the extent that participants do not consent to acts which are reckless or intentional." (*Turcotte v Fell*, 68 NY2d 432, 439 [1986].) "[I]n assessing whether a defendant has violated a duty of care within the genre 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." (*Morgan v State*, 90 NY2d 471, 485 [1997] [internal quotation marks omitted].) In assessing whether a plaintiff had the appropriate awareness to assume the subject risk, such "awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff." (*Id.* at 485–486.)

In 1975, the state legislature codified New York's comparative fault law when it passed what is now CPLR 1411, "Damages recoverable when contributory negligence or assumption of risk is established." CPLR 1411 provides:

> "In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages."

Notwithstanding the text of CPLR 1411, the Court of Appeals has held that, in certain circumstances, a plaintiff's assumption of a known risk can operate as a complete bar to recovery. The Court of Appeals refers to this affirmative defense as "primary assumption of risk" and states that "[u]nder this theory, a plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard him or her from the risk." (*Custodi v Town of Amherst*, 20 NY3d 83, 87 [2012] [internal quotation marks omitted].) In assuming a risk, Plaintiff has "given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone." (*Turcotte v Fell*, 68 NY2d 432, 438 [1986], quoting Prosser and Keeton, Torts § 68, at 480–481 [5th ed].)

Nonetheless, the doctrine of primary assumption of risk has often been at odds with this state's legislative adoption of comparative fault, and as such has largely been limited in application to "cases involving certain types of athletic or recreational activities." (*Custodi*, 20 NY3d at 87.) In *Trupia ex rel. Trupia v Lake George Cent. School Dist.*, Chief Judge Lippman discussed the uneasy coexistence of the two doctrines:

> "The doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation. In the end, its retention is most persuasively justified not on the ground of doctrinal or practical compatibility, but simply for its utility in facilitating free and vigorous participation in athletic activities. 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. We have not applied the doctrine outside of this limited context and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation that the Legislature has deemed applicable to any action to recover damages for personal injury, injury to property, or wrongful death."

(14 NY3d 392, 395–96 [2010] [internal quotation marks and emendation omitted].) Writing two years later, Chief Judge Lippman further explained the scope of primary assumption of risk in *Bukowski v Clarkson University*:

> "The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities s aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks. An educational institution organizing a team sporting activity must exercise ordinary reasonable care to protect student athletes voluntarily participating in organized athletics from unassumed, concealed, or enhanced risks. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty. Relatedly, risks which are commonly encountered or 'inherent' in a sport, such as being struck by a ball or bat in baseball, are risks for which various participants are legally deemed to have accepted personal responsibility. The primary assumption of risk doctrine also encompasses risks involving less than optimal conditions."

(19 NY3d 353, 356 [2012] [internal quotation marks and emendation omitted].)

III. Defendant Has Shown Prima Facie that Plaintiff Assumed the Risk of Injury from Falling from Defendant's Gym's Climbing Wall, and Plaintiff Has Failed to Raise a Genuine Issue of Material Fact in Response

Based upon the Court's reading of the submitted papers and the parties' oral argument before it, the Court finds that Defendant has shown prima facie that Plaintiff assumed the risks associated with falling from Defendant's gym's climbing wall, including injury. Defendant has shown prima facie that Plaintiff voluntarily participated in the sporting activity of bouldering at Steep Rock Bouldering and assumed the risks inherent therein. Specifically, Defendant has

referred to Plaintiff's deposition testimony, which was sufficient to establish that Plaintiff: (1) had experience with rock climbing; (2) was aware of the conditions of the climbing wall from observations both at a distance—from looking online at facebook and watching others—and up close on her two or three successful climbs prior to her injury; and (3) was aware that a person could drop down from the wall, as Plaintiff had herself already jumped down from the wall of her own accord.

In response, Plaintiff fails to raise a genuine issue of material fact. Steep Rock Bouldering's climbing wall is of an average height for bouldering walls according to Dr. Richards. Dr. Nussbaum's assertion that climbing on any wall of a height of eight feet or more requires a harness or similar device is conclusory, unsupported by citation, and, ultimately, unavailing.

To require harnesses and ropes at Steep Rock Bouldering would fundamentally change the nature of the sport. Bouldering is a type of climbing that does not require ropes or harnesses. The Court finds that injury from falling is a commonly appreciable risk of climbing—with or without harnesses, ropes, or other safety gear—and that Plaintiff assumed this risk when she knowingly and voluntarily climbed Defendant's gym's climbing wall for the third or fourth time when she fell. To hold that Defendant could be liable for Plaintiff's injuries because it allowed her to climb its wall without a rope and harness would effectively make the sport of bouldering illegal in this state. To do so would fly in the face of the reasoning in *Trupia* that such "athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and . . . that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise." (14 NY3d at 395–96.)

In dismissing the instant case, the Court notes that the facts here are distinguishable from those in *Lee v Brooklyn Boulders, LLC* (—NYS3d—, 2017 NY Slip Op 08660, 2017 WL 6347269, *1 [2d Dept, Dec. 13, 2017, index No. 503080/2013]) and *McDonald v. Brooklyn Boulders, LLC* (2016 WL 1597764, at *6 [Sup Ct, Kings County Apr. 20, 2016]). Both cases involved plaintiffs who were injured when they jumped down from the climbing wall—at the same defendant's bouldering facility—and each plaintiff's foot landed in a gap between the matting. In both cases, summary judgment was denied because there was a genuine issue of material fact concerning whether the gap in the matting presented a concealed risk. Here, Plaintiff does not contend that she was injured by such a concealed risk, but essentially argues she should not have been allowed to

voluntarily engage in the sport of bouldering. For the reasons previously stated, this Court finds such an argument to be unavailing.

CONCLUSION

Accordingly, it is

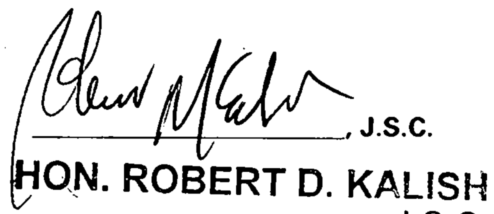
ORDERED that Defendant Steep Rock Bouldering, LLC's motion pursuant to CPLR 3212 for an order granting Defendant summary judgment against Plaintiff Min-Sun Ho is granted; and it is further

ORDERED that the action is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendant; and it is further

ORDERED that counsel for movant shall serve a copy of this order with notice of entry upon Plaintiff and upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who are directed to mark the court's records to reflect the dismissal of this action.

The foregoing constitutes the decision and order of the Court.



Dated: January ✓, 2018
New York, New York

_________________, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE