

<b>Chiaromonte v Town of Smithtown</b>
2018 NY Slip Op 30465(U)
March 15, 2018
Supreme Court, Suffolk County
Docket Number: 15-3985
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 15-3985  
CAL. No. 17-00387OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

**P R E S E N T :**

Hon. WILLIAM G. FORD  
Justice of the Supreme Court

MOTION DATE 7-27-17  
ADJ. DATE 10-26-17  
Mot. Seq. # 003 MG; CASEDISP

-----X  
TRICIA CHIARAMONTE,  
  
Plaintiff,  
  
- against -  
  
TOWN OF SMITHTOWN, and  
RECREATIONAL SPORTS LEAGUE,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 35 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 25; Answering Affidavits and supporting papers 26 - 32; Replying Affidavits and supporting papers 33 - 35; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendants Town of Smithtown and Recreational Sports Leagues, Inc., for summary judgment dismissing the complaint against them is granted.

This action was commenced by plaintiff Tricia Chiaramonte to recover damages for injuries she allegedly sustained on May 10, 2014, when she slipped and fell while playing softball at Flynn Memorial Park in the Town of Smithtown, New York.

Defendants now move for summary judgment in their favor, arguing plaintiff assumed the risks inherent in the sport of softball, that the alleged dangerous condition was open and obvious, and that defendants had no duty to protect or warn of a naturally occurring condition. In support of their motion, they submit copies of the pleadings, a transcript of plaintiff's General Municipal Law § 50-h hearing, transcripts of the parties' deposition testimony, an affidavit of Marcel Caillat, an affidavit of Joseph Morreale, a transcript of non-party Sandra Miranda's deposition testimony, an affidavit of Peter Primerano, a copy of a "Smithtown Recreation Department Field Permit," a copy of a "Town of Smithtown Recreation Department Field Permit Application," an affidavit of Thomas E. Grosse, and an affidavit of Thomas Lynn.

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Plaintiff testified that at 8:30 a.m. on the date in question, she arrived at Flynn Memorial Park in Kings Park, New York for the purpose of participating in a charity event entitled the "Flynn Field Park Lounge Swing For A Cure Softball Tournament." She indicated that she was a member of a softball team called "Shanahan's," which was named after the team's restaurant sponsor, and that Deanna Shanahan was "in charge" of the team. Plaintiff stated that she has played in various softball leagues, that she coached her daughter's Eastport Little League softball team, and that she has played softball at Flynn Memorial Park "at least 50 times."

Plaintiff testified that upon her arrival to the park, she put on her softball cleats and "waited for the fields to be ready." Upon questioning as to what she was waiting for, she explained that a maintenance crew was "raking" the fields, but she did not witness any maintenance of the field on which she was eventually injured. She explained that Flynn Memorial Park had a total of four baseball/softball fields, and that the "far left" field is where she played her first game of the tournament. Plaintiff testified that she played the position of pitcher during that first game, describing the field as "[s]lightly muddy," but that it "wasn't bad." Upon questioning, she denied lodging any complaints regarding the condition of the field.

Her team having won their first game of the tournament, plaintiff testified that they moved on to the next game, which was being held on the far-right field when viewed from the park's parking lot. She indicated that another team was exiting that field, having just completed a game. Plaintiff described this second field's condition as "pretty muddy," but without any standing water. Plaintiff stated that at her first at-bat she hit a single and ran to first base. She testified that the following batter hit the softball into center field, at which time she ran to second base, rounded second base, then ran toward third base. She indicated that as she was passing by the shortstop, "both [of her] legs [were] kicked out from under [her]" and she fell onto her left hand. At a further deposition, plaintiff explained that "as [she] was running . . . [she] slipped and both legs went up in the air in different directions." Plaintiff further stated that "[t]he ground, the mud" caused her fall, that it was "thick," and that her shoes were able to sink halfway down into it. However, she testified that she is unaware of anyone else slipping on mud that day.

Questioned regarding the weather conditions on the date of her alleged injury, plaintiff testified that "it was misting" when she left her house that morning, that it had rained the previous day, and that the rain ended by the time she arrived at Flynn Memorial Park. She indicated that while it had not rained on the previous occasions when this tournament was held, she has played softball in the rain. She further stated that she was aware of the chance of injury "[o]n any given day" while playing softball.

Marcel Caillat testified that he is employed by the Town as a labor crew leader. He indicated that his responsibilities include ensuring that Town park "attendants" are present at all events, and that the ball fields are prepared for those events. Mr. Caillat stated that another Town employee, Joe Morreale, was the person in charge of the "ball field crew" that performed the specialized maintenance tasks necessary to those fields. However, he testified that Mr. Morreale was not present the day of plaintiff's accident. Rather, Mr. Caillat stated that the only Town employees there were himself and one seasonal employee named Tom Robrect.

Further, Mr. Caillat testified that when he arrived at Flynn Memorial Park at approximately 8:00 a.m. on May 10, 2014, he performed an inspection of each of the four ball fields and found three of them immediately suitable for play, and with no standing water. The fourth field, he explained, was "softer" than the other three and required additional work by Mr. Robrect. Mr. Caillat recalled that while it rained the two

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days prior to the softball tournament, the rain ended at approximately 2:00 p.m. on May 9, 2014. He testified that whenever rain fell on Flynn Memorial Park's ball fields, both his and Mr. Morreale's subordinates would use implements to push any pooling water around the clay infield areas, to aid evaporation and drying. Mr. Caillat indicated that on the morning of plaintiff's incident, Mr. Robrect raked some wet infield areas by hand, noting that raking "makes lines through [the soil] to let the air in to dry it out." He testified that they also put out the bases, painted lines, and brought a mechanical "groomer" to the fields. A mechanical groomer, he stated, was used to eliminate footprints from the clay areas of the fields after use, because "the people want to see like Yankee Stadium." Additionally, Mr. Caillat indicated that Mr. Robrect spread an instant-acting drying agent called Turface on the fields that morning.

Mr. Caillat indicated he was acquainted with Peter Primerano, whom he described as the permit holder for the softball tournament at issue. Mr. Caillat stated that he had conversations with Mr. Primerano in the days prior to the tournament regarding the weather forecast, noting that he possessed the authority to halt activities if weather conditions rendered use of the park unsafe, as did the umpires present at each game. He testified that a prohibition of play on the fields would not be a revocation of the user's permit, but merely an opportunity to reschedule the event for a mutually-suitable date. Finally, Mr. Caillat stated that he did not receive any complaints that the playing fields were unsafe on the date in question, nor is he aware of any complaints lodged with other Town employees.

Thomas Lynn testified that he is the president of Recreational Sports League (RSL), a New York corporation founded in 2004. He stated that RSL "organize[s] and maintain[s]" adult sports leagues. With regard to the instant charity softball tournament, Mr. Lynn indicated that RSL donated the liability insurance necessary for Peter Primerano to obtain a park use permit from the Town. Upon questioning as to his opinion of the quality of the ball fields at Flynn Memorial Park, Mr. Lynn testified that they were "[f]ar superior" to the other fields he had encountered.

It is axiomatic that for a plaintiff to recover against a defendant in a negligence action, plaintiff must prove defendant owed plaintiff a duty and that the breach of that duty resulted in the injuries sustained by plaintiff (see *Lugo v Brentwood Union Free School Dist.*, 212 AD2d 582, 622 NYS2d 553 [2d Dept 1995]). "A plaintiff is barred from recovery for injuries which occur during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law" (*Leslie v Splish Splash at Adventureland*, 1 AD3d 320, 321, 766 NYS2d 599 [2d Dept 2003]). "Under the doctrine of primary assumption of risk, if the risks of a sporting activity are fully comprehended or perfectly obvious to a voluntary participant, he or she has consented to them and the defendant has discharged its duty of care by making the conditions as safe as they appear to be" (*E.B. v Camp Achim*, 156 AD3d 865, 866, 67 NYS3d 666 [2d Dept 2017], quoting *Brown v City of New York*, 69 AD3d 893, 893-894, 895 NYS2d 442 [internal quotation omitted]). "The primary assumption of risk doctrine also encompasses risks involving less than optimal conditions" (*Bukowski v Clarkson Univ.*, 19 NY3d 353, 356, 948 NYS2d 568 [2012]; see *Palladino v Lindenhurst Union Free School Dist.*, 84 AD3d 1194, 924 NYS2d 474, [2d Dept 2011]; *Bouck v Skaneateles Aerodrome, LLC*, 129 AD3d 1565, 1566, 10 NYS3d 783 [4th Dept 2015]). "It is not necessary to the application of the doctrine that the injured plaintiff should have foreseen the exact manner in which the injury occurred so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Cruz v Longwood Cent. Sch. Dist.*, 110 AD3d 757, 758, 973 NYS2d 260 [2d Dept 2013] [internal quotation omitted]).

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Defendants have established a prima facie case of entitlement to summary judgment in their favor (see *Perez v City of New York*, 118 AD3d 686, 986 NYS2d 850 [2d Dept 2014]). The Town adduced evidence, namely the deposition testimony of the parties, that plaintiff was participating in the organized sport of softball at the time she allegedly sustained her injuries. Plaintiff testified that she was aware of the risks inherent in the game of softball, as well as the condition of the play fields on the date in question (see *Tinto v Yonkers Bd. of Educ.*, 139 AD3d 712, 32 NYS3d 176 [2d Dept 2016]; *Safon v Bellmore-Merrick Cent. High Sch. Dist.*, 134 AD3d 1008, 22 NYS3d 233 [2d Dept 2015]). Further, defendants have shown that the Town's employees were diligent in their inspection of the fields and took measures to remedy any minor deficiencies. Finally, defendant Town demonstrated that no complaints were lodged on the day of plaintiff's accident regarding the fields' condition, nor did any other players sustain injuries while running in the area of her fall.

Plaintiff argues defendants had notice of the alleged dangerous condition on the softball fields, namely mud, and, nevertheless, authorized the softball tournament's participants to play on them. Plaintiff also alleges the Town concealed the muddy condition, which was then not open or obvious. In opposition, plaintiff submits her own affidavit, an affidavit of Sandra Miranda, a transcript of non-party Roberta Traynor's deposition testimony, and a transcript of non-party Deana Shanahan's deposition testimony.

In her affidavit, plaintiff states that she relied upon the expertise of Town employees to determine whether or not the park's fields were suitable for play on the date of her accident, and that she observed Town employees using equipment to groom portions of their infields. Plaintiff avers that while she observed muddy areas in the grassy portion of the fields, the Town groomed/raked the base paths, "giving the impression that they were not muddy." She indicates that, had she seen the condition between second base and third base, she "would never had run on that surface, presuming [she] would have played at all."

Sandra Miranda supplied an affidavit wherein she states that she was Director of the Parks Department for the Town of Smithtown from March of 2014 through August of 2015. She indicates that on May 13, 2014 (sic), she called Joseph Morreale to inform him that she was revoking Peter Primerano's permit to use the Flynn Memorial Park fields due to water accumulation. She further states that, somehow, her directive to revoke Mr. Primerano's permit was either not received or was disregarded, and the event was held.

Nonparty Roberta Traynor testified that she has been friends with plaintiff since she was two years old and sees her two or three times a year. She indicated that she witnessed plaintiff's accident, which occurred when plaintiff was running toward third base, then turned to head back to second base because the ball had beaten her to third. Ms. Traynor stated that one of Flynn Memorial Park's four softball fields was closed on the date of the tournament due to puddles of water present, but that the park's other three fields were open. She further stated that the location of plaintiff's accident was muddy. Nonparty Deana Shanahan testified that she has been friends with plaintiff "since junior high" and sees her "between three to eight times a year." She indicated that the field where plaintiff's accident occurred was muddy but that they, nevertheless, played a game on that field after noticing its muddy condition earlier.

Plaintiff's evidentiary submissions do not raise a triable issue of material fact. Initially, in her memorandum of law in opposition to the instant motion, plaintiff admits she is unable to adduce evidence

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establishing defendant RSL owed her any duty. Accordingly, the motion by defendant Recreational Sports Leagues, Inc. for summary judgment dismissing the complaint against it is granted.

As to the Town, given plaintiff “was aware of that [muddy] condition and voluntarily chose to play on the field,” she assumed the risk of slipping on the mud (*E.B. v Camp Achim*, *supra* at 866; *see also Stadelmaier v Town of Tonawanda*, 2 AD3d 1369, 768 NYS2d 868 [4th Dept 2003]; *Swan v Town of Grand Is.*, 234 AD2d 934, 652 NYS2d 166 [4th Dept 1996]). Plaintiff’s reliance on arguments the Town had prior notice of the fields’ muddy condition or that, by allowing the tournament to go forward, the Town explicitly vouched for the safety of the fields is misplaced. Plaintiff cites no authority assigning a duty to supply plaintiff with a flawless playing field. It is self-evident that, whether it be morning dew or residual precipitation, the presence of moisture in outdoor, natural environments is not easily prevented. Further, given the Town’s practice of cancelling events due to extreme weather, its provision of a preemptive “rain date” at the time of the tournament permit’s issuance, and the dearth of other accidents on the date in question, there has been no evidence adduced to support plaintiff’s contention the tournament should not have been held.

Here, plaintiff was not subject to any compulsion to participate in the tournament nor, given her extensive softball experience, was she unaware of the possibility of slipping while running the bases at full speed (*see Siegel v Albertus Magnus High Sch.*, 153 AD3d 572, 60 NYS3d 202 [2d Dept 2017]). None of the field’s conditions rose to the level of being “unassumed, concealed, or enhanced risks” (*see Bukowski v Clarkson Univ.*, *supra*; *see also Sirianni v Town of Oyster Bay*, 156 AD3d 739, 66 NYS3d 524 [2d Dept 2017]; *Sykes v County of Erie*, 94 NY2d 912, 707 NYS2d 374 [2000]; *cf. Deserto v Goshen Cent. Sch. Dist.*, 153 AD3d 595, 57 NYS3d 423 [2d Dept 2017] [triable issue remained as to whether defendants were negligent in placing a large steel plate only feet from a football field sideline]; *MacIsaac v Nassau County*, 152 AD3d 758, 60 NYS3d 64 [2d Dept 2017] [triable issue of whether a sprinkler fitting in a grass-covered hole was concealed or unreasonably increased the risks inherent in a golf course]). Plaintiff’s assertion that the grooming of the base paths disguised their muddy nature, an argument raised for the first time in her opposition, is a feigned issue, unmentioned in her bill of particulars or deposition testimony (*see Barron v E. Athletic, Inc.*, 150 AD3d 654, 53 NYS3d 689 [2d Dept 2017]).

Accordingly, the motion by defendant Town of Smithtown for summary judgment dismissing the complaint against it is granted.

Dated: March 15, 2018  
 Riverhead, New York



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 WILLIAM G. FORD J.S.C.

  X   FINAL DISPOSITION           NON-FINAL DISPOSITION