Berestyanska v City of New York
2018 NY Slip Op 31423(U)
June 22, 2018
Supreme Court, New York County
Docket Number: 150996/12
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
--X
IRYNA BERESTYANSKA

Plaintiff,

-against-

CITY OF NEW YORK and BRYANT PARK CORPORATION

Defendants.
--X

Index No. 150996/12

Motion Seq. No. 001

DECISION and ORDER

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

I. INTRODUCTION

In this action to recover damages for personal injuries, plaintiff, Iryna Berestyanska, alleges that he was injured on December 25, 2010, at "Citi Pond", an ice skating rink located in Bryant Park in Manhattan, after colliding with another skater when the rink became overcrowded. The defendants, City of New York (City) and Bryant Park Corporation (BPC), move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted.

II. BACKGROUND

On the date of the accident, Bryant Park was owned by the City, and was maintained by BPC pursuant to an agreement with the City. BPC contracted with non-party Bryant Park Market Events, LLC (BPME), a concessionaire, to operate the ice skating rink.

The plaintiff commenced this action against the City and BPC on March 19, 2012, alleging that the defendants negligently managed, controlled, repaired, and maintained the ice rink, specifically, that "she was caused to trip and fall and was violently thrown to the ground as a result of a dangerous condition existing at the aforementioned premises." In its answer, the defendants asserted numerous affirmative defenses, including assumption of the risk and culpable conduct on the part of the plaintiff. Plaintiff's verified bill of particulars alleges in part that the defendants were negligent "in allowing an excess number of skaters onto the rink at one time."

At her 2016 deposition, the plaintiff, born in 1963, testified that she started ice skating as a five-year-old child in the Ukraine and had skated hundreds of times in her life, including ten times at skating rinks in the USA. Prior to December 25, 2010, she had witnessed skaters collide and fall several times. She had previously skated at a rink at Hofstra University, but could not recall seeing any "skating guards" or "monitors" there, or anywhere else except for the Ukraine.

On December 25, 2016, Christmas Day, she and her two daughters traveled from Long Island to Manhattan, ate brunch at a location she could not recall, and then went to Bryant Park to skate. The plaintiff testified that there were many people on the rink when they arrived, but they decided to skate anyway, and

proceeded to wait in line for two or three hours to buy tickets. From the line, she could see the rink, which is enclosed by a transparent fence or wall of several feet in height. She estimated that there were more than one thousand people waiting in line, and testified that the line moved slowly because the rink personnel would allow only a limited number of people on the rink at any one time. When her turn came, she put on her rented skates, entered the rink and noticed that it was still crowded. She estimated that more than 100 people were on the ice.

The plaintiff proceeded to skate around the rink at what she described as average speed. She did not recall seeing any skater push any other skater, before or after she got on the ice, and did not see anyone fall. A few minutes after entering the rink, she was pushed by another skater from behind and fell backward to the ice, landing on her lower back and wrists. She never saw the individual. She did not see if this skater was an adult or a child, male or female, and could not describe their clothing. She did not know if it was a push with hands or a full body collision, and did not know if it was on purpose of by accident, or if the person took any steps to avoid the collision. She didn't recall if any other skate came to her assistance after she fell. After a few minutes, employees in red vests, who she had seen prior to the fall, came to assist her from the ice. She could not recall if they were male or female, or anything else

about them and could not recall if they asked her what happened. She claimed that they offered her water and "pills" but not any medical assistance and did not ask if she wanted an ambulance. However, an ambulance took her to the hospital where casts were placed on both wrists, which were fractured in the fall.

At her 2017 deposition, the plaintiff's daughter, Marta Tupychak, testified that she was born in 1988 and was very young at the time of the incident and had little recollection of the day. She remembered waiting a long time in line, and that there were approximately 100-200 people on the ice when she entered the rink. Most were skating counterclockwise but a few were skating clockwise or were stopped. Tupychak testified that she was on the ice for only a short period, during which time three skaters made contact with her, but she could not recall anything about them and told no one about it. Her mother, the plaintiff, was skating separately from Tupychak and her sister. Tupychak saw her mother sitting on the ice after she fell, and skated to her. There were 30-40 people between her and her mother at that point. Tupychak testified that since she didn't see the skater bump into her mother, "I don't know what happened."

The defendants also submit the deposition testimony of Ariana Abel, the plaintiff's other daughter who was with her at the rink on the day of the incident. She also testified that she could not recall many details of the incident, but recalled

waiting on a long line to enter the ice behind 80 or 100 people, and that the ice was also crowded and some people were skating in the wrong direction and/or weaving in and out of other skaters. Like her sister, Abel did not witness the incident which caused her mother to fall, but quickly skated over to her once she saw her down on the ice.

At his deposition, Itai Schoffman, executive director of BPME, testified that the day the plaintiff was at the Bryant Park rink was a peak time of year, drawing 8,000-10,000 people per day. Admission is free but each person is provided a wristband before entering the rink so that BPME can keep a count of the number of people in the skating pavilion, where skates can be rented and snacks purchased, and the rink. There are no assigend "sessions" limiting one's time on the ice. However, skaters are asked, by signage and verbally by staff, to limit their time to 60 minutes and be courteous to fellow skaters. People are constantly entering and leaving the ice, but BPME employees attempt to keep the traffic on and off the ice flowing. There is only one opening in the rink to enter the ice, on the south side, which is monitored by staff. Typically, four to six skate guards, but no less than two, would be on duty on the ice at any one time. They are the "eyes and ears" of management and are tasked with keeping the flow of skaters moving in the right direction and assisting skaters who fall.

Schoffman testified that although an exact count can not always be kept, as of December 25, 2010, no more than 500 people were allowed onto the ice at any given time. He testified that since the facility is approximately 17,000 square feet, this is in keeping with industry standards of approximately one skater per each 30 square feet. BPME employees also clean the ice with a Zamboni machine every 60-90 minutes, first clearing the ice of all skaters. Many of them leave at that point, and this tends to reduce the overall number of skaters on the ice. Schoffman recalled receiving a "handful" of complaints about overcrowding each season, along with thousands of positive comments. In any event, he testified, long wait times and overcrowding was alleviated between 2005 and 2010 by extending operating hours til midnight and expediting admission procedures.

In an affidavit dated January 11, 2017, submitted in further support of the defendants' motion, Itai Schoffman asserts that skaters awaiting admission to the rink can see onto the rink from the line and from the pavilion where they can rent skates. There is also a raised deck surrounding the rink where the ice and all skaters are fully visible from all sides. He opined that the number of skaters and the manner in which they were skating was "open and obvious" to anyone, whether on or off the ice. Schoffman also alleges that there are posted signs, in print and on television screens, warning skaters of the risks of skating

and advising that they "skate at their own risk."

In opposition, the plaintiff relies on her own deposition testimony and that of Itai Shoffman, as set forth above, and submits an affirmation from her attorney.

In reply, the defendants submit an additional attorney affirmation.

The defendants submit a Memorandum of Law; the plaintiff does not.

III. DISCUSSION

"[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). The 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.

The 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 she was aware that another skater might bump into her. 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 purportedly occurred due to the single act of misconduct by one unidentified skater. The defendants' submissions in support of the motion include the pleadings, the affirmation of counsel, deposition transcripts, an affidavit of Itai Shoffman, Executive Director of Bryan Park Market Events LLC, photographs and a memorandum of law.

In opposition to the motion, the plaintiff argues that the defendants fail 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 BPC breached its duty to adequately manage and supervise the ice skating rink by allowing it to become overcrowded, thus causing another skater to collide with the plaintiff. In this regard, plaintiff argues that she did not assume the risk of conduct by other skaters by choosing

to enter the rink since the purported overcrowded condition increased the risk of collisions over and above that which inheres in recreational skating.

In reply, the defendants maintain that the plaintiff's accident was the result of a common collision between ice skaters, a risk which all skaters assume, and that there is no evidence that the defendants increased that risk. The 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.

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); Pisany v City of New York, 2016 WL 4764973, 2016 N.Y. Slip Op 31711(U) (Sup Ct, NY County, Sept. 12, 2016). As

such, 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).

The doctrine of primary assumption of risk bars this action since the plaintiff has not shown that the rink was operated beyond its capacity so as to present a condition of dangerous overcrowding, and the risks to skaters were not increased above and beyond those that inhere in the activity of recreational ice skating, plaintiff was an 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 lone skater who suddenly bumped into her from behind and disappeared could not have been prevented by even the most intense supervision. In her submissions, plaintiff has not shown that any exception to the doctrine is applicable. Notably, claims of overcrowding at the same rink were similarly dismissed for lack of proof by this court in Pisany v City of New York, supra and by Justice Rakower in Del Pozzo v Bryant Park Corp., Index No. 109109/2011 (Sup Ct, NY County Jan. 14, 2014).

Further, as to the City, it is well settled that an out-of-possession landlord "is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." Johnson v Urena Serv. Ctr., 227 AD2d 325, 326 (1st Dept. 1996). Either a lessee or such an out-of-possession landlord may be held liable if it had actual or constructive notice of the allegedly dangerous condition (see Barbuto v Club Ventures Invs., LLC, 143 AD3d 606 [1st Dept. 2016]), or created or exacerbated the condition by its own

affirmative acts. See Bleiberg v City of New York, 43 AD3d 969, 971 (1st Dept. 2007).

Here, defendant City of New York was an out-of-possession landlord and, 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 any triable issue of fact. See DeJesus v Tavares, 140 AD3d 433, 433 (1st Dept 2016). The affirmation of her attorney, who claims no personal knowledge of the facts, is without probative value or evidentiary significance on this motion (see Zuckerman v City of New York, supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 [1st Dept. 2012]; Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 [1st Dept. 2010] *lv denied* 17 NY3d 713 [2011]) and, contrary to the plaintiff's contention, the two deposition transcripts appended to that affirmation do not warrant denial of the motion.

IV. CONCLUSION

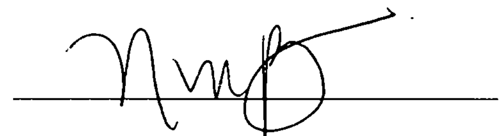
Accordingly, upon the foregoing papers and reasoning, it is

ORDERED that the motion of the defendants, City of New York and Bryant Park Corporation, for summary judgment is granted and the complaint is dismissed as to both defendants, and it is further,

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

This constitutes the Decision and Order of the court.

Dated: June 22, 2018 ENTER:



HON. NANCY M. BANNON JSC