SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 52EFM

Justice

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INDEX NO. 157309/2015

HECTOR MOQUETTE

MOTION DATE 10/04/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing papers, plaintiff moves to strike the defendant City of New York's answer for failing to provide discovery, or alternatively compel the same. Defendant cross moves for summary judgment.

On May 19, 2014, plaintiff was playing softball on Colonel Young Playground located in New York, New York. He claims that he was running for a fly ball and, when reaching to catch the ball, his left foot made contact with a manhole cover, which made him fall. At his deposition, plaintiff was shown a photograph that depicts the accident location, and he marked the area that allegedly caused his accident with an X (Dkt #21-22). Plaintiff had played on that field before but had not seen that particular manhole cover and/or alleged dangerous condition.

In support of its motion for summary judgment, defendant argues that plaintiff "assumed the risk of the injury he claims to have sustained because he was voluntarily engaged in a recreational activity, and the City discharged its duty to make the premises as safe as it appeared to be because the alleged condition was open and obvious" (Brisard aff, ¶ 7).

"Pursuant to the doctrine of primary assumption of risk, one is deemed to have assumed, as a voluntary participant, spectator, or even bystander, certain risks occasioned by athletic or recreational activity, and to the extent of such an assumption, any legally enforceable duty to reduce the risks of such activity is limited" (Roberts v Boys and Girls Republic, Inc., 51 AD3d 246, 247 [1st Dept 2008], affd 10 NY3d 889 [2008]). "An assumption under the doctrine is thus potentially broad and may encompass risks engendered by less than optimal conditions, provided that those conditions are open and obvious and that the consequently arising risks are readily appreciable" (Roberts, 51 AD3d at 248).

This principle may also extend to the risks involved in the general layout and construction of a playing field (see Bryant v Town of Brookhaven, 135 AD3d 801, 802 [2d Dept 2016] ["Among the risks inherent in participating in a sport are the risks involved in the construction of the field, and any open and obvious conditions of the place where the sport is played"]; Sanchez v City of New York, 25 AD3d 776, 776 [2d Dept 2006] ["The assumption of risk doctrine also applies to any readily observable condition of the place where the activity is carried on"]).

However, this Court finds the depression around the manhole cover is not inherent in the sport of baseball, and does not "arise out of the nature of the sport generally and flow from such participation" of playing softball (Morgan v State of New York, 90 NY2d 471, 484 [1997]).

While the doctrine may apply in situations where plaintiff's injury was caused by an irregular surface, such application is proper to "irregular surfaces or features in playing spaces that existed as they were designed" (Philius v City of New York, 161 AD3d 787, 796 [2d Dept 2018], quoting Palladino v Lindenhurst Union Free School Dist., 84 AD3d 1194, 1199 [2d Dept

2011]). The Court cannot see how such a dip or depression in the field is part of the baseball field's design.

The City relies, in part, on Sykes v County of Erie, where the Court of Appeals held that plaintiff assumed "the risks of playing upon an irregular surface" that "are inherent in outdoor basketball activities" (94 NY2d 912, 913 [2000]). There, the plaintiff "injured his knee when he stepped into a recessed drain near the free throw line while playing basketball on an outdoor court owned by defendant" (id.). As Justice Connelly noted in her concurring opinion in Philius, supra, "critical to understanding *Sykes* is the Court of Appeals' statement that, '*[a]lthough the doctrine of assumption of risk does not exculpate a landowner from liability for ordinary negligence in maintaining a premises, there is no evidence that the drain was defective or improperly maintained*'" (161 AD3d at 795, quoting Sykes, 94 NY2d at 913).

Here, even if the feature here (the manhole cover) could be considered as similarly designed with the feature that caused plaintiff's injury in Sykes (the recessed drain), summary judgment should not be granted where, as here, plaintiff submitted evidence in opposition demonstrating that the condition of the field was unacceptable in numerous reports and complaints were made about erosion on the field possibly indicating dangerous condition(s).[1] Indeed, tripping hazards of this nature indicate that the surface was not maintained; this sort of state of disrepair should not exculpate a landowner from liability (see Philius, 161 AD3d at 796–97 [Connelly, J., concurring] ["it does not comport with public policy to preclude only sporting participants from suing landowners who have negligently allowed their properties to deteriorate—indeed, if the plaintiff had been a pedestrian who tripped while simply passing

[1] In this regard, the motion should be denied in any event for further discovery as set forth infra (see CPLR Rule 3212 [f]).

through the basketball court, he would be allowed to hold the defendant responsible for its negligence"]).

Additionally, as the plaintiff points out in opposition, even though he had played on this field before, there is no evidence that he had seen this particular condition before or was aware of it at any time prior to his fall. Thus, in considering, e.g., this particular plaintiff's experience in assuming the risk of the injury (see Morgan, 90 NY2d at 486), it cannot be said that he knew about such risk such that he voluntarily consented to the hazard (cf. Philius, 161 AD3d at 800 [Justice Connelly concurring with the majority to grant defendant summary judgment "because NYCHA established that the plaintiff was aware of the cracks on the court and voluntarily chose to play basketball at this location"]; Williams v New York City Hous. Auth., 107 AD3d 530, 531 [1st Dept 2013] ["Plaintiff was an experienced player and was aware that the subject court, where he had played on numerous occasions, had cracks."]).

As such, the Court finds that the defendant has not shown that it completely discharged any duty owed to plaintiff to maintain the premises in a reasonably safe condition.

The defendant also claims that the defect was open and obvious. However, in order to completely absolve the defendant of any liability, it must also be found to be "not inherently dangerous" as a matter of law (see Cupo v Karfunkel, 1 AD3d 48, 52 [2d Dept 2003]; Sirianni v Town of Oyster Bay, 156 AD3d 739 [2d Dept 2017]). Additionally, "the fact that a condition is visible does not necessarily mean it is open and obvious" (Cook v Consolidated Edison Co., 51 AD3d 447, 448 [1st Dept 2008]). Here, the Court cannot conclude that the condition is not inherently dangerous. Additionally, as plaintiff notes, there might be issues with the visibility of the condition as plaintiff was playing at night.

Accordingly, it is hereby ORDERED that the plaintiff's motion is granted in part to the extent that the defendant is directed to provide a response to plaintiff's demand dated February 9, 2018 within thirty (30) days; the parties shall schedule the deposition of Parks Department witness Tim Burch on or before the parties' next compliance conference on January 30, 2019; and it is further

ORDERED that defendant's cross motion is denied at this juncture without prejudice.

1/9/2019
DATE

ALEXANDER M. TISCH, J.S.C.

HON. ALEXANDER M. TISCH

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED		DENIED	[X]	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE