Bastidas v Go Airborne, LLC
2019 NY Slip Op 30772(U)
March 26, 2019
Supreme Court, New York County
Docket Number: 150449/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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KRYSTIE BASTIDAS,

Plaintiff,

- v -

GO AIRBORNE, LLC d/b/a BOUNCE TRAMPOLINE SPORTS,

Defendant.

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INDEX NO. 150449/2016

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 34

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action, defendant Go Airborne, LLC d/b/a Bounce Trampoline Sports ("Bounce Trampoline Sports") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Krystie Bastidas ("Bastidas") in its entirety. Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

On March 22, 2015, plaintiff Bastidas was allegedly injured while she was visiting a trampoline sports facility owned by defendant Bounce Trampoline Sports. (Doc. 19 at 5.) Plaintiff subsequently filed this negligence action against defendant by filing a summons and complaint on January 15, 2016. (*Id.* at 2, 5.)

In her bill of particulars, plaintiff alleged that she was caused to "slip[] in a gap between the trampoline's jumping surface and the framing pad, which caused her foot to become trapped and for her to fall and sustain severe, serious and permanent personal injuries . . . ." (Doc. 21 at 2–3.) Her bill of particulars further charged defendant with "permitting a hazardous condition and trap to exist on the trampoline . . . ." (*Id.* at 3.) Likewise, at her deposition, plaintiff testified that she fell because her foot got caught in a gap between the trampoline and the yellow padding:

> Q: So, now, after you stopped jumping, did you come to a complete stop?
> A: Yes, I did.
> Q: Then, what happened at that time?
> A: I took that first step, my foot slid and I got caught underneath the yellow [sic]. At first when I flew forward my left foot was still caught underneath and when it finally released all I heard was it twisted and the crack. And, I landed and I turned over and immediately grabbed my foot.
> Q: All right. And, so, your left foot stepped on, what? Was it the trampoline part or the yellow part?
> A: I took my first step, my left; my left foot slid.
> Q: It slid on the trampoline? The black part?
> A: Correct, the trampoline. And, I slid underneath that yellow padding and I flew forward from the force.

(Doc. 22 at 48–49.)

Defendant Bounce Trampoline Sports now moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's entire complaint. (Docs. 17–18.)

In support of its motion, defendant proffers a surveillance video recording of the incident.[1] The video recording shows seven rows of trampolines. (Def.'s Ex. F.) In the video, plaintiff can

[1] Defendant served plaintiff a Notice to Admit on June 29, 2017 (Doc. 23) requesting that plaintiff admit that the videotape accurately depicts, *inter alia*, plaintiff jumping on the trampolines, the facility, and plaintiff's husband (*id.*). Since plaintiff failed to respond to the Notice to Admit, the matters set forth in defendant's request are deemed admitted pursuant to CPLR 3123(a). (*See* CPLR 3123[a] ("Each of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof . . . the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.").)

be seen utilizing the third trampoline set from the top of the complex. (*Id.*) Contrary to her deposition testimony, wherein she stated that she fell as she began to walk because her foot got caught in a gap (Doc. 22 at 48–49), the recording shows that plaintiff fell near the edge of the trampoline as she was landing from a jump. (Def.'s Ex. F.) The video does not show either of plaintiff's feet getting stuck beneath the yellow pads surrounding each trampoline. (*Id.*) Defendant therefore argues that the complaint must be dismissed because it neither created the alleged hazardous condition nor had actual or constructive notice of its existence prior to plaintiff's accident. (Doc. 18 at 6.) Moreover, defendant maintains that the complaint should be dismissed because plaintiff had assumed the risks associated with jumping on trampolines. (*Id.* at 6–9.)

In opposition to the motion, plaintiff asserts that the video recording is unreliable due to the quality of the video and because the recording is too far away from where she was positioned at the time. (Doc 29 at 4.) Further, plaintiff submits frame-by-frame stills of the video recording, which she claims establishes that her "foot was in fact underneath the [yellow] framing pad, and that . . . this hazardous condition . . . caused her injury." (*Id.* at 5.) In response to defendant's argument regarding assumption of risk, plaintiff argues that the assumption of risk doctrine does not apply to jumping on trampolines (*id.* at 7–8) and that, even if it did, she "did not assume the risk of being injured as a result of the trap that was created" by defendant (*id.* at 6).

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment

as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

Plaintiff alleges that defendant negligently maintained its trampolines in such a way as to create a hidden "trap" between the trampoline and the yellow padding. (Doc. 29 at 5–6, 8.) An owner has the "duty to maintain its property in a reasonably safe condition . . . ." (*Boderick v RY Mgt. Co., Inc.*, 71 AD3d 144, 147 [1st Dept 2009].) "In order to recover damages for an alleged breach of this duty, the plaintiff must first demonstrate that the defendant created or had actual or constructive notice of the hazardous condition which precipitated the injury." (*Id.*) Conversely, a "defendant who moves for summary judgment . . . has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008].)

Keeping these standards in mind, this Court determines that defendant Bounce Trampoline Sports is entitled to summary judgment dismissing the complaint. An underlying assumption in the standards set forth in *Boderick* and *Smith* is that the plaintiff, suing on the theory of premises liability, was injured by a defective condition. Only when the defendant demonstrates that it neither created nor had notice of the defect will a court grant summary judgment in the defendant's favor. (*See id.*) Here, however, plaintiff has not shown the existence of a dangerous condition that caused her to fall. In fact, the submitted evidence establishes the opposite. The surveillance video illustrates that plaintiff fell near the edge of a trampoline as she was landing from a jump. (Def.'s

Ex. F.) Defendant has thus "shouldered its burden of making a prima facie showing that it neither created the hazardous condition, nor had notice of it." (*Smith*, 50 AD3d at 501.) Plaintiff failed to raise a material issue of fact in response. Her testimony that she was walking and that her foot got caught underneath the yellow padding is squarely contradicted by the recording.

Further, this Court finds that the assumption of risk doctrine is applicable to the situation herein. (*See Koubek v Denis*, 21 AD3d 453, 453 [2d Dept 2005] (granting summary judgment to defendant and holding that plaintiff had assumed the risk of using a trampoline); *Liccione v Gearing*, 252 AD2d 956, 956 [4th Dept 1998] (same).) "The doctrine of primary assumption of risk provides that a voluntary participant in a sporting or recreational activity 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." (*Latimer v City of New York*, 118 AD3d 420, 421 [1st Dept 2014] (internal quotations omitted).) Falling has been recognized as a common risk of jumping on a trampoline. (*See Koubek*, 21 AD3d at 453; *Liccione*, 252 AD2d at 956.) Defendant's motion for summary judgment to dismiss the complaint must therefore be granted.

In light of the foregoing, it is hereby:

ORDERED that defendant Go Airborne, LLC d/b/a Bounce Trampoline Sports' motion for summary judgment dismissing the entire complaint of plaintiff Krystie Bastidas is granted; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, counsel for the moving party shall serve a copy of this order with notice of entry upon all parties, and upon the General Clerk's Office at 60 Centre Street, Room 119; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of this Court.

3/26/2019
DATE

KATHRYN E. FREED, J.S.C.

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

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