To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

----------x

JASMINE SERRANO,

Plaintiff,

-against-

K1 SPEED-NEW YORK, INC.,

Defendant.

----------x

DECISION AND ORDER

Index No.: 2017-50075

The following papers numbered 1-18 were considered in connection with Defendant K-1 SPEED-NEW YORK's (hereinafter "Defendant") motion for an Order pursuant to CPLR 3212 granting summary judgment in Defendant's favor and for dismissal of Plaintiff's Complaint in its entirety:

Notice of Motion-Affirmation of Paul E. Cirner, Esq.-Exhibits A-L 1-14
Affirmation in Opposition of Derek J. Spada, Esq.-Plaintiff's Affidavit-Exhibit A 15-17
Reply Affirmation of Paul E. Cirner, Esq. 18

This action was commenced by Plaintiff Jasmine Serrano ("Plaintiff") on or about January 11, 2017. The Complaint alleges that Plaintiff was caused to sustain injuries and damages at an indoor go kart racing facility operated[1] by Defendant on or about April 3, 2016.

[1] According to Defendant's moving papers, the premises are owned by non-party Poughkeepsie Galleria, LLC and leased to Defendant.

It is further alleged that Plaintiff's injures resulted from the negligence, carelessness and recklessness of the Defendant and its employees and that Defendant failed to have adequate supervision and adequately trained staff.

Defendant moves for summary judgment on the grounds that Plaintiff's primary assumption of risk constitutes a complete bar to recovery against Defendant. Its application includes the pleadings, Plaintiff's Verified Bill of Particulars, the deposition transcripts of Plaintiff, non-party Jesse Utarid, Bryan Boesch and Jordan Greene on behalf of Defendant, the accident report for Plaintiff's accident, go-kart inspection log sheet, an assumption of risk and waiver signed by Plaintiff on March 28, 2016, and K1 Speed track rules and safety information.

It is well settled that on a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In order to defeat summary judgment, "the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact." *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 AD2d 497 [2d Dept. 1986]; *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept. 2012].

At her deposition, Plaintiff testified that she sustained injuries when the go-kart that she was operating was rear ended by another go kart on April 3, 2016. As a result of the impact, her go-kart collided with the track barrier. Plaintiff had previously driven a go-kart at the

subject facility on March 28, 2016, at which time she read and signed an assumption of risk and waiver agreement. Cirner Affirmation, Exhibit J. Plaintiff also testified that she understood that the risks of participating in the go-kart race included coming into contact with the barriers, a person or other go-karts. Indeed, Plaintiff testified that throughout the first two laps of the race she collided with the barriers on almost every turn.

Defendant argues that it engaged in all reasonable efforts on the date of the accident to minimize the risks of collisions, utilizing a flag system during the races and installing safety barriers along the track as well as providing seatbelts and helmets for the customers. It further argues that bumping and collisions are known to occur and do occur in go-kart racing and Plaintiff herself acknowledged these risks during her deposition.

"Under the doctrine of primary assumption of risk, 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' [citations omitted]. *Hanson v. Sewanhaka Cent. High Sch. Dist.*, 155 AD3d 702, 702–03 [2d Dept. 2017]. A plaintiff negates any duty on the part of the defendant to safeguard him or her from a known risk by freely assuming said risk. *Id.* at 703. "If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty." *Id.* In other words, "[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, Inc.*, 1 AD3d 320, 321 [2d Dept. 2003].

Defendant asserts that Plaintiff herein is barred from recovery because she voluntarily

participated in the go-kart race and assumed the risks associated with said race. In short, Defendant argues that Plaintiff was well aware of the risks of coming into contact with the barriers and/or other drivers both prior to and on the day of the accident in question.

Defendant's argument focuses on two (2) cases involving go-karts which support this argument. In *Garnett v. Strike Holdings LLC*, 131 AD3d 817, 819 [1st Dept. 2015], the First Department held that go-kart racing is an activity "to which the assumption of risk doctrine is appropriately applied." The risks associated with go-kart racing include the risk that the go-kart would bump into objects. *Id., citing Loewenthal v. Catskill Funland, Inc.*, 237 AD2d 262, 263 [2d Dept. 1997]. The First Department also held that "the 'apparent or reasonably foreseeable' risks inherent in go-karting also include the risk that vehicles racing around the track may intentionally or unintentionally collide with or bump into other go-karts. It is that inherent risk which 'negates any duty on the part of the defendant to safeguard [plaintiff] from the risk' [citations omitted]." *Garnett, supra.* Defendant argues that since Plaintiff was aware of the risks and was allegedly injured as a result of an apparent or foreseeable risk of go-kart racing, they are entitled to summary judgment.

Defendant also cites *Treacy v. Castle Fun Ctr.*, 120 AD3d 1405 [2d Dept. 2014], in which the Second Department affirmed the lower court's granting of Defendant's summary judgment motion based upon Treacy's primary assumption of risk in riding in a go-kart. Although that case involved go-karts using a "slick track," the assumption of risk analysis is the same. Pursuant to "the doctrine of primary assumption of risk, '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.'"

Id. at 1406, *citing Morgan v State of New York*, 90 NY2d 471, 484 [1997]. In the instant matter, Plaintiff's accident occurred when her go-kart was struck from behind by another participant and she struck the protective barrier. As demonstrated by the case law cited by Defendant, this occurrence is a commonly appreciated risk inherent in driving go-karts.

As such, Defendant has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that Plaintiff assumed the risks inherent in driving a go-kart, including the risk of sustaining injuries in the manner in which she did so in this case. *Augustin v. Grand Prix New York Racing, LLC*, 138 AD3d 902, 903 [2d Dept. 2016].

In opposition, Plaintiff submits an attorney affirmation and her own affidavit. Plaintiff argues that questions of fact exist regarding whether the assumption of risk doctrine is applicable and whether Defendant unreasonably increased the risks associated with the usage of its go-karts by failing to timely intervene.

In her affidavit, Plaintiff avers that she understood that there were certain risks involved in operating a go-kart. However, she further states that she did not recognize, nor did she agree, to allow another go-kart driver to repeatedly strike go-karts, including hers, during the race. Plaintiff's claims that there was an aggressive driver who repeatedly struck other drivers during the race and that Defendant's employees stopped the race and warned the driver who was striking other go-karts. Plaintiff claims that this driver "continued to bump and collide with other go karts" and that Defendant's employees failed to intervene. Plaintiff Affidavit, ¶9. Finally, she claims that the driver "who had been hitting go karts throughout the race struck the rear of [her] go kart, which caused [her] to lose control and slam the wall." *Id.*

Notably, the evidence before the Court does not support the allegations contained in

Plaintiff's Affidavit. Plaintiff testified at her deposition that she did not observe any collisions on the day of her accident, she only heard other collisions. Plaintiff's EBT transcript, p. 56, Cirner Affirmation, Exhibit D. It was her boyfriend that told her that the person who struck her "kept hitting people." According to Plaintiff, her boyfriend saw this individual hit other people twice. *Id.* at p. 42. However, her boyfriend's testimony also fails to support this allegation.

Plaintiff's boyfriend, Jesse Utarid, testified that shortly after the race began on April 3, 2016, he observed a man in a blue plaid shirt bump another driver which resulted in a collision. It appeared to Mr. Utarid that the two drivers knew each other. Notably, this collision was the only bumping between go-karts that Mr. Utarid actually observed that day. He testified that he heard another collision and when he came around a turn, he saw the same two go-karts stopped and the occupants were having what appeared to be a friendly argument. Mr. Utarid could not say whether the individual in the plaid shirt was the one who caused this second collision. Utarid EBT transcript, p. 36-37, Cirner Affirmation, Exhibit E. As such, on the day of the incident, Mr. Utarid only observed the man in the blue plaid shirt bump one go-kart and he did not witness the collision involving Plaintiff's go-kart.

Moreover, Plaintiff herself cannot identify the individual who rear ended her go-kart, nor is there any evidence that the individual who struck the rear of Plaintiff's go-kart had been driving aggressively or that he bumped and collided with other go-karts multiple times prior to striking Plaintiff's go-kart.[2] Therefore, Plaintiff's Affidavit in opposition to the instant motion contains factual allegations that are in conflict with her own deposition testimony, as well as that

[2] Although the operator of the other go-kart was identified in the Accident Report annexed to the Cirner Affirmation as Exhibit H, there is no evidence in the record that said individual provided any statement regarding the happening of the accident.

of Mr. Utarid. As such, said affidavit merely raises what appear to be feigned issues of fact designed to avoid the consequences of earlier deposition testimony, and thus, is insufficient to defeat the defendant's motion. *Diaz v. Brentwood Union Free Sch. Dist.*, 141 AD3d 556, 559 [2d Dept. 2016].

In addition, Plaintiff argues, in essence, that there are questions of fact as to whether Defendant failed to use reasonable care to guard against a risk which might reasonably be anticipated, citing *Garman v. E. Rochester Sch. Dist.*, 46 AD3d 1354, 1355 [4th Dept. 2007]. The *Garman* plaintiff was injured during a school trip to an obstacle course when she attempted to swing across an obstacle on the back of another student. The defendants' witness acknowledged that it was not appropriate for the students to swing in tandem across the obstacle and would not have allowed it if the witness had been present. The Fourth Department thus found a question of fact as to whether the defendants failed to provide proper supervision of the obstacle activity which exposed plaintiff to unreasonable increased risks of injury.

Relying on *Garman*, Plaintiff's counsel claims that there are issues whether Defendant's employees should have intervened and removed the aggressive driver from the track prior to the incident. Spada Affirmation, ¶27. However, as demonstrated above, there is no record evidence that the individual who struck the rear of Plaintiff's go-kart had been driving aggressively throughout the race or that he had been "hitting everyone else on the track." Spada Affirmation, ¶18. As such, this case is distinguishable from *Garman*, *supra*, as there is no evidence that Plaintiff herein was exposed to unreasonable increased risks of injury. Instead, the record demonstrates that Plaintiff herein was injured when her go-kart was struck by another go-kart, which is a common and anticipated risk of go-karting. Thus, Plaintiff failed to raise a

triable issue of fact as to whether the Defendant unreasonably increased the risk of injury above and beyond the usual dangers inherent in the sport. *Augustin, supra*, at 903.

Plaintiff next argues that there are questions of fact regarding whether this incident was foreseeable because the alleged aggressive driver struck another go-kart with sufficient force to cause the race to be stopped twice before the incident involving Plaintiff. Counsel concludes that "it was foreseeable that this driver would continue to strike other go-karts, or there are at least issues of fact about this topic. The incident involving [Plaintiff] was not a sudden, unanticipated and accidental occurrence. Rather there was a prolonged buildup to this collision." Spada Affirmation, ¶28. As has been shown, there is no evidence in the record to support counsel's factual assertions, nor his conclusion. Accordingly, Plaintiff has failed to raise an issue of fact on this argument as well.

Finally, Plaintiff argues that the *Garnett* and *Treacy* cases are distinguishable. With respect to *Garnett*, Plaintiff argues that said case is distinguishable as it involved a products liability claim and there was no evidence that the collisions in *Garnett* were intentional. However, the *Garnett* Court specifically addresses assumption of risk as a separate analysis from the products liability issue. Moreover, even assuming there was evidence that the collision with Plaintiff's go-kart in this case was intentional, which there is not, the *Garnett* Court specifically found that even intentional collisions are apparent or reasonably foreseeable risks of go-kart racing. *Garnett, supra* at 819. It concluded that '[i]t is that inherent risk which 'negates any duty on the part of the defendant to safeguard [plaintiff] from the risk' [citations omitted]." *Id.*

Nor does Plaintiff raise an issue of fact by alleging that Defendant's own rules were violated when the alleged aggressive driver was not removed from the course before the accident

involving Plaintiff. "Since the operator of the track does not have a duty to protect the go-kart rider from the inherent and foreseeable risk of being bumped by another go-kart, no such duty to plaintiff will be deemed to have been created by the operator's rule prohibiting go-karts from intentionally bumping into other karts, or by its policy of stopping the race when bumping is observed." *Id.* at 820.

Plaintiff similarly fails to distinguish the *Treacy* case, which involved go-kart racing on a slick course. Plaintiff merely argues that the *Treacy* case is incomparable to the instant case as that case pertained to the condition of the go-kart track involved. However, as discussed above, the primary assumption of risk analysis contained in the *Treacy* case is clearly applicable to the instant matter and Plaintiff provides no evidentiary support that said analysis should not be applied herein. Indeed, Plaintiff has failed to raise any issue of fact demonstrating that the cause of her accident and alleged injuries – being struck from behind by another go-kart and being propelled into the barrier – was not a commonly appreciated risk inherent to go-kart racing.

Based on the foregoing, Defendant is entitled to judgment as a matter of law dismissing the Complaint, as Plaintiff, under the facts of this case, assumed the risk of her injuries. *Treacy, supra* at 1406. The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is GRANTED and the Complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
February 26, 2019

HON. CHRISTI J. ACKER, J.S.C.

To: All Counsel via ECF