Donohue v Netherwood Acres, LLC
2019 NY Slip Op 34557(U)
April 1, 2019
Supreme Court, Dutchess County
Docket Number: Index No. 2016-52983
Judge: Hal B. Greenwald
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SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. HAL B. GREENWALD
Justice.

SUPREME COURT: DUTCHESS COUNTY

______________________________________x

MARITZA DONOHUE and JOHN DONOHUE,

Plaintiffs,

-against-

NETHERWOOD ACRES, LLC,

Defendant.

______________________________________x

DECISION AND ORDER
Index No.: 2016-52983
Motion Seq. No. 2

The following papers were read and considered on this motion for dismissal filed by the defendant.

NYSCEF DOC. NO. 49-68

This action is one for negligence arising out of a horseback riding incident that occurred on July 25, 2015. Plaintiff commenced the action by the filing of a summons and complaint on December 15, 2016. Defendant did not initially appear. On March 2, 2017 Plaintiff moved for a default judgment against Defendant and on April 14, 2017, Defendant filed its Answer containing affirmative defenses of Assumption of Risk and Waiver.The complaint alleged that plaintiff was riding on a trail ride, when plaintiff was "caused to be thrown from the horse and fall to the ground by reason of the negligence of defendant thereby sustaining severe and serious personal injuries."

Plaintiff made further allegations that defendant failed to properly train the horse, provide plaintiff with the appropriate saddle, or properly match a horse with its rider. Plaintiff claimed she expressed warnings to the defendant's employees about the horse's actions. Plaintiff further claimed that defendant negligently allowed plaintiff to mount the subject horse "...despite prior notice of the dangerous and 'misbehaving' nature of the horse."

The instant motion by defendant seeks an order pursuant to CPLR §3212 dismissing the plaintiff's complaint and an order declaring that Defendant Kristen Smith is not "personally responsible for any judgment that may be entered against the defendant in this case."

<u>Background Facts</u>

There is no issue that Plaintiff engaged in a "trail ride" on a horse, while being supervised by Defendant's agents and/or employees. Further, it is agreed that Plaintiff executed a document

prior to riding the subject horse entitled, "Netherwood Acres, LLC RELEASE AND WAIVER OF LIABILITY". The release states initially that the rider, Plaintiff is: "aware and acknowledging that riding.... are [sic] inherently dangerous, hazardous and unpredictable activities." The release further states in bold, larger type that:

> **"I EXPRESSLY AND VOLUNTARILY ASSUME ALL THE RISK OF LOSS, DAMAGE, PERSONAL INJURY OR DEATH THAT I OR MY PROPERTY MAY SUSTAIN IN CONNECTION WITH ANY EQUESTRIAN ACTIVITIES"**

Even though Plaintiff executed the above waiver, it is not the waiver that the Court focuses on in the within Decision and Order.

It is well established that on a motion for summary judgement, once the movant has established its initial burden of having a valid claim or defense, sufficient to cause the court to direct...judgment in [its] favor..." (CPLR 3212[b]), the burden then shifts to the other party. Again, the relevant statute, (CPLR 3212[b]) requires the other party to "...show facts sufficient to require a trial of any issue of fact." (*Brancati v. Bar-U-Farm, et al.*, 183 A.D.2d 1027 [3rd Dept. 1992]).

Plaintiff's Examination Before Trial (EBT) reveals much relevant information about the plaintiff and the incident. She takes medication for migraines (Pg. 13, Lines l4-8); she sometimes sees double (Pg. 15, Lines 5-9; she researched the type of saddle after the incident; Pg. 18, Line 20 to Pg. 20, Line 5); she has been wearing "glasses" since she was 5 (Pg. 25, Lines 1-21); she claimed she thought she was not secure in the saddle (Pg. 29 Lines 23-24); she claimed the "horse had already ran, took off" (Pg. 32, Line 9); Plaintiff withdrew her claim that the horse was "vicious" (Pg. 34, Lines 12-23); she claimed the horse got spooked by an oil slick (Pg. 35, Lines 9 to Pg. 36, Line 4).

An EBT of Defendant by Kristen Smith was also taken. Smith says she helped adjust Plaintiff's stirrups (Pg. 22, Lines 3 -10); Smith discussed the subject horse "Pearl" (Pg. 23, Line 19 to Pg. 24, Line 18); Smith described Pearl and his temperament (Pg. 25, Line 19 to Pg. 27, Line 12): she confirmed with the people assigned to lead the trail ride that Donahue had not complained at all during the ride (Pg. 40, Line 2-18);

An EBT of Defendant by Jenny Adrion was taken. She was the leader of the trail ride She testified about Pearl's temperament (Pg. 32, Line 18 to Pg. 33, Line 22);

If one is to consider the Plaintiff's allegations in the light most favorable to the plaintiff, there was insufficient evidence that one would conclude that Plaintiff had faced and dealt with issues that constituted any enhanced risk, while participating in the subject trail ride.

"The doctrine of primary assumption of the risk provides 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" (*Kirkland v. Hall*, 38 A.D.3d 497, 498, 832 N.Y.S.2d 232 [internal quotation marks omitted]; *see Morgan v. State of New York*, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202).

"The risks of falling from a horse or a horse acting in an unintended manner are risks inherent in the sport of horseback riding" (*Kirkland v. Hall*, 38 A.D.3d 497 at 498, 832 N.Y.S.2d 232). One who participates in the recreational activity of horseback riding, assumes the risk of a sudden action by the horse, including being thrown from the horse. (*Dalton Adirondack Saddle Tours, 40 A.D.3d 1169)*. Even assuming that Plaintiff's claim that she was "thrown from the horse", Donahue still should be found to have assumed the risk, such as falling, when she participated in the subject trail ride. It is important to note that the participant will not assume the risk for unreasonable increased risks. This is not the situation in the matter before the Court. There was no "increased risk", and certainly not one that was caused by any actions by the Defendant, that would bar the doctrine of primary assumption of risk.

That one could fall from a horse or that a horse could act up in an unintended matter, say by being "spooked" are risks that one takes when one partakes in the sport of horseback riding (*see Eslin v. County of Suffolk*, 18 A.D.3d 698, 699, 795 N.Y.S.2d 349; *Kinara v. Jamaica Bay Riding Academy, Inc.*, 11 A.D.3d 588, 783 N.Y.S.2d 636; *Becker v. Pleasant Val. Farms*, 261 A.D.2d 427, 690 N.Y.S.2d 76; *Freskos v. City of New York*, 243 A.D.2d 364, 663, N.Y.S.2d 174).

Plaintiff further contends that she advised the guides that she felt uncomfortable in the saddle, and that "…the horse had already ran…off" (*see* EBT of Maritza Donahue at pg. 32, line 9). Despite her prior allegations, Plaintiff withdrew her claim that the subject horse, Pearl was "vicious. (*See* EBT of Maritza Donahue at pg. 34, lines 12-23). The guides who rode with the Plaintiff that day both confirmed that the subject horse Pearl, was gentle, and was specifically used with beginner trail rides because of his temperament. When asked about Pearl, Kristen Smith testified about Pearl's temperament at her EBT. She stated that Pearl was "small", that he was purchased for the specific purpose of trail rides that "he was an Irish draft horse. He was a laid back guy.". (*See* EBT of Kristen Smith at pg. 23, line 19 to pg. 24, line 18, and pg. 25, line 19 to pg. 27, line 12). The trail ride itself was described as uneventful, even taking into account the Plaintiff's allegations that she was uncomfortable, that she allegedly felt like she was slipping and her claim that the horse was spooked by an oil slick. Those statements do not invalidate the doctrine of primary assumption of risk.

If one was to consider Plaintiff's allegations in the light most favorable to her, there was insufficient evidence that Plaintiff faced any uncommon difficulties on the subject trail ride, other than the ordinary risks inherent in horseback riding. For the doctrine of primary assumption of risk to fail, it must be shown that the Defendant had a special duty of care because of some other information known to the Defendant and withheld from the Plaintiff. This could include that Defendant knew that the subject horse, Pearl, had the propensity to throw riders; or that the Defendant through its employees or agents on the scene, failed to properly assist the Plaintiff. Plaintiff's testimony that she complained to the guides, that she felt uncomfortable, are self-serving statements that do not prevent the doctrine of primary assumption of risk to apply, and for Plaintiff's complaint to be dismissed.

Several cases cited by Plaintiff's opposition have no merit to the instant matter before the Court. *Murphy v Steeplechase Amusement*, 250 NY 479 concerned a young man injured on an amusement called "The Flopper". As the name suggests, patrons were caused to fall off, or "flop" when walking on a moving staircase. The Court of Appeals reversed the lower courts and found that Defendant was not negligent, and Plaintiff had assumed the risk by participating in such a ride.

The Court of Appeals decided four (4) matters concerning assumption of risk in the citation known as *Morgan v State of New York*, 90 N.Y.2d 471. The Court of Appeals found that in the first matter, *Morgan* concerning a bobsledder who was injured when his bobsled went off the track into a concrete wall. The Court determined that the proximate cause of the accident was Plaintiff Morgan's improper handling of the brake and that the Defendant was not negligent in designing or maintaining the bobsled track. The Court dismissed the claim. In the next two matters decided by the Court of Appeals in the *Morgan* decision, *Beck v Lenny Scimeca d/b/a Hwrang-Do Center et al* and *Chimerine v World Champion John Chung Tae Kwon Do Institute* the Plaintiffs had been voluntarily involved in karate and martial arts. The Court of Appeals held that in participating in these training classes and exercises, each Plaintiff had assumed the risk of injury inherent in such activities. The Court of Appeals dismissed both claims under the doctrine of primary assumption of risk, as both of the incidents dealt with were foreseeable and inherent risks. In the fourth matter *Siegel v City of New York*, *230* A.D.2d 762 the Appellate Division affirmed the trial court that held that laintiff had assumed the risk while playing tennis. However, the Court of Appeals reversed by reason that the Plaintiff therein had tripped on a net that separated courts and found that this condition was not an inherent risk associated with the game of tennis. This was the holding, despite the testimony of the injured Plaintiff that he played tennis in the subject club frequently and was aware of the torn net. However, the Court found Defendant liable because of the heightened risk such a condition posed to those who played tennis there. This was not the situation presented in the instant matter. Defendant did not "hide" anything from Plaintiff. There were no dramatic inclines or increasingly rocky trails that Plaintiff had to confront. The horse was not vicious and had no propensities to "throw" a rider. It was a "laid back guy". Defendant's agents did not fail to perform their tasks. Consequently, the doctrine of primary assumption of risk applies and the Complaint should be dismissed.

Plaintiff's reliance on several cases is misplaced. In *Bukowski v Clarkson University*, 19 N.Y.3d 353 the Plaintiff was injured while playing baseball for the Defendant university. The Court of Appeals held that Plaintiff had been aware of the risks inherent in playing the organized sport of baseball and was not entitled to recover for his injuries. Football was the sport in *Benitez v New York City Board of Education*, 73 N.Y.2ad 650. The trial court was held to have applied the incorrect duty of care to the school district and found for the Plaintiff. This was reversed. The Court said that although assumption of risk is not an automatic bar to recovery, "... "but a measure of the defendant's duty of care." and held that the Board of Education "…must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or increasingly increased risks." In the instant matter before the Court herein, the duty of care certainly is what the defendant provided, plus there was no evidence that there were any "…unassumed, concealed or increasingly increased risk", that Plaintiff faced while horseback riding.

What distinguishes *Irish v Deep Hollow Ltd.*, 251 A.D.2d 293, was the fact that the guide caused the horse to increase its pace to a "canter". Thus, the actions of an agent or employee of the Defendant caused the accident, and assumption of risk did not apply.

In summation, the doctrine of primary assumption of risk applies to the instant matter before the court. The Defendant owed Plaintiff the ordinary duty of care, and none of Defendant's actions violated that promise., accordingly, it is

ORDERED, that Defendant NETHERWOOD ACRES, LLC's Motion for Summary Judgement to dismiss the Complaint pursuant to SPLR 3212 is granted; and it is further

ORDERED, that Defendant NETHERWOOD ACRES, LLC's Motion for a declaration that Kristen Smith is not personally liable for any judgement that may be entered in this matter is granted.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: April 1, 2019
Poughkeepsie, New York

ENTERED:

HON. HAL B. GREENWALD, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.