

Stanziale v Berlinger
2020 NY Slip Op 30400(U)
February 11, 2020
Supreme Court, New York County
Docket Number: 157739/2014
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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BENJAMIN STANZIALE,

Plaintiff,

- v -

SCOTT BERLINGER, CHELSEA PIERS L.P., FULL
THROTTLE ENDURANCE RACING, FULL THROTTLE
CYCLES NYC, LLC,

Defendant.

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INDEX NO. 157739/2014

MOTION DATE 01/24/2020,
01/24/2020

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 84, 85, 86, 87, 89

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 88, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that Defendants Scott Berlinger, Chelsea Piers L.P., Full Throttle Endurance Racing, and Full Throttle Cycles NYC, LLC’s motion for dismissal (Motion Seq. 003) is denied; and it is further

ORDERED that the branch of Plaintiff’s motion seeking partial summary judgment as to liability (Motion Seq. 004) is denied; and it is further

ORDERED that the branch of Plaintiff’s motion seeking dismissal of defendants’ affirmative defenses is granted only to the extent that defendants’ affirmative defense of assumption of risk is dismissed.

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry; and it is further

ORDERED that the parties are directed to appear in Part 40 for trial on April 6, 2020.

MEMORANDUM DECISION

In this negligence action, defendants Scott Berlinger, Chelsea Piers L.P. (Chelsea Piers), Full Throttle Endurance Racing and Full Throttle Cycles, NYC, LLC (Full Throttle) move for dismissal of the complaint pursuant to CPLR 3212 (Motion Seq. 003). Plaintiff Benjamin A. Stanziale, Jr. Esq. (Plaintiff), as Bankruptcy Trustee to Angela Coppa Williams (Coppa), moves for partial summary judgment on the issue of liability, as well as for dismissal of Defendants' affirmative defenses (Motion Seq. 004). The motions are consolidated for disposition.

BACKGROUND FACTS

On July 31, 2012, Coppa was running in Central Park on East Drive near the 72nd Street traverse, a roadway that at the time was reserved for pedestrians and nonmotorized traffic (NYSCEF doc No. 84, ¶ 6). The roadway was crowded and Coppa was running on the left side of the roadway, which is generally reserved for walkers and runners and is separated from the right side, meant for faster moving traffic (*id.* at ¶ 8). Plaintiff alleges that as she was running, she was struck from behind by defendant Berlinger, who was riding his bicycle and struck her in the calf, knocking her over and then landing on top of her back along with his bicycle (*id.* at ¶ 9). Plaintiff alleges Berlinger told her he swerved into her to avoid being hit by another cyclist.

Chelsea Piers offers a training protocol system run inside its premises known as Full Throttle (*id.* at ¶ 12). Berlinger, who developed and owns Full Throttle, is a triathlon coach and, on the day of the accident, he was leading a group of cyclists through the park on a training, offered by Chelsea Piers, for an upcoming triathlon. Berlinger alleges that he was hit from behind by another group of cyclists and he was thrown off his bike, causing him to hit Coppa (*id.* at ¶ 15). The other cyclists allegedly fled the scene after the accident.

Defendants now move for summary judgment, arguing that their negligence did not contribute to Plaintiff's accident. As there is a paucity of caselaw regarding bicycle accidents, Defendants rely on motor vehicle accident law, where it is established that liability generally rests with the rearmost driver in chain accident collisions. Defendants argue that as nothing suggests Berlinger was operating his bicycle in an unsafe manner when he was hit from behind, he is entitled to summary judgment. Defendants further contend there is no vicarious liability for Chelsea Piers or Full Throttle, as liability could only extend if Berlinger acted negligently in the course of his employment.

Plaintiff opposes Defendants' motion and cross-moves for summary judgment on the issue of liability. Plaintiff argues that Berlinger is negligent as matter of law, as he violated statutory and common law duties to maintain a reasonably safe speed and avoid collisions with pedestrians. Plaintiff also moves for dismissal of Defendants' affirmative defenses of comparative negligence and assumption of risk, as there is no evidence Plaintiff contributed to her accident with her own actions. Plaintiff concludes that this matter should be placed on the calendar for a trial on damages only.

DISCUSSION

Summary judgment is granted when "the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st

Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also*, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). Here, since each side seeks summary judgment, each side bears the burden of making 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 (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A) (Sup. Ct., N.Y. County 2012), *aff'd*, 102 AD3d 563 [1st Dept 2013], *citing Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra*, *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

The function of a court in reviewing a motion for summary judgment “is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Where “credibility determinations are required, summary judgment must be denied” (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421 [1st Dept 2013] (holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial).

LIABILITY

The Court finds summary judgment to be an improper remedy for either party as nearly all the facts of this case are in question. Defendants and Plaintiff have offered drastically different accounts of how the accident happened. Both parties have offered testimony from non-parties that create a question of fact as to the negligence and culpable conduct of each side.

In opposition to Defendants' motion, Plaintiff has introduced testimony from nonparty witness Christopher Coffin, an employee of Chelsea Piers who was participating in Berlinger's cycling session. According to Coffin, he and Berlinger became separated from the group after Berlinger's bicycle sprung a flat tire (NYSCEF doc No. 84, ¶ 17). After Coffin stopped to help, the two rode together separately from the rest of the group. Approaching an intersection, Coffin swerved to the right to avoid joggers traveling in the same direction (*id.* at ¶ 17). Coffin claims that after he swerved, he heard the collision occur behind him and turned around to see Coppa and Berlinger on the ground. However, Coffin attests that no cyclist struck Berlinger from behind and he does not recall Berlinger ever telling him about such an occurrence (*id.* at ¶ 19). Berlinger denies this entire chain of events, including the flat tire (*id.* at ¶ 31).

Defendants have introduced conflicting testimony from nonparty witness Jason Sandolo, another member of the Chelsea Piers team. Sandolo claims Coppa was "not paying attention to her surroundings" and was jogging at an angle that put her on a path towards collision with cyclists (NYSCEF doc No. 91, ¶ 11). Defendants argue that based on Sandolo's testimony, there are questions of fact regarding whether Plaintiff was acting negligently. More specifically, Defendants allege that Plaintiff may have violated Vehicle and Traffic Law § 1152(a) and Rules of the City of New York §4-04(b)(2), which stipulate, respectively, that pedestrians must yield the right of way to vehicles and may not "walk or run into the path of a vehicle which is so close that

it is impossible for the operator to yield.” Defendants also argue that Coffin’s testimony should be discounted as he is not a neutral witness, given that he was fired by Berlinger shortly after the accident (NYSCEF doc No. 91, ¶ 19).

Summary judgment cannot be warranted for either party here, as there are material issues of fact as to how Berlinger’s collision with Coppa occurred (*see Passos v MTA Bus Co.*, 129 AD3d 481, 482 [1st Dept 2015] [holding, in the motor vehicle context, that “a question of fact as to the sequence of the collisions” prevented a determination of liability as a matter of law]). Berlinger owed Coppa a duty of care to operate his bicycle in a reasonably safe manner, as failing to do so would foreseeably harm a runner such as Coppa (*see Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006]). As the parties submit evidence supporting differing versions of the accident, the Court cannot determine the issue of Berlinger’s negligence as a matter of law. Thus, neither Plaintiff, nor Berlinger, Full Throttle, and Chelsea Piers are entitled to summary judgment on the issue of liability.¹

Affirmative Defenses

Plaintiff seeks dismissal of defendants’ affirmative defenses of comparative fault and assumption of risk. As to comparative fault, there is clearly an issue of fact, as Berlinger claims that it was Coppa who veered into his path, rather than *vice versa*. Thus, the branch of Plaintiff’s motion seeking dismissal of defendants’ affirmative defense of comparative fault is denied.

As to assumption of risk, Plaintiff is entitled to dismissal of this affirmative defense, as being hit by a bicycle is “not an ordinary risk inherent in the activity of jogging in the park” (*Pacheco v Snellenburg*, 283 AD2d 361 [1st Dept 2001]). Defendants’ contention that Coppa

¹ The Court notes that Chelsea Piers and Full Throttle rely only on the argument that Belinger was not negligent to support their motion for summary relief.

veered into Berlinger’s path is an argument that goes to comparative fault rather than assumption of risk.

CONCLUSION

Based on the foregoing, it is hereby

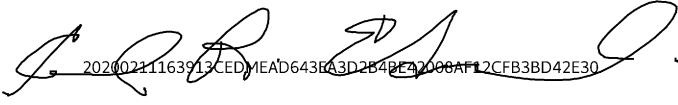
ORDERED that Defendants Scott Berlinger, Chelsea Piers L.P., Full Throttle Endurance Racing, and Full Throttle Cycles NYC, LLC’s motion for dismissal (Motion Seq. 003) is denied; and it is further

ORDERED that the branch of Plaintiff’s motion seeking partial summary judgment as to liability (Motion Seq. 004) is denied; and it is further

ORDERED that the branch of Plaintiff’s motion seeking dismissal of defendants’ affirmative defenses is granted only to the extent that defendants’ affirmative defense of assumption of risk is dismissed.

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry; and it is further

ORDERED that the parties are directed to appear in Part 40 for trial on April 6, 2020.



2/11/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE