A.L. v Chaminade Mineola Socy. of Mary, Inc.
2020 NY Slip Op 30505(U)
January 13, 2020
Supreme Court, Nassau County
Docket Number: 602927/18
Judge: Diccia T. Pineda-Kirwan
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Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable **DICCIA T. PINEDA-KIRWAN** IA PART 30
Justice

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A.L., a minor under the age of majority, by her father and natural guardian, RAYMOND LEWIS, and RAYMOND LEWIS individually,

Plaintiff(s),

-against-

CHAMINADE MINEOLA SOCIETY OF MARY, INC., aka CHAMINADE HIGH SCHOOL, ET AL,

Defendant(s).

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Index No.: 602927/18
Motion Date: 11/14/19
Motion Cal. #: 10, 11, 12, 13
Seq. No.: 2, 3, 4, 5

The following numbered papers read on these motions by defendants for summary judgment on the issue of liability.

PAPERS	NUMBERED
Notices of Motion-Affidavits-Exhibits.....	EF 32 - 103
Answering Affidavits-Exhibits.....	EF 104 - 174
Replying.....	EF 175 - 184
Stipulation.....	*1*

Upon the foregoing cited papers, and after conference, it is ordered that the motions are consolidated for disposition, and are determined as follows:

Plaintiffs commenced the instant action to recover for injuries that the infant-plaintiff, A.L., allegedly sustained on October 11, 2016, as a result of her diving into a swimming pool (the "Pool") located at Chaminade High School (the "School"). Defendants Province of Meribah Society of Mary, Inc., aka Marianist Provincialate (s/h/a Chaminade Mineola Society of Mary, Inc., aka Chaminade High School, Province of Meribah Society of Mary, Inc., aka Marianist Provincialate) is the Catholic Order that owns the School, and defendants Robert Casella and Donald Scarola are the School's Facility's Manager and Athletic Director, respectively (collectively "Chaminade"). A.L. was a member of the swim team at defendant the Diocese of Rockville Centre (s/h/a Holy Trinity Diocesan High School and the Diocese of Rockville Centre), where she was coached by defendant Megan McNeely (collectively "Holy Trinity"). Defendant Sacred Heart Academy (s/h/a Sisters of St. Joseph Brentwood aka Sacred Heart Academy) (collectively "Sacred Heart") was the "host" team at the October 11, 2016 swim meet where A.L. was allegedly injured. Chaminade (Seq. 2), Holy Trinity (Seq. 3), and Sacred Heart (Seq. 5), each separately move for summary judgment on the issue of liability, dismissing plaintiff's negligence claims against them. Sacred Heart (Seq. 5) and Chaminade (Seq. 4) further each seek summary judgment on Chaminade's cross-claims for contractual indemnification from Sacred Heart.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form, demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Only when the movant satisfies its initial burden will the burden shift to the opponent, "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Chance v Felder*, 33 AD3d 645, 645-646 [2006]).

In support of its motion, Chaminade submits, among other things, the depositions of A.L., Megan McNeely, the affidavits of Megan McNeely, George McNeely, Kyle Chaikin, Professor J.M. Stager, Robert Blanda, President and Owner of Mill Bergen Pools, John Callahan, Assistant Principal of Athletics and Campus Activities at the School, and copies of the New York State Department of Health (NYSDOH) annual Swimming Pool Inspection Reports for the Pool.

A.L. states that at the time of the accident, she was a freshman at Holy Trinity High School and a member of its swim team. The girls on the swim team were separated into three groups based on ability, and she was placed in the lowest group. During her first practice on September 1, 2016, she received instruction on how to dive head first into the Pool from its side and practiced it at least once. On September 29, 2016, her swim coach, Megan McNeely, demonstrated the correct way to dive from the starting blocks at the Pool, and this was the only time A.L. entered the Pool from the starting blocks prior to the accident. She was aware that the starting blocks were located in the shallow end of the Pool, where the water was only 4 feet deep. On the date of the accident, she arrived late and one of the team captains told her to warm up. Although no one told her to do so, she entered the Pool by diving from the starting blocks, and hit her head on the Pool's bottom.

Ms. McNeely states that the Catholic High School Athletic Association (CHSAA) and National Federation of State High School Association (NFSHSA) rules permit dives to be made off starting blocks located over 4 feet of water. Non-party George McNeely, is an assistant swim coach at Holy Trinity, in charge of the least experienced swimmers, including A.L. Both contend that A.L. executed numerous dives from the Pool's starting blocks prior to the accident, with Mr. McNeely alleging A.L. did so at least 6 times a day on three separate occasions. He avers that A.L. consistently dove at a depth of less than 2 feet, and never dove more than 4 feet. Both McNeelys assert that the Pool's starting blocks have been used by numerous swimmers and high schools for years, and that prior to A.L.'s accident, neither of them had heard of anyone striking their head at the bottom of the Pool after performing a dive from the starting blocks.

Chaminade contends that it is not liable since A.L. assumed the risk of her activity. The doctrine of assumption of risk applies where a person who consents to participate in a sporting activity is aware of the inherent risks of that activity, appreciates the nature of the risks, and voluntarily assumes them (*see Altagracia v Harrison Cent. Sch. Dist.*, 136 AD3d 848, 849 [2016]). The doctrine will not bar liability if the risk is "unassumed, concealed, or unreasonably increased" (*Alqurashi v Party of Four, Inc.*, 89 AD3d 1047, 1047-1048 [2011]). However, where the risks are fully comprehended or obvious, "plaintiff has consented to them and defendant has performed its duty" (Turcotte v Fell, 68 NY2d 432, 439 [1986]). A participant's awareness of the risk assumed is "to be assessed against the background of the skill and experience of the particular plaintiff" (*Maddox v City of New York*, 66 NY2d 270, 278 [1989]).

It is well-established that "[o]ne who engages in water sports assumes the reasonably foreseeable risks inherent in the activity" (*Sartoris v State*, 133 AD2d 619, 620 [1987]), "including swimming and diving" (*Jahier v Jahier*, 50 AD3d 966, 967 [2d Dept 2008]). Chaminade cites to a number of cases where plaintiffs who were allegedly injured when they dove headfirst into a pool, were found to have assumed the risk of their activity. However, as plaintiffs point out, in each of these cases, the court emphasized the swimming experience of the plaintiff and/or their familiarity with the pool in question (*see Jahier* at 967] [plaintiff had been using pool for at least ten years and dove into it approximately 50 times]; *Clark v Sachem Sch. Dist. at Holbrook*, 227 AD2d 366, 367 [1996][plaintiff was an "experienced high school swimmer, who had prior experience in the use of the starting blocks" at this high school's pool]).

Here, in contrast A.L. was placed in the beginner group on her swim team, claims she had only used the Pool's starting blocks on one prior occasion, and was permitted, and in fact encouraged by her coaches to use the starting blocks. A.L.'s situation is more comparable to *Buckley v State*, 34 Misc3d 879 (Ct Cl 2011), where the plaintiff's recovery was not barred by the doctrine of primary assumption of risk since a lifeguard granted plaintiff permission to use the starting blocks located over water 4 feet in depth, thus unreasonably increasing the risks plaintiff assumed. The *Buckley* court specifically noted that although plaintiff had been on a swim team and was familiar with the pool, she had never dove off the starting blocks before. Thus, plaintiffs' claims are not barred by the doctrine of assumption of risk as triable issues remain as to whether the risk A.L. assumed was unreasonably increased.

An additional component of this consideration is whether Chaminade was negligent for failing to move its starting blocks to the deep end of the Pool. New York State Public Health Code, 10 NYCRR § 6.1.29(15.6) (the "Code"), enacted in 1992, states in relevant part that "[s]tarting blocks . . . shall be installed over a minimum ordered depth of 6 feet." Emails from senior legal counsel for the NYSDOH, Megan E. Mutolo, Esq., state that the Code is effective as of "October 7, 1992 and applied to newly installed starting blocks." She further explained that "[t]he department's guidance for replacement of starting blocks that were installed prior to the October 7, 1992 Code amendment has been to relocate the starting blocks to the deep end of the pool, if possible. If relocation is not possible, in kind replacement of existing starting blocks is acceptable."

The only case cited by the parties addressing the Code is *Buckley v State*, 34 Misc3d 879 (Ct Cl 2011), where the court found that the pool owner was not required to either remove its starting blocks or relocate them to the deep end of its pool. However, *Buckley* is distinguishable since although the pool was similarly constructed in the 1970's, the starting blocks were replaced in 1988, before the Code was enacted. The Pool in contrast underwent what the principal of the School called a "total renovation," in 2014, including the purchase of six new starting blocks, two new diving boards and stands, and replacement of surrounding tiles, gutter grates, and depth markers.

Chaminade contends it was not required to move its starting blocks, and references NYSDOH annual Swimming Pool Inspection Reports for the Pool, which state that they are "[a] review of compliance with subpart 6.1 of the New York State Sanitary Law," and include a section for "Adequate Water Depths For Diving/Slides/Starting Blocks, Clearances." In reports from 2010 though 2016, no violations were found.

Plaintiffs and Chaminade submit competing affidavits as to whether the Code requires the starting blocks be moved to the Pool's deep end. Professor Stager states that 4 feet is the most common starting depth for pools in the United States, and complies with national standards. He avers that since A.L.'s dive only landed her only 2-3 feet from the starting block, she was too close for a proper dive, and thus the accident is attributable to improper technique and not the Pool's depth. He and Mr. Blanda opine that the Code does not require existing pools move starting blocks located over 4 feet of water, and that moving the starting blocks to the deep end of the Pool would require removal of the three diving boards located there. Mr. Blanda states that project would cost approximately $200,000.00, and Mr. Callahan avers that removing the diving boards is untenable as they are utilized by the School as well as other Catholic high schools for recreation and competition.

In opposition, Ms. Bella, plaintiffs' aquatic expert, states that starting blocks should be relocated to a minimum pool depth of 6 feet, and should be eliminated from competitive races if relocation is not possible. She and J. Michael Vincent, a civil engineer specializing in designing and building pools, aver that all the starting blocks could have been moved to the Pool's deep end by removing just one diving board, or alternatively, that one starting block should have been installed at the deep end to train novice swimmers since learning to dive in 4 feet of water is unsafe. Mr. Vincent states that the 2014 work cost more than $250,000.00, which included a complete replacement of the starting blocks. Moving the starting blocks to the Pool's deep end and removing one diving board would have added a 22% additional cost to the 2014 work. Alternatively, placing two starting blocks at the deep end of the Pool would not require removal of any diving boards and would cost less than $6,000.00. Ms. Bella concludes that failing to move at least one starting block to the deep end deprived A.L. of a safe training environment, and was a substantial cause of the accident.

Plaintiffs further point to the testimony of Robert Casella, the Facilities Manager responsible for aquatic safety and the 2014 work, who stated that he did not review the Code prior to the 2014 renovations, and had no knowledge of the 1992 Amendments. He avers there was no budget for the 2014 work, and that no inquiry was made into moving the starting blocks to the deep end. Both he and Mr. Scarola further could not state that Chaminade had a NYSDOH mandated written "Safety Plan" specifically addressing diving injury prevention for starting blocks located above 4 feet of water.

"[I]n assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport'" (*Morgan v State of New York*, 90 NY2d 471, 485 [1997], quoting *Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 970 [1992]). Given the totality of the evidence submitted, including the competing testimony of the experts as to whether relocating the starting blocks was required, or even possible, at this juncture, it cannot be concluded as a matter of law that Chaminade's continued placement of the starting blocks at the shallow end of the Pool did not constitute negligence. Thus, Chaminade's motion is denied.

However, to the extent plaintiffs contend the starting blocks were wobbly or slippery, and that these conditions contributed to the accident, this claim is dismissed. A.L. testified that although the block felt "slippery" and "wobbly," she was able to firmly place her feet on the block, bend her knees, extend her arms, and execute the dive. Additionally, both Mr. Blanda and Professor Stager inspected the Pool and said that the starting blocks were stable with non-slip surfaces, which contention was not disputed.

As to Holy Trinity, it first contends that A.L.'s claims are barred by the doctrine of assumption of risk. However, as stated above, triable issues of fact remain as to whether the risks A.L. assumed were unreasonably increased by permitting her to utilize diving blocks over 4 feet of water (*see Buckley v State*, 34 Misc3d 879 [Ct Cl 2011]).

Additionally, the evidence submitted raises a triable issue of fact as to whether A.L.'s coaches failed to properly train and supervise her, and whether this failure unreasonably increased her risk of injury (*see Morales v Beacon City Sch. Dist.*, 44 AD3d 724, 726 [2007]). Ms. Bella stated that Holy Trinity failed to properly assess and train A.L. to perform racing starts, and that A.L. should not have been permitted to use the starting blocks at the shallow end of the Pool. She opines that racing starts should not be taught in less than six feet of water, and should never be attempted by novice swimmers in 4 feet of water until they are properly trained to dive at a shallow trajectory. She avers that A. L.'s coaches failed to recognize her inability to control her diving depth, and did not instruct her to angle her hands toward the surface immediately after diving, increasing her risk of injury. She concludes that Holy Trinity's failure to properly train A.L., while encouraging her to use starting blocks over shallow water, substantially caused the accident.

Plaintiffs further refer to the testimony of Mr. McNeely, who was primarily tasked with training A.L. to dive. He states that he never received any formal training to teach headfirst entries; admitted that swimmers should not perform dives from starting blocks into less than 6 feet of water until they have perfected them; and acknowledged that A.L. had a tendency to dive "deep." Thus, Holy Trinity's motion is denied.

As to Sacred Heart, pursuant to the parties' so-ordered stipulation dated August 22, 2019, plaintiffs consented to the summary dismissal of Sacred Heart as a matter of law. Thus, the portion of Sacred Heart's motion seeking to dismiss plaintiffs' claims against it, is granted.

Chaminade however seeks contractual indemnity from Sacred Heart based upon a Premises Use Agreement (Agreement) it had with Sacred Heart for the use of the Pool. It is undisputed that due to a lack of pool space, swim meets are scheduled during practice times set by Chaminade, and if a meet is scheduled during a particular school's practice time, that school would be considered the "home team" at the meet. Sacred Heart was the "home team" for the swim meet on the date of the accident.

The Agreement states in relevant part that Sacred Heart shall "hold harmless, defend and indemnify . . . Chaminade . . . from and against all actions . . . including damages for personal injuries . . . or a violation of law, and expenses, including reasonable

attorney's fees, all expenses . . . as a result of or arising from the use of the premises by Permittee, and any negligent actions or failure to act by Permitee, intentional, criminal, and/or reckless actions or failure to act by Permittee and/or Chaminade . . ."

Here, the Agreement states that Sacred Heart "will provide its own supervision for all participants and/or activities without assistance or involvement on the part of Chaminade High School." However, A.L. testified that on the date of the accident, she did not speak with, or receive any instruction from anyone associated with Sacred Heart. Both Ms. McNeely and Mary White, Sacred Heart's head coach, further confirmed that each school is responsible to ensure that its team members are properly trained and supervised, and that a coach does not have authority to direct or give any instructions to another team's swimmers during warmups.

Chaminade however states that it does not have a Premises Use Agreement with every team that uses the Pool which is why it is important when it designates a school as the "home" team, because that team becomes the "permitee" during that meet. As this accident occurred during the warmup immediately prior to the meet, it occurred "as a result of or arising from the use of the premises."

"Indemnification provisions are strictly construed, and the right to contractual indemnification depends upon the specific language of the contract" (*Davis v Catsimatidis*, 129 AD3d 766, 768 [2015]). Here, as a triable issue of fact exists as to whether A.L.'s accident arose out of Sacred Heart's use of the School pursuant to the terms of the Agreement, the motions by both Chaminade and Sacred Heart seeking summary judgment on Chaminade's cross-claims for indemnification, are denied (*see McCoy v Medford Landing, L.P.*, 164 AD3d 1436, 1440 [2018]).

Accordingly, Chaminade's motion is denied, with the exception of plaintiffs' claim that the starting blocks were "wobbly" or "slippery," which is dismissed. Holy Trinity's motion is denied. Sacred Heart's motion is granted solely to the extent that plaintiffs' claims against it are dismissed. Chaminade's motion and the branch of Sacred Heart's motion regarding contractual indemnification, are denied.

Any request for relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

Dated: January 13, 2020

ENTERED
FEB 19 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

DICCIA T. PINEDA-KIRWAN, J.S.C.