SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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RISA MORLEY, Individually and as parent and natural Guardian of JM, an infant under the age of fourteen years old,

Plaintiff,

- v -

BPP ST OWNER, LLC, *et al.*, STUYVESANT TOWN-PETER COOPER VILLAGE, IRE CROWN RINKS, LLC, THE ICE AT STUYTOWN,

Defendants.

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INDEX NO. 150239/2017

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 68-107 were read on this motion for summary judgment.

In this action, plaintiff seek damages for injuries sustained by her daughter JM at defendants' ice-skating rink. (NYSCEF 70). Alleging that JM had sustained a "severe right thumb crush/degloving injury as a result of the dangerous, defective and unsafe conditions of the premises," plaintiff advances two causes of action for negligence, one on behalf of JM and the other for herself. (NYSCEF 70). In her bill of particulars, plaintiff also alleges that as a result of the accident, JM suffers from post-traumatic distress syndrome. (NYSCEF 72).

Defendants deny liability. (NYSCEF 71). By notice of motion, defendants BPP ST Owner, LLC (BPP) and IRE Rinks NY, LLC, s/h/a IRE Crown Rinks, LLC (IRE) jointly move pursuant to CPLR 3212 for an order granting them summary dismissal of the complaint. (NYSCEF 68). Plaintiff opposes. (NYSCEF 92).

I. BACKGROUND

The rink is owned by BPP and managed by IRE. According to IRE's general manager, he oversees the annual construction of the rink and inspects and repairs the polycarbonate four-foot-tall dasher boards that are bolted to a steel frame and placed against each other, "sealed tight," in eight-foot sections surrounding the rink. Skaters of all ages use the dasher boards to steady themselves. As part of the daily rink inspection, the general manager and ice monitors look for loose screws and missing pieces. One monitor per 200 is the industry standard. (NYSCEF 74).

On the day of plaintiff's accident, the general manager had inspected the rink immediately before it opened at 12:00 p.m. and saw no gaps between the boards anywhere in the rink, and between 12 noon and 1:40 pm, the ice monitors observed no separation between the boards at any location, including the area of the rink which JM identified as the site of her injury. And, despite the dozens of skaters at the rink that afternoon, not one had lodged a complaint about the condition to any of defendants' employees. (NYSCEF 74, 78).

On November 8, 2016, the day of JM's accident, a newly hired ice monitor was the sole employee on duty in the rink and she was in training. She testified at her deposition that she had checked the boards throughout the day per her ordinary job responsibilities and had seen no cracks in the perimeter of the rink. For 25 to 30 skaters, the number of skaters on the ice that day, the ice monitor testified that there are "usually" two ice monitors, although the second monitor does not "usually" come onto the ice until 90 minutes after the 12 noon opening, and once the number of skaters increases, a second monitor comes out. (NYSCEF 78). According to an ice monitor who was present that day but not on the ice, the general manager was responsible for assigning ice monitors to the rink. (NYSCEF 76).

That day, plaintiff and her daughter JM were at the rink. At approximately 1:40 pm, after

JM had been skating for 30 to 40 minutes and following a refreshment break, she resumed skating along with 25 to 30 other skaters. After becoming unsteady on the ice, she skated to the perimeter dasher boards to steady herself and then skated away because she "didn't know [that her thumb was stuck] and then the top half of [her] thumb got pulled off." (NYSCEF 70, 80). In her bill of particulars, plaintiff admits that when JM "held onto the board for balance," the board "expanded and separated allowing [her] thumb to get caught between the boards . . . ." JM located the board at the entrance and exit doors for the Zamboni. (NYSCEF 72).

Upon being directed by another skater to attend to JM, the ice monitor encountered JM sitting on the ice and crying. The monitor saw blood on the ice and blood on the dasher board above JM. Although the monitor testified to having seen a separation of almost one inch between two of the dasher boards, the general manager saw none. (NYSCEF 74, 78).

II. CONTENTIONS

A. Defendants (NYSCEF 69-89)

Defendants argue that there is no dispute that they did not create the condition which caused JM's injuries as all of the employee-witnesses testified that they neither constructed nor manipulated the dasher boards in such a manner as to cause a separation to form. Thus, defendants argue that they demonstrate, *prima facie*, that they did not create the condition. Rather, a reasonable inference may be drawn from the undisputed facts, including the admission contained in plaintiff's bill of particulars, that the condition arose just before the accident, absent their fault and knowledge. For the same reasons, they deny having had actual notice of the allegedly defective condition.

Nor, defendants maintain, did they have constructive notice of the alleged defect as it was not seen by any of defendants' employees or by anyone else that day before the accident. Rather,

they posit, its discovery was contemporaneous with the accident.

Defendants also dispute plaintiff's claim that JM suffered from post-traumatic stress disorder as a result of the accident and offer the expert affirmation of a neuropsychologist in support. (NYSCEF 88).

B. Plaintiff (NYSCEF 92-100)

In opposition, plaintiff offers the expert affidavit of a licensed professional engineer who has previously been deemed an expert in premises liability and civil and traffic engineering. Based on the expert's observation, in photographs taken the day after JM's accident by her father, of a "significant uneven gap," which the expert opines was produced as a result of a gradual loosening of a screw over time, plaintiff argues that she demonstrates the existence of a dangerous and defective condition created by defendants' negligence which caused JM's accident. Additionally, she relies on the portion of the video taken by JM's father depicting the dasher board vibrations causing the dasher board to separate and asserts that the 90 minutes elapsing from the time the general manager had inspected the dasher boards to JM's accident constituted a sufficient amount of time to have allowed defendants to discover the condition. (NYSCEF 92-93).

Plaintiff identifies two factual disputes requiring a trial. One is whether a single ice manager's assertion that one monitor per 200 skaters is the industry standard is unsupported. The other issue pertains to the differing testimony offered by defendants as to the size of the separation between the dasher boards where the monitor first encountered JM. From that inconsistency, plaintiff claims, a jury could reasonably infer that had there been two ice monitors on the ice that day, the defect would have likely been discovered over the one hour and 40 minutes, and thus, defendants' failure constitutes negligent supervision and monitoring.

(NYSCEF 93).

C. Defendants' reply (NYSCEF 101-105)

Defendants again deny having had any actual or constructive notice of the alleged condition given their regular and frequent inspections of the dasher boards around the rink which revealed no such condition. They also claim that the opinion of plaintiff's expert engineer raises no triable issue sufficient to withstand awarding them summary judgment. They thus assert that they satisfied their duty to maintain the rink in a reasonably safe condition, and reiterate that they demonstrate that they cannot be held liable for the creation of a separation between the boards and that they had no actual or constructive notice of the alleged defect as it was not observed in the course of any of the inspections conducted by defendants' employees the day of JM's accident.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

"A landowner has a duty to exercise reasonable care to maintain its premises in a reasonably safe condition 'in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk'" (*Hadidi v City of New York*, 181 AD3d 795 [2d Dept 2020], citing *Salomon v Prainito*, 52 AD3d 803, 804–805 [2d Dept 2008], quoting *Basso v Miller*, 40 NY2d 233, 241 [1976]). For a defendant property owner to be held liable in tort to a plaintiff who claims to be injured as a result of an allegedly defective condition on the property, the plaintiff must prove that the defect existed and that the defendant created the condition or had actual or constructive notice of it. (*Gani v Ave. R Sephardic Congregation*, 159 AD3d 873, 873 [2d Dept 2018]). Thus, such a defendant may establish *prima facie* entitlement to judgment as a matter of law in the action by showing that the defect did not exist or that it neither created it nor had actual or constructive notice of it. (*Id.*).

Constructive notice may be found when the condition is "visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition." (*Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011]). A defendant may prove a lack of constructive notice by "evidence of [its] maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." (*Id.*).

Given the undisputed testimony that the continuous inspections of the perimeter of the rink performed that day by defendants' employees revealed no dangerous condition existing before JM's accident, defendants demonstrate, *prima facie*, an absence of constructive notice.

As it is undisputed that there was constant activity of skaters in and at the perimeter, that the nature of JM's accident was unique, that the nature of her injury was not cataclysmic when compared the kinds of injuries often sustained in ice rinks by falls onto hard ice, and that

defendants shouldered the duty to avoid the risk by constant inspections, plaintiff's expert opinion that the gap in which JM caught her thumb was "significant" and "uneven," absent any indication of its size, raises no triable issue of fact as to the reasonably safe condition of the rink. Moreover, that the ice monitor estimated a gap of almost an inch is irrelevant as she locates it in a different portion of the perimeter. In any event, there is no reason to believe that such a defect would have been noticed and in fact, it was not.

Even assuming that defendants were aware that dasher boards may move when skaters impact them does not constitute evidence that they created the alleged defect or that they had notice of it beyond a general awareness that a dangerous condition may be present. (*See Rooney v George Hardy St. Francis Apartments, LLC*, 181 AD3d 493 [1st Dept 2020] [presence of nail embedded in piece of wood on floor of plaintiff's apartment, during renovation by building's owner, constituted evidence of general awareness that condition may be present and insufficient to constitute notice of condition in issue]). Plaintiff's claim that the presence of two ice monitors would have revealed the defect is fatally speculative.

Absent notice, movants cannot be held liable for JM's accident. Thus, damages need not be addressed.

Moreover, to the extent that the non-moving defendants were served in 2017 and failed to appear or answer timely, and as plaintiff did not timely move for a default judgment against them, the complaint is dismissed as against those defendants. (CPLR 3215[c]).

Accordingly, it is hereby

ORDERED, the motion of defendants BPP ST-Owner, LLC and IRE Rinks NY LLCs/h/a IRE Crown Rinks, LLC for summary judgment dismissing the complaint is granted; and it is further

ORDERED, that the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

4/20/2020
DATE

BARBARA JAFFE, 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	