Samuelsen v Wollman Rink Operations LLC
2020 NY Slip Op 32702(U)
August 11, 2020
Supreme Court, New York County
Docket Number: 150046/16
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42
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DIANE SAMUELSEN,

Plaintiff,

- v -

DECISION AND ORDER
Index No. 150046/16
MOT SEQ 006, 007

WOLLMAN RINK OPERATIONS LLC d/b/a THE TRUMP ORGANIZATION d/b/a TRUMP RINK, CLASSIC CARPET SHOWROOM INC.

Defendants.
---x
NANCY M. BANNON, J.:

I. INTRODUCTION

In this consolidated personal injury action arising from a fall inside an ice rink, defendants Wollman Rink Operations LLC and The Trump Organization, Inc. s/h/i as The Trump Organization, Inc. d/b/a Trump Rink (collectively WRO/Trump), move pursuant to CPLR 3212 to dismiss the complaint and the cross-claims asserted against it by defendant Classic Carpet Showroom Inc. (Classic) for common law indemnification and contribution (MOT SEQ 006). Classic moves separately pursuant to CPLR 3212 to dismiss the complaint and the cross-claims asserted against it by WRO/Trump for common law indemnification, contribution, and contractual indemnification (MOT SEQ 007). The plaintiff, Diane Samuelsen, opposes the motions. The motions are denied.

II. BACKGROUND

Wollman Rink is an ice skating rink located in Central Park in Manhattan. It is open to the public and managed and operated by defendant WRO. Although defendant Trump Organization was not forthcoming as to its association with WRO, it is clear that WRO is a subsidiary or otherwise closely associated with the Trump Organization. [1] Inexplicably, the employees produced for deposition by WRO and Trump had difficulty answering such questions or their attorney, Harold Dershowitz, objected to them. However, they were unable to refute the proof produced by

[1] At his 2019 deposition, Raymond Garrity, the Director of Engineering for the Trump Organization, could not identify the president of WRO or the Trump Organization, his employer of 17 years. Nor did Garrity know who in the Trump Organization could provide this information. Asked if he knew who was the current president of the Trump Organization, Garrity answered "I don't know, Eric or Donny..." He was able to identify the names of some executives in the organization who worked with him in Trump Tower, such as Alan Weiselberg who "works upstairs on the 26th floor", but his memory failed him when asked any further details. Expressly asked "Do you know anything else about the ownership structure of the Trump Organization?", Garrity replied, "No, I don't." He was shown a 2001 licensing agreement and a 2010 amendment to the license agreement between Wollman Rink Operations LLC and the City of New York Department of Parks and Recreation, all signed on behalf of Wollman Rink by Donald J. Trump, as president of that LLC. Trump's 2010 signature was notarized by Michael Cohen, who identifies him as the president of Wollman Rink Operations LLC. Garrity still could not answer or recognize the signature. Garrity maintained that "all I know is when I started there, I started going over to Wollman."

When asked if WRO was part of the Trump Organization, Dale Klied, Director of Operations for Wollman Rink, replied, "I don't believe so. I don't know the answer to that." He denied that he was employed through the Trump Organization but could not explain why he had a Trumporg.com business e-mail address.

the plaintiff showing that Donald J. Trump was the president of WRO and WRO's address was Trump Tower. In any event, WRO and the Trump Organization, who share counsel, do not now argue that the either is an improper party. As such, any judgment against them would be entered jointly and severally.

On December 11, 2014, the plaintiff, a recreational ice skater who had been taking ice skating lessons at Wollman Rink for several years, fell on the ramp used to enter and exit the rink as she attempted to leave the rink following one of her lessons. She claims to have suffered traumatic brain injury and other injuries as a result of the fall.

The plaintiff commenced the instant action on January 4, 2016, alleging that the defendants were negligent in failing to timely remove the ice from the ramp, failing to install and maintain matting on the ramp that was suitable for outdoor use and provided an even surface, and failing to provide a proper handrail near the ramp. The plaintiff claims that at the point where the ramp meets the ice there were lumps of ice and uneven matting, which caused her skates to become caught and her to fall backwards and hit her head on the ice. She further claims that a portion of the rink's refrigeration system was improperly located beneath the ramp, which contributed to the icy build-up beneath the matting and further exacerbated the uneven surface.

The plaintiff described the accident in greater detail at her deposition.

In 2014, she was taking lessons three days per week at the rink. Her skates were custom made and several years old but sharpened twice annually. On the day of the accident, after using her locker, she walked from the clubhouse to the ice with her skates on, without plastic blade guards, and walked into the rink through the center ramp. The sloped ramp was covered with a rubber mat and was wide enough to allow three or four people to walk onto or off the ice side by side. There were flat wood "ship rails" which were waist-high and ran along either side of the ramp. The rails were about one foot in width, too wide to grab onto, and ended about four steps before a skater would step onto the ice. She sometimes used the rail to steady herself. On the day of the accident, as she entered the rink at about 7:30 a.m., she used the left rail because she saw snow and ice on the ramp. The plaintiff recalled seeing "bumps and lumps of ice" on the "entire bottom section" of the ramp, the portion without the rails. She did not slip or fall going into the rink but had to walk sideways, on her toe picks, due to the ice. She did not report the ice to anyone at the rink. She free skated for 30 minutes to warm up, then took a 30-minute private lesson. To exit the rink, she went back to the same ramp, and stepped onto the bottom area near the ice. She saw it was still icy so again

used her toe pick. Suddenly, her "blade caught something" and she was "up in the air." Her head hit the ice when she landed, and she lost consciousness. An ambulance responded.

The defendants answered the complaint and asserted various affirmative defenses, including assumption of the risk, and cross-claims for negligence, contribution and indemnification. The parties conducted and completed discovery and the Note of Issue was filed on October 30, 2019. The plaintiff was granted a trial preference by order dated November 15, 2019.

Discovery included depositions of all parties. The plaintiff testified as above. Dale Klied, Director of Operations for Wollman Rink Operations, LLC, testified that he was the General Manager of the rink on December 11, 2014. He recalled that he and other managers would direct their Zamboni drivers and skate guards, all operations department employees, to remove ice and snow from the matting on the ramp if they observed a hazardous condition. However, he could not recall if he was present at the rink on December 11, 2014, and he did not know the condition of the matting on the main ramp that morning. Klied testified that Carpet Showroom, Inc., a vendor of WRO, installs the matting, which is removed at the end of each season by the operations department and stored on-site to be put back on the ramps if it was still in good condition. Classic would

also be required to fix any problem with the matting. If a problem arose, WRO would contact Tom Casquarelli of Classic.

Klied was shown a proposal dated October 2014 from Classic Carpet to "supply and install Cathon matting at header of rink" which is the patio area. He explained that that matting is not the same as the matting placed on the ramps, which is "interlocking matting." Klied believed the proposal was accepted since it was signed by a WRO employee, Barry Weiselberg. A corresponding invoice reflects that Classic supplied 50 pieces of interlocking mats and two rolls of Cathlon matting. That matting was to be installed in various locations in the rink. Klied testified that he had no independent recollection of supervising or inspecting the work performed to install 50 pieces of interlocking matting prior to December 11, 2014. He was unaware of any incident where the interlocking matting became "disengaged" or uneven. He knew of no complaints about the condition of the ramp prior to December 11, 2014.

Klied knew the plaintiff from the rink but "just to say good morning." He did not recall if he was working on December 11, 2014, and only learned of the accident when his lawyer asked him for an incident report. A search was done, but no incident report was found. Klied checked with Elise Preston, his skate school director, who confirmed that the accident occurred.

Preston had been notified of the accident by one of the coaches, David Ings. Klied did not recall if Preston provided any detail of the accident and could not recall which year he spoke to her about it. Although there is a specific form used when, as here, an ambulance is called to the rink, no such report was found in regard to the plaintiff's accident.

According to Klied, the refrigeration equipment for the rink is operated by the New York City Department of Parks and Recreation. Titan Mechanical performs basic maintenance on the refrigeration system every fall, before the start of the skating season. To perform that work, Titan would remove the matting, and Classic would re-install it. Klied did not know when in 2014 that work was performed.

Raymond Garrity, the Director of Engineering for the Trump Organization for 17 years, was not an engineer. His highest level of education was high school plus "a couple of accounting courses at NYU." His duties included going to the rink "to make sure that the repairs or replacements [requested by WRO] are necessary." Although he claimed to oversee any work done at Wollman rink for 17 years, Garrity knew the names of only three people there, including Klied and Alan Weiselberg's son Barry.

At the start of each skating season, he and the City Parks Department engineers would inspect the Wollman Rink facilities

and mechanical equipment, including the refrigeration equipment that runs under the ramp. Garrity would review any proposed repairs prior to them being made, and again after to determine that they were done properly.

Between 2004 and 2014, he was never informed by anyone from Wollman that the subject ramp needed repair. He did not recall any repairs in 2014 and neither he nor the Trump Organization had documentation showing whether he approved or disapproved any work in 2014. He did not know who installed the matting and never heard of Classic Carpet Showroom. He did not know who at Wollman rink was responsible for maintaining the mats. He was last at Wollman rink a month before the deposition when Dale Klied called him to look at a failing flow switch on a refrigeration machine.

Thomas Casquarelli, vice-president of Classic Carpet Showroom, Inc., testified that Classic is a family business and they do not have any written service contracts. They merely respond to phone calls for repairs or other issues with the flooring they install. Casquarelli testified that Classic had been working with the Trump Organization for several years by providing and installing matting at Wollman rink. It was his understanding that Wollman Rink Operations, LLC and the Trump Organization were one and the same entity. Casquarelli usually

goes to the rink in October each year to see if any mats need to be replaced or adjusted. They do maintenance work at the rink every year, several times throughout the year, even if new mats are not installed. "Some years it was a lot worse than others." However, when asked about 2013/2014, Casquarelli replied "I don't remember that year." He was not aware of the plaintiff accident until a few years later when he was asked for records.

Casquarelli testified that Classic used 4' x 6' interlocking mats of ¾ inch thickness from a supplier called Mats, Inc. The mats are made of recycled rubber, are water resistant and expand and contract with the changing temperature. Casquarelli explained that the interlocking mats sometimes separate and become unlocked and start to overlap. He referred to this problem as "peaking" or "shifting". That could be fixed by use of a mallet to put the mats back in place. If ice was present, it would first have to be removed before using the mallet. The mats are "loose laid, there is no adhesive." Barry Weiselberg of WRO would direct where the mates were to be placed. Casquarelli could not recall receiving any complaints from Wollman rink about the mats and or anyone at Classic being asked to address ice buildup on or around the mats. Classic used the same type of matting at other rinks. The vendor prior to Classic had used a different type at Wollman rink.

The plaintiff's submissions also include a 2001 licensing agreement between Wollman Rink Operations LLC and the City of New York Department of Parks and Recreation, which granted WRO a license to operate and manage the rink, and a 2010 amendment to the license agreement, both signed by Donald J. Trump as president of Wollman Rink Operations LLC. The address of WRO is "c/o The Trump Organization" at 725 Fifth Ave. By the 2010 amendment, the license was extended to April 30, 2021.

Additional submissions are discussed below as relevant.

WRO/Trump and Classic now move, separately, for summary judgment dismissing the complaint as against them, both arguing (i) that they neither caused, created, or had notice of the dangerous condition, and (ii) even if they did, the plaintiff assumed the risk of injury.

III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes

incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

A. WRO/Trump's Motion for Summary Judgment

In support of its motion for summary judgment, WRO/Trump submits, *inter alia*, the plaintiff's deposition testimony which is summarized above. Also submitted by WRO/Trump are affidavits from David Ings, the plaintiffs' skating coach, and Chantelle

Trazyk, another skating instructor, who both work at the rink but describe themselves as self-employed. Ings coached the plaintiff for two years and was leaving the ice with her at the time of the accident. The plaintiff was behind him on the ramp when she fell and he did not observe any "ice, water, or buckling/unevenness of the matting" at that location on the ramp" at the any time that day. He was at the rink since early morning and used that ramp five times that day, including seconds before the plaintiff fell. No one complained to him of ice on the ramp or the condition of the matting. If they did, he would have reported it to a rink employee. Ings never complained about the handrails and knew of no other such complaints. Traczyk similarly stated that she was at rink from early morning and used the subject ramp twice that day prior to the plaintiff's accident, the last time at 8:00 a.m. she was at her desk inside the building adjacent to the rink when the accident occurred, but went to the plaintiff when the accident was reported to her. Traczyk observed nothing unusual about the ramp the entire day, even when she responded to the plaintiff after her fall. Traczyk never complained about the handrails and knew of no complaints by others. She knew of no prior incident where someone fell on the ramp due to unevenness/buckling of the matting or accumulations of snow and/or ice.

WRO/Trump also submits an expert affidavit from Bernard Lorenz, a licensed civil engineer, who inspected the site on November 11, 2019, and reviewed photographs, transcripts and other records. He concluded that the mats were designed to be used as ice arena perimeter flooring, that the mats he observed in 2019 were well-maintained, and the slope of the walking surface was safe. In his report, Lorenz expressly disagrees with the opinion of John Burley, the plaintiff's expert. Burley was of the view that the rubber matting used is intended only for indoor use as it loses resilience in cold temperature, was to be used only on a level surface, and was to be glued down in accordance with the manufacturer's instructions, which was not done here. Lorenz further opined that neither the handrail nor the ramp violated any applicable New York codes or regulations.

In his affidavit, George Pfreundschuh, a licensed professional engineer and accident reconstruction consultant, concluded that the plaintiff fell due to a lump of ice on the ramp, and not the purportedly uneven matting. He reviewed documents, transcripts, photographs, weather data and "rubber matting information" and conducted a site inspection on December 12, 2019, five years after the accident. He relied upon information and representations provided to him at the inspection from Raymond Garrity, the Director of Engineering for the Trump Organization, that the ramp on which the plaintiff

fell in 2014 was of the same construction, materials and configuration and in the same condition as the ramp that they examined on December 12, 2019. [Notably, Garrity did not seem to recall these details at his own deposition.] Pfreundschuh further opined that one continuous piece of matting covered the ramp in 2014, but that the outer perimeters of the mat could become displaced and allow for water seepage underneath that could freeze into ice. On this basis, Pfreundschuh concluded that "without any question of fact, ...plaintiff's alleged accident was not caused by uneven matting." He also opined that "clearly" the plaintiff did not use her toe picks at the time she fell, as she testified.

WRO/Trump argues that these submissions establish its entitlement to summary judgment inasmuch as they demonstrate (i) that WRO/Trump did not have actual or constructive notice of the lumps of ice on the ramp, and (ii) that the plaintiff, having seen the icy condition of the ramp, assumed the risks associated with skating while there was ice that may impede her ability to exit the rink.

The rules concerning premises liability are well settled. A landowner has a duty to maintain premises in a reasonably safe condition. See Gronski v County of Monroe, 18 NY3d 374 (2011); Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities

Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). Landowners may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017).

Summary judgment is warranted only where a defendant can establish that it did not have either actual or constructive notice of the dangerous or defective condition. See Gordon v American Museum of Natural History, 67 NY2d 836 (1986). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident, to permit defendant's employees to discover and remedy it. Id. at 837.

With regard to dangerous conditions on premises designed for sport or recreational activity, a claim for negligence survives a motion for summary judgment where a triable issue of fact exists as to whether a defendant's action or inaction "create[s] a dangerous condition over and above the usual dangers" inherent to the sport or recreational activity. Owen v RJ.S. Safety Equip., 79 NY2d 967, 970 (1992). Whether a dangerous or defective condition exists "depends on the peculiar facts and circumstances of each case and is generally a question

of fact for the jury. Schechtman v Lappin, 161 AD2d 118 (1st Dept. 1999).

The doctrine of assumption of the risk holds 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." Morgan v State of New York, 90 NY2d 471, 484 (1997). "The duty owed in these situations is 'a duty to exercise care to make the conditions as safe as they appear to be.'" Custodi v Town of Amherst, 20 NY3d 83, 88 (2012), quoting Turcotte v Fell, 68 NY2d 432, 439 (1986). Nevertheless, a participant "'will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks.'" Anand v Kapoor, 15 NY3d 946, 948 (2010), quoting Morgan v State of New York, supra, at 485. Thus, "if the risks of an activity are fully comprehended or perfectly obvious, one who participates in the activity is deemed to have consented to the risks." Sajkowski v Young Men's Christian Ass'n of Greater New York, 269 AD2d 105 (1st Dept. 2000). Application of the assumption of risk doctrine requires that the plaintiff have "knowledge of the injury-causing defect but also appreciation of the resultant risk, but awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the

particular plaintiff." Morgan v State of New York, supra at 486, quoting Maddox v City of New York, 66 NY2d 270, 278 (1985). "[I]t is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results." Maddox v City of New York, supra, at 278.

WRO/Trump fails to meet its burden since its submissions fail to conclusively establish that it did not have actual or constructive notice of the lumps of ice and uneven matting alleged by the plaintiff. The affidavits of David Ings and Chantelle Trazyk merely demonstrate that at least two individuals did not see or report any dangerous conditions to WRO/Trump that day. They do not demonstrate, as WRO/Trump seems to contend, that the rink was free from any lumps of ice or uneven matting throughout the morning of the plaintiff's accident, and any dangerous condition that may have led to the plaintiff's injuries was unknown to WRO/Trump and thus, could not be remedied.

Nor does WRO/Trump's contention that the plaintiff will be unable to establish that WRO/Trump had actual or constructive notice warrant summary dismissal of the complaint. It is well settled that, "[a] defendant does not establish its entitlement to summary judgment merely by pointing out gaps in the

plaintiffs' case" (Giaquinto v Town of Hempstead, supra at 1049; see Torres v Merrill Lynch Purchasing, Inc., 95 AD3d 741 [1st Dept. 2012]; Sabalza v Salgado, 85 AD3d 436 [1st Dept. 2011]), "but must affirmatively demonstrate the merit of [their] claim or defense." Velasquez v Gomez, 44 AD3d 649, 651 [2nd Dept. 2007]; see Torres v Merrill Lynch Purchasing, supra; Alvarez v 21st Century Renovations Ltd., 66 AD3d 524 [1st Dept. 2009

Even assuming that the defendants met their initial burden on the motion, the plaintiff's submissions raise triable issues of fact The plaintiff submits, *inter alia*, affidavits and deposition testimony from other regular skaters at Wollman Rink all of whom aver that they regularly observed and complained to WRO/Trump about the poor condition of the ramp prior to the plaintiff's accident.

In her affidavit dated July 2015, Deborah Weatherbee-Shulman states that had skated at the rink for years and she was present at the rink at the time of the accident and saw the plaintiff lying on the ice. Wetherbee-Shulman recalled that the ramp was covered with "a series of loose overlapping rubber mats that form an uneven surface, where water, patches of ice and clumps of ice form, depending on weather conditions." On December 11, 2014, she saw "icy, lumpy, uneven ice conditions" on the ramp where the plaintiff fell. According to Weatherbee-

Shulman, she had complained to the skating coaches and rink management for many years about the ramp conditions.

Catherine Sweeney, another frequent skater at the rink who was also present at the time of the accident, just three feet away, saw and heard the plaintiff's head hit the ice, making a loud thud sound. Earlier that morning, Sweeney had complained to other skaters about the condition of the ramp, which she testified was dislodged and uneven where it met the ice, and covered in ice. She explained that this condition would cause the skaters to take a longer step to get onto the mat to avoid the raised and icy areas. Sweeney testified that complaints about the ramp were "a common occurrence."

Douglas Eaton, a retired federal magistrate judge, and avid skater, frequented the rink for many years including 2014, and knew the plaintiff. A number of times each season he would observe ice forming on top of and underneath the rubber mat on the ramp and create an uneven surface. Three or four times each season he would report the condition to the person at the sign-in desk, Elise Preston being one of them and an employee named Susie being another. Eaton had observed rink staff working on the ramp to address those conditions during the 2014 skating season. He recalls workmen chipping ice out from underneath the front edge of the rubber mat which had become raised due to the

ice accumulation underneath. Eaton testified that the condition was made worse by the absence of railing the last five feet before the ice. The staff would sometimes put up orange cones in response to his complaints. Eaton was not present on the morning of the plaintiff's accident.

Joanne Eaton, Douglas Eaton's wife, also testified that ice accumulated under the mat, which would become displaced. The interlocking edges of the mats would separate. Eaton estimated that the ice accumulation under the mat would be half an inch or an inch high. The ice on top was sometimes black making it difficult to see. The black ice was an ongoing problem for several years, and occurred less than once a weeks but more than once a season. The ice accumulation under the mat, however, would stay much longer - weeks, as long as a month at a time. It was often the subject of conversation among the frequent skaters. Being a frequent skater, she knew rink employees and had complained to them on several occasions about the poor condition of the ramp. Joanne Eaton was present at the time of the plaintiffs' accident, but did not see her fall. She saw the plaintiff afterward, her head lying on the ice, her feet on the ramp, and uncommunicative.

The plaintiff further submits an affidavit from John Burley, an expert in the field of ice rink operations, had 40

years experience with ice rink/arena design, manufacturing and operation. He is president of Everything Ice, Inc. and a of Ice Rink Construction Consultants, and was involved with the construction of more than 650 ice rinks worldwide over his career. Burley also invented ice rink technologies, including refrigeration systems. Burley reviewed the deposition testimony, photographs, available records and other documents. He concludes that WRO/Trump failed to properly maintain the ramp. He explained that the lumps of ice on the ramp and underneath the matting likely formed due to the rink's refrigeration system, which consists of piping underneath the rink at temperatures well below freezing in order to maintain the ice on the rink, that the ice would have been present on the rubber matting for hours, if not days, and therefore WRO/Trump staff should have noticed and cleared or removed the ice. Burley's affidavit also concludes that because WRO/Trump generally had only one ramp open at a time, the ramp was a 'critical egress point' and WRO/Trump's failure to have handrails that extended down toward the rink was at such a point was a departure from good and accepted custom and practice in the ice skating industry such that it constitutes a dangerous condition.

In his affidavit, Jim Vizzini, a registered professional engineer in eleven states, had 28 years of experience in the field of mechanical engineering, specifically, the design and

renovation of ice rinks, including system design of district heating and cooling plants. At the plaintiff's request, he reviewed numerous deposition transcripts, certified climatological records, photographs and other documents. Vizzini agreed with Burley that WRO/Trump failed to maintain the ramp to provide a safe entrance and exit to the ice rink surface. Vizzini opined, with a reasonable degree of engineering certainty, that in light of the climatological data, the type of mat, the construction of the ramp and the type of mechanical refrigeration system and other mechanicals located under the ramp, the mat's surface would have been below freezing even if the air above was 34-40 degrees. He further opined that, therefore, the ice observed by Weatherbee-Shulman at 7:15 a.m. or 7:30 a.m. would still have been present when the plaintiff saw the ice in the same location at 8:00 a.m. and again at 9:00 a.m. that morning.

The plaintiff's proof raises triable issues as to whether (i) the ice that formed on or beneath the matting and lack of proper handrails constitutes a dangerous condition over and above the general dangers inherent to ice skating, and (ii) whether those conditions, particularly the ice accumulations, were in existence long enough or often enough that WRO/Trump had actual or constructive notice of the condition.

WRO/Trump's submissions likewise fail to establish its entitlement to summary judgment on its assumption of the risk defense. The plaintiff's deposition testimony does establish that the plaintiff observed the poor conditions of the ramp, including the ice accumulation and uneven matting, prior to her ice skating lesson, thus supporting an inference that the risks stemming therefrom were "fully comprehended or perfectly obvious". Sajkowski v Young Men's Christian Ass'n of Greater New York, supra. However, WRO/Trump fails to establish that the plaintiff had an "appreciation of the resultant risk" that the icy conditions posed, particularly that the icy conditions could cause the plaintiff's skates to get stuck when attempting to leave the area. Morgan v State of New York, supra at 486.

WRO/Trump also argues that slipping and falling on ice, including when entering or exiting the rink, is an inherent risk of ice skating, assumed by the skater, thus they should be shielded from liability. However, it is well settled that the doctrine of assumption of risk does not serve to bar liability where the risk is unassumed, concealed, or unreasonably increased. Id.

The plaintiff's submissions, particularly Burley's expert affidavit, raise a triable issue of fact as to whether WRO/Trump's failure to clear or remove the ice from on and under

the matting, coupled with the lack of a proper handrailing, constitutes a dangerous condition which unreasonably increases the potential risks beyond the scope of what is contemplated when ice skating. Thus, WRO/Trump's motion for summary judgment on its defense that that the plaintiff assumed a risk is denied.

WRO/Trump also fails to establish its entitlement to summary judgment dismissing Classic's cross-claims for common law indemnification and contribution. WRO/Trump argues that, as it should be granted summary judgment dismissing the plaintiff's complaint as against it, it cannot be found negligent and therefore Classic's cross-claims must fail. However, as WRO/Trump has not established entitlement to summary judgment dismissing the plaintiff's negligence claim, dismissal of the cross-claims is not warranted. See Naughton v City of New York, 94 AD3d 1 (1st Dept. 2012); Children's Corner Learning Ctr. v A. Miranda Contracting Corp., 64 AD3d 318 (1st Dept. 2009).

Thus, WRO/Trump's motion is denied in its entirety.

B. Classic's Motion for Summary Judgment

In support of its motion for summary judgment, Classic submits, *inter alia*, the plaintiff's deposition transcript, as detailed above, and the deposition transcript of Thomas Casquarelli, the vice president of Classic, who avers that

WRO/Trump never reported any issues with the matting to Classic. Classic also relied upon the expert affidavit of Bernard Lorenz, in which he opines that the matting at the rink was properly maintained and in good condition.

Similar to WRO/Trump's arguments, Classic contends that these submissions demonstrate (i) that Classic did not cause, create, or have notice of any dangerous condition relating to the plaintiff's accident, and (ii) that the plaintiff assumed the risk relating to slipping and falling by engaging in ice skating. However, these submissions fail to establish Classic's entitlement to summary judgment.

While it is true that, generally, a contractual obligation, such as the one here between WRO/Trump and Classic, standing alone, does not establish a duty to noncontracting third parties (see Church v Callanan Indus., 99 NY2d 104 [2002]), exceptions exist (1) where the contracting party undertakes to discharge its obligation and then negligently creates or exacerbates a dangerous condition (see Moch Co. v Rensselaer Water Co., 247 NY 160 [1928]), (2) "where the plaintiff detrimentally relies on the continued performance of the contracting party/s duties and, (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." Espinal v Melville Snow Contrs.,98 NY2d 136, 140 (2002).

Here, Classic argues that as it never received any complaints or reports from WRO/Trump, and that the submissions are devoid of any evidence that it caused or created any dangerous condition, or had notice of it, and therefore it is entitled to summary judgment. However, as already discussed herein, "[a] defendant does not establish its entitlement to summary judgment merely by pointing out gaps in the plaintiffs' case" (Giaquinto v Town of Hempstead, supra at 1049), "but must affirmatively demonstrate the merit of [their] claim or defense." Velasquez v Gomez, supra.

Moreover, in opposition, the plaintiff's submissions, which are essentially the same as those submitted in opposition to WRO/Trump's motion, raise a triable issue of fact as to whether Classic caused or contributed to the accident by improperly installed matting. Specifically, as to Classic, the Burley affidavit posits that the matting and exit ramp installed by that defendant are for indoor use only, and are to be used on a level surface and glued down in accordance with the manufacturer's instructions, and that the use of the matting in violation of the instructions could have caused the plaintiff's fall.

Classic attacks Burley's affidavit as both conclusory and contradictory to the manufacturer's instructions, which state

that they may be used in an ice arena setting and that adhesive is not necessary. Classic further argues that the conclusion in the expert affidavit of Bernard Lorenz, that the matting was properly maintained and in good condition, is the correct conclusion. Contrary to Classic's argument, these competing opinions do not entitle it to summary judgment but raise issues of credibility for a jury which must determine the weight, if any, to be given to each expert's opinion. They are not to be resolved by summary judgment. See S.J. Capelin Assoc. V Globe Mfg. Corp., 34 NY2d 338 (1974); DeSario v SL Green Mgt., 105 AD3d 421 (1st Dept. 2013).

In that regard, as the plaintiff points out, the Lorenz affidavit is sworn in 2019, approximately five years after the date of the accident, and after the matting was replaced multiple times. Thus, to the extent they are based on his 2019 inspection, his opinions regarding the maintenance and condition of the matting present a triable issue for a jury.

To the extent that Classic also moves for summary judgment on the grounds that the plaintiff assumed the risk of slipping and falling whenever she skated, that argument fails for the reasons already discussed in regard to the motion of WRO/Trump.

Classic also fails to establish its entitlement to summary judgment dismissing WRO/Trump's cross-claims for common law

indemnification, contribution, and contractual indemnification. Classic argues that, as it should be granted summary judgment dismissing the plaintiff's complaint as against it, it cannot be found negligent and therefore WRO/Trump's cross-claims must fail. However, as Classic has not established entitlement to summary judgment dismissing the plaintiff's negligence claim, and therefore can still be found negligent, dismissal of the cross-claims is not warranted. See Naughton v City of New York, 94 AD3d 1 (1st Dept. 2012); Children's Corner Learning Ctr. v A. Miranda Contracting Corp., 64 AD3d 318 (1st Dept. 2009).

For these reasons, Classic's motion is denied in its entirety.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of defendants Wollman Rink Operations LLC and The Trump Organization, Inc. s/h/i as The Trump Organization, Inc. d/b/a Trump Rink pursuant to CPLR 3212 seeking summary judgment dismissing the complaint and all cross-claims as against it is denied in its entirety (MOT SEQ 006); and it is further,

ORDERED that the motion of defendant Classic Carpet Showroom Inc. seeking summary judgment dismissing the complaint

and all cross-claims as against it is denied in its entirety (MOT SEQ 007); and it is further,

ORDERED that the parties are to contact chambers on or before October 30, 2020, to schedule a settlement conference.

This constitutes the Decision and Order of the court.

Dated: August 11, 2020 **ENTER:** HON. NANCY M. BANNON