

<b>Siesto v AJ Merone Fitness Inc.</b>
2020 NY Slip Op 34999(U)
January 7, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 608849/2017
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 56 SUFFOLK COUNTY**

**PRESENT:**

*Hon. Carmen Victoria St. George*  
**Justice of the Supreme Court**

X

**VICTORIA SIESTO,**

**Index No.  
608849/2017**

**Plaintiff,**

**Motion Seq:  
001 MD  
Decision/Order**

**-against-**

**AJ MERONE FITNESS INCORPORATED,**

**Defendant.**

X

The following numbered papers were read upon this motion:

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Before the Court is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, Victoria Siesto, as a result of an alleged trip and fall accident at a gym complex located at 34 Jamaica Avenue, Port Jefferson Station, New York which is operated and managed by Defendant, AJ Merone Fitness Incorporated.

Defendant moves this Court for an Order pursuant to CPLR § 3212, granting summary judgment dismissing Plaintiff’s Complaint against Defendant; or, dismissing Plaintiff’s Complaint pursuant to CPLR § 3211(a)(7) for failing to state a cause of action. Plaintiff opposes Defendant’s motion. Defendant’s motion is denied for the reasons set out in this Decision and Order.

**BACKGROUND**

On August 4, 2016, at approximately 6:15pm, the Plaintiff and her husband Matthew Siesto were working out at the Game Day Sports Performance gym. The Plaintiff had been attending that facility since the beginning of June and was attending twice a day, five days a week. While running on a turf surface in the gym Plaintiff tripped and fell resulting in a high-grade partial tear of the anterior talo fibular ligament in her right ankle.

Plaintiff commenced the instant action by filing a Summons and Complaint with the Suffolk County Clerk on April 29, 2017. Defendant joined issue by Answer on June 19, 2017. A Note of Issue was filed on April 30, 2019. The instant motion was brought by Defendant on July 1, 2019 and submits, *inter alia*, the pleadings, and Plaintiff's, Defendant's, and non-party witnesses' depositions. Plaintiff opposed the motion submitting the Plaintiff's husband's affidavit.

*A. Plaintiff Siesto's Deposition Testimony*

Mrs. Siesto testified she had attended classes at the gym twice a day since June of 2016. She had been a member of other gyms, previously attending once a day, every day. She further testified she had no complaints with the classes or the turf and had not heard of any complaints from others. At the time of her accident in August, she was wearing sneakers she had purchased in June for the classes and reported they had not worn. The classes, for the most part, were self-directed and classes were not organized. Mrs. Siesto testified she stretched as a warmup prior to working out. Mrs. Siesto testified her husband was exercising with her and witnessed the accident and was behind her. She testified that Merone and Martino were at the other side of the gym. While running on the turf in a shuttle exercise her right foot went under a six-inch lift in the turf causing her to fall. She testified, "There was approximately six inches of the turf that was lifted up. So, at this wall, as my foot got caught underneath it, as I was about to pivot to sprint to the other side, that's when I heard a snap." She and her husband did not take any photos. She did not see the lifted turf as she ran to the wall and her pivot did not cause the turf to lift. She was looking out to make sure she did not run into anyone. She described the turf at her deposition as "lifted up. It was curved in." She heard her ankle snap, felt pain, and fell right to the ground. Her husband, Merone and Martino came over to her after the fall. While she was on the ground, she did not see what caused her accident, it was not until she got up that she saw that she tripped on the lifted turf. She tried to run again after falling but could not. She stated her accident happened where the pieces of turf meet, and besides being lifted up it was not torn or otherwise missing.

*B. Defendant Adam Merone's Deposition Testimony*

Mr. Merone, the gym's owner, installed the turf, on which the accident occurred, by himself, with the assistance of others, soon after signing a lease for the gym. He purchased the turf from SportsFacility.com. The turf was installed on a concrete floor with Turf Bond which was a glue adhesive and turf tape. Merone supervised a small group of student athletes he trained in installing the turf. After it was installed, he placed weights on it and let it dry. They tested the field by playing dodge ball and running on it. There is no air conditioning or humidifier in the gym, there is heating. Merone received no complaints about the turf prior to the accident. Merone relied on feedback from coaches who visited the gym to opine on the turf's standards. Merone would do agility cuts in high traffic areas to test it. Clients signed consent forms. Merone testified that from thirty (30) feet away "out of the corner of [his] eye" he saw Plaintiff trip over her own two feet." Merone saw the Plaintiff jog and saw her when she went to stop to turn and then she fell. Merone ran over to her after she fell. After telling him she rolled her ankle Merone advised she stay down. Merone observed the turf "was flat, and it was perfectly fine." There was nothing on the turf. Although the gym has cameras they were

overwritten. There are no photos of the turf from the time of the accident. There was no accident report made and no written protocol for turf inspection in writing.

*C. Deposition Testimony of Non-Party Witnesses Martino & DeMeo*

*1. Martino*

Mr. Martino was an assistant training coach working for Mr. Merone from 2015 through 2018. During that time Mr. Martino assisted in installing the turf field. Mr. Martino described installing the turf in a similar manner to Mr. Merone, except that certain pieces had to be cut. Mr. Martino testified that he would rake the turf, about once a month, “just like you would a lawn.” He further testified that it was field turf with a rubber bottom. Mr. Martino did not see Mrs. Siesto fall, but he did hear her fall, he was fifteen (15) yards away. Mr. Martino ran to grab Mrs. Siesto’s husband. Although he did not witness the fall, Mr. Martino “think[s] she kind of fell over her own two feet, but [he’s] not too sure.” Mr. Martino testified she was not near a seam. He inspected the area where she fell, “there was nothing in the area. There [were] no seams.” No maintenance was done to the turf, he never witnessed turf coming off the floor. He testified that Ms. DeMeo was training with Mr. Merone that day and she was doing shuttle runs, about ten to fifteen yards away from Mrs. Siesto. Mr. Martino was unsure if inspection records were kept of the turf or if there was a written protocol. He did not take any photos or statements about the accident.

*2. DeMeo*

Ms. DeMeo was a student athlete who trained at Mr. Merone’s gym. She also worked there for a three-month period. She testified that she had never seen the turf lifted. She further testified that no one ever complained about the turf. There were no other accidents on the turf that she knew of. Ms. DeMeo testified she witnessed Mrs. Siesto’s accident, she didn’t see how Mrs. Siesto fell or that she tripped on anything. Thirty minutes after the accident Ms. DeMeo ran over the same area as the accident and did not see anything wrong with it. She never experienced the turf lifting.

*D. Plaintiff Siesto’s Husband’s Affidavit*

Included for the first time in Plaintiff’s affirmation in opposition is an affidavit from her husband. He avers that he did not witness her fall but was alerted by Mr. Martino. He further avers that he “observed that there was approximately six (6) inches of turf that was lifted up and curved in.” He affirmed that his wife told him that she injured her ankle when she fell because she got caught underneath the six-inch lift in the turf.

**DISCUSSION**

*A. CPLR § 3212 Standard*

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite*

*Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once such proof has been offered the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and "must show facts sufficient to require a trial of any issue of fact" (CPLR § 3212[b]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v. Barreto*, 289 AD2d 557 [2d Dept 2001]; *O'Neil v. Town of Fishkill*, 134 AD2d 487 [2d Dept 1987]).

1. *Primary Assumption of Risk*

CPLR § 1411, adopted in 1975, provides in pertinent part that, "[i]n any action to recover damages for personal injury. . . the culpable conduct attributable to the claimant. . . including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant. . . bears to the culpable conduct which caused the damages" (CPLR § 1411).

In this case, one of the theories advanced by defendants to bar plaintiff from recovering damages is assumption of the risk. Despite enactment of CPLR § 1411, courts "have held that a limited vestige of the assumption of the risk doctrine—referred to as 'primary' assumption of the risk—survived the enactment of CPLR 1411 as a defense to tort recovery in cases involving certain types of athletic or recreational activities" (*Custodi v. Town of Amherst*, 20 NY3d 83, 87 [2012]). "Since the adoption of CPLR 1411, we have generally restricted the concept of assumption of the risk to particular athletic and recreative activities in recognition that such pursuits have 'enormous social value' even while they may 'involve significantly heightened risks'" (*Id.* at 88, *citing Trupia v. Lake George Central School District*, 14 NY3d 392, 395 [2010]). "Hence, the continued application of the doctrine 'facilitate[s] free and vigorous participation in athletic activities' (*Benitez v. New York City Board of Education*, 73 NY2d 650, 657 [1989]), and fosters these socially beneficial activities by shielding coparticipants, activity sponsors or venue owners from 'potentially crushing liability' (*Bukowski v. Clarkson University*, 19 NY3d 353, 358 [2012])" (*Custodi v. Town of Amherst*, 20 NY3d at 88, *supra*). Consistent with this justification each of our cases applying the doctrine involved a sporting event or recreative activity that was sponsored or otherwise supported by the defendant, or occurred in a designated athletic or recreational venue" (*Id.* at 88).

Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity “consents to those commonly appreciated risks [that] 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 doctrine applies to inherent risks related to the construction of the playing field or surface and “encompasses risks involving less than optimal conditions” (*Bukowski v. Clarkson Univ.*, 19 NY3d at 356, *supra*; see *Ziegmeyer v. United States Olympic Comm.*, 7 NY3d 893, 894 [2006]; *Sykes v. County of Erie*, 94 NY2d 912, 913 [2000]; *Maddox v. City of New York*, 66 NY2d 270, 277 [1985]). The doctrine does not apply to the case at bar because the issue in contention, whether there was a six-inch lift in the turf, is not inherent in turf. This is not the grass field that other plaintiff’s have assumed the risks of divots, holes, and undulations. On the contrary, a man-made surface, turf is the opposite of grass, the user has an expectation of levelness. Further, in running on turf no one is expecting a six-inch lift that curves in. In short, that is a defect, and a defect voids this doctrine.

The primary doctrine of primary assumption of risk “does not exculpate a landowner from liability for ordinary negligence in maintaining a premises” (*Sykes v. County of Erie*, 94 NY2d at 913, *supra*; see *Custodi v. Town of Amherst*, 20 NY3d at 89, *supra*; *Cotty v. Town of Southampton*, 64 AD3d 251, 257 [2d Dept 2009]). Thus, the doctrine does not necessarily absolve landowners of liability where they have allowed certain defects, such as a hole in a net in an indoor tennis court, to persist (see *Morgan v. State of New York*, 90 NY2d at 488, *supra*). Here, the “six-inch lift” at dispute invokes the doctrine’s applicability to defects, as there is a distinction between accidents resulting from premises having fallen into disrepair and those resulting from features of a premise. As to the condition presented on the facts of this case, the “six inch lift” is a defect, and the application of the doctrine of primary assumption of risk is inappropriate (see *id.*; *Sykes v. County of Erie*, 94 NY2d 912, *supra*; *Morgan v. State of New York*, 90 NY2d 471, *supra*; *Maddox v. City of New York*, 66 NY2d at 274-275, *supra*). Here, as the testimony conflicts as to whether the six-inch lift even exists the Defendant failed to establish as a matter of law that the defect of the artificial turf was open and obvious, further, there was no written protocol to inspect or maintain the field and except for monthly raking the turf received no other maintenance Defendant cannot prove whether or not it was the result of his negligence in maintaining the field (*Maddox v. City of New York*, 66 NY2d 270, *supra*).

## 2. Defective or Dangerous Condition

“An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition” (*Farrar v. Teicholz*, 173 A.D.2d 674, 676 [2d Dept 1991]; see *Boudreau–Grillo v. Ramirez*, 74 A.D.3d 1265 [2d Dept 2010]; *Cupo v. Karfunkel*, 1 A.D.3d 48, 51 [2d Dept 2003]; *Millman v. Citibank*, 216 A.D.2d 278 [2d Dept 1995]). In this case, to impose liability upon the defendant for the injured plaintiff’s fall, there must be evidence that a dangerous or defective condition existed, and that the defendant had actual or constructive notice of the condition and failed to remedy it within a reasonable time (see *Drago v. DeLuccio*, 79 A.D.3d 966 [2d Dept 2010]). “[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 [1997])[internal quotation marks omitted]; see *Nagin v. K.E.M. Enters., Inc.*,

111 A.D.3d 901 [2d Dept 2013]). While a possessor of real property has a duty to maintain that property in a reasonably safe condition (*see Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]; *Milewski v. Washington Mut., Inc.*, 88 A.D.3d 853 [2d Dept 2011]), there is no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous (*see Mathew v. A.J. Richard & Sons*, 84 A.D.3d 1038, 1039 [2d Dept 2011]; *Katz v. Westchester County Healthcare Corp.*, 82 A.D.3d 712, 713 [2d Dept 2011]; *Tyz v. First St. Holding Co., Inc.*, 78 A.D.3d 818, 819 [2d Dept 2010]). “Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*Katz v. Westchester County Healthcare Corp.*, 82 A.D.3d at 713, *supra*; *see Stoppeli v. Yacenda*, 78 A.D.3d 815, 816 [2d Dept 2010]; *Villano v. Strathmore Terrace Homeowners Assn., Inc.*, 76 A.D.3d 1061, 1062 [2d Dept 2010]; *Shah v. Mercy Med. Ctr.*, 71 A.D.3d 1120 [2d Dept 2010]).

Here, there is conflicting testimony as to the defect, Mrs. Siesto testifies that there was a six-inch lift in the turf and that lift was curved in. Mr. Merone, Mr. Martino, and Ms. DeMeo, upon inspecting the turf after the accident, testify that the turf was flat. These disputed facts are ripe for a jury’s resolution. Accordingly, viewed in the light most favorable to the plaintiff as the nonmovant, a triable issue of fact has been raised as to whether the defect was trivial, and defendants have failed to establish their *prima facie* entitlement to summary judgment as a matter of law (*see Brenner v. Herricks Union Free School District*, 106 AD3d 766 [2d Dept 2013]; *Boxer v. Metropolitan Transportation Authority*, 52 AD3d 447 [2d Dept 2008]; *Mishaan v. Tobias*, 32 AD3d 1000 [2d Dept 2006]). Moreover, taking into consideration all of the evidence presented, including time, place and circumstances of the plaintiff’s fall, it cannot be said that the defect was trivial as a matter of law and therefore not actionable (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]; *Trincere v. County of Suffolk*, 90 NY2d at 978, *supra*). Since the defendants have failed to meet their *prima facie* burden, it is unnecessary to determine whether the plaintiff’s papers submitted in opposition are sufficient to raise a triable issue of fact (*See Levin v. Khan*, 73 AD3d 991 [2d Dept 2010]; *Kjono v. Fenning*, 69 AD3d 581 [2d Dept 2010]).

B. CPLR § 3211(a)(7)

“When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory . . . if the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one . . . [The motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it” (*Thaw v. North Shore Univ. Hosp.*, 129 AD3d 937, 938 [2d Dept 2015][internal quotation marks omitted]’ *see Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; “*JohnDoe I*” *v. Board of Educ. Of Greenport Union Free Sch. Dist.*, 100 AD3d 703, 705 [2d Dept 2012]). “To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension

of harmful contact” (*Fugazy v. Corbetta*, 34 AD3d 728, 729 [2d Dept 2006], quoting *Cotter v. Summit Sec. Servs. Inc.*, 14 AD3d 475, 475 [2d Dept 2005]). Here, the evidentiary material submitted by the Defendant fails to demonstrate that the Plaintiff did not have a cause of action against Defendant to recover damages for personal injury. As such, Defendant’s motion for dismissal pursuant to CPLR § 3211(a)(7) is denied.

**CONCLUSION**

Defendant’s motion is denied.

Upon the foregoing; it is

**ORDERED** that Defendant’s motion seeking an Order pursuant to CPLR § 3212, granting summary judgment dismissing Plaintiff’s Complaint against Defendant is denied; and it is further,

**ORDERED** that Defendant’s motion seeking an Order pursuant to CPLR § 3211(a)(7), granting dismissal of Plaintiff’s Complaint for failure to state a claim is denied.

The foregoing constitutes the decision of this Court.

Dated: January 7, 2020  
Riverhead, NY

  
CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [ X ]