SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
----------X
MAXIM CHJEN,

Plaintiff,

-against-

LB WAKE, INC. d/b/a LB WADE AND WATERSPORTS, JOHN DOES 1 THROUGH 5, NAMES ARC FICTITIOUS INTENDED TO BE THE NAMES OF JET SKI INSTRUCTORS,

Defendants.
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Index No.: 519748/2017
Motion Date: 8-10-20
Mot. Seq. No.: 4

DECISION/ORDER

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, LB WAKE, INC. moves for an order pursuant to CPLR 3212 granting it summary Judgment dismissing the complaint on the pursuant to the doctrines of primary and express assumption of the risk.

Background:

The plaintiff, MAXIM CHJEN, commenced this action claiming that on September 23, 2017, he sustained personal injuries, including a trimalleolar fracture of the left ankle, while operating a jet ski that he rented from the defendant. At the time of the accident, the plaintiff and several of his friends were participants in a jet ski tour that was being run by an employee of the defendant. Plaintiff of claims that he was injured when the jet ski he was operating came into

contact with a large wave which propelled him several feet it the air and caused him to eventually land in the water. Plaintiff maintains that the instructor that led the tour acted irresponsibly, recklessly and was negligent in leading plaintiff and his friends into rough ocean waters where a novice jet-skier, such as the plaintiff, would be unable to navigate due to the level of expertise needed to stay onboard.

Discussion:

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572, citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see also* CPLR 3212[b]). If the movant makes such a showing, in order to defeat the motion, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). If the movant fails to make a prima facie showing of entitlement to judgment as a matter of law, the motion must be denied regardless of the sufficiency of the opposing papers (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]). In deciding a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inferences must be drawn in that party's favor (*see McNulty v. City of New York*, 100 N.Y.2d 227, 230, 762 N.Y.S.2d 12, 792 N.E.2d 162; *Boyd v. Rome Realty Leasing Ltd. Partnership*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340; *Erikson v. J.I.B. Realty Corp.*, 12 A.D.3d 344, 783 N.Y.S.2d 661).

Primary Assumption of the Risk:

Defendant did not demonstrate as a matter of law that plaintiff's claim should be dismissed pursuant to the doctrine of primary assumption of the risk. Pursuant to this doctrine, a voluntary participant in a sporting or recreational activity " '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' " (*Alqurashi v. Party of Four, Inc.*, 89 A.D.3d 1047, 1047, 934 N.Y.S.2d 214, quoting *Morgan v. State of New York*, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202). The doctrine operates to limit the scope of s defendant's duty, and "it has been described [as] a 'principle of no duty' rather than an absolute defense based upon a plaintiff's culpable conduct" (*Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392, 395, 901 N.Y.S.2d 127, 927 N.E.2d 547, quoting *Morgan v. State of New York*, 90 N.Y.2d at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202). "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (*Turcotte v. Fell*, 68 N.Y.2d at 439, 510 N.Y.S.2d 49, 502 N.E.2d 964).

Notwithstanding the above, as the court stated in *Georgiades v. Nassau Equestrian Ctr. at Old Mill, Inc.*:

> The primary assumption of risk doctrine does not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased (*see Custodi v. Town of Amherst*, 20 N.Y.3d 83, 957 N.Y.S.2d 268, 980 N.E.2d 933; *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 654, 543 N.Y.S.2d 29, 541 N.E.2d 29; *Weinberger v. Solomon Schechter Sch. of Westchester*, 102 A.D.3d 675, 961 N.Y.S.2d 178). "[A]wareness 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*, 90 N.Y.2d at 486, 662 N.Y.S.2d 421, 685 N.E.2d 202, quoting *Maddox v. City of New York*, 66 N.Y.2d 270, 278, 496 N.Y.S.2d 726, 487 N.E.2d 553; *see Toro v. New York Racing Assn., Inc.*, 95 A.D.3d 999,

> 1000, 944 N.Y.S.2d 229; *Calouri v. County of Suffolk,* 43 A.D.3d 456, 841 N.Y.S.2d 598). Furthermore, "in 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 N.Y.2d at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202, quoting *Owen v. R.J.S. Safety Equip.,* 79 N.Y.2d 967, 970, 582 N.Y.S.2d 998, 591 N.E.2d 1184; *see Gross v. Sweet,* 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 306).

(Georgiades v. Nassau Equestrian Ctr. at Old Mill, Inc., 134 A.D.3d 887, 889, 22 N.Y.S.3d 467, 469–70).

Here, the defendant failed to establish, prima facie, that the conduct of defendant's tour guide did not unreasonably increase plaintiff's exposure to the risk of injury given his limited experience operating a jet ski. Given plaintiff's account of the accident, which defendant failed to rebut by admissible proof, a jury can infer that under the circumstances, defendant's tour guide increased the novice plaintiff's exposure to the risk of injury by leading him into rough ocean waters where large waves are foreseeable.

Express Assumption of Risk:

While it is true that an "express" assumption of risk by the plaintiff precludes any recovery (*Arbegast v. Board of Education of South New Berlin Central School,* 1985, 65 N.Y.2d 161, 490 N.Y.S.2d 751, 480 N.E.2d 365) and that a plaintiff "expressly" assumes the risk of his injuries when he agrees, in advance, that the defendant "need not use reasonable care for the benefit of plaintiff" (*Id.* at 169, 490 N.Y.S.2d at 757, 480 N.E.2d at 371), defendant did not demonstrate as a matter of law that the plaintiff expressly assumed the risk of injury on the day of the accident.

In support of its argument that the plaintiff expressly assumed the assumption of the risk of injury, the defendant submitted two forms that the plaintiff apparently electronically signed on two prior occasions. He signed these forms on September 5, 2017 and August 17, 2016, when he previously rented a jet ski from the defendant. In both of these forms, the plaintiff agreed to "ASSUME THE RISK OF BODILY INJURY, DEATH, OR PERMANENT DAMAGE, whether due to the negligence of RELEASEES [sic] negligence, my negligence, or any other reason or factor, while upon the premises, while operating a PWC [personal watercraft] rented from or owned by LB WATERSPORTS., and/or while participating in any activities." The form further provided:

> 1) My participation in PWC or boating activities, as with any watersport, will test my physical and mental limits, involves very powerful machinery, and exposes me to dangers associated with the operation of PWC and/or boats. These dangers include, without limitations: collisions with other vessels, fixed objects, persons in the water, or objects in the water; exposure to the elements; mechanical breakdown; loss of control of the vessel; falling off the vessel; sinking of the vessel; drowning; and other dangers known or unknown. I understand these rules and assume the risk of harm presented by these damages.

Since the plaintiff did not submit a similar form signed by the plaintiff on the date of accident, the two forms plaintiff apparently signed on the two prior occasions did not demonstrate as a matter of law that the plaintiff expressly assumed the risks set forth in the form on the day of the accident.

In sum, the defendant did not in the first instance demonstrate its prima facie entitlement to summary judgment dismissing the complaint on the grounds of primary assumption of risk and express assumption of risk . Accordingly, defendant's motion must be denied regardless of the sufficiency of plaintiffs opposing papers.

For the above reasons, it is hereby

ORDRED that defendant's motion is **DENIED.**

This constitutes the decision and order of the Court.

Dated: October 26, 2020

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020