SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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MARINA OETIKER,

Plaintiff,

- v -

HUDSON RIVER PARK TRUST, FRIENDS OF HUDSON RIVER PARK, INC.,

Defendants.

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INDEX NO. 450412/2018

MOTION DATE 05/17/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, defendant Hudson River Park Trust, moves pursuant to CPLR Rule 3212 for summary judgment dismissing plaintiff's complaint. For the following reasons, the motion is granted.

This matter stems from an incident that occurred on June 1, 2017. On said date, plaintiff, an experienced tennis player who now coaches,[1] met two adolescent clients at Pier 40, a recreational facility, for a regularly scheduled tennis lesson. Prior to the date of the incident, plaintiff and the adolescent clients conducted approximately five lessons at Pier 40. The previous lessons took place within the main field areas, unlike on the date of accident, where the lesson was held in an enclosed rubber field located on the roof of the Pier.

Plaintiff testified in her October 26, 2020 deposition that the floor of the rubber field was cracked and defective. She stated that after she set up her portable net, she stood on one side while

[1] Plaintiff formerly played division one tennis on athletic scholarship in undergrad and played professionally with the Women's Tennis Association.

the clients she was teaching stood on the other side because "that area had less of those visible floor rubber damages" (NYSCEF Doc No. 38, EBT at 38:16-17). She began to volley with the students and would throw balls to them and return them if the ball came back near her, but would not run to go get it, and basically stayed within a three-foot area (EBT at 43). Plaintiff testified about her efforts to try and remain in that particular area that appeared to be free of any defects, while aware of the cracked and defective conditions around her (see EBT at 40-41, 48).

Plaintiff further testified that, after about twenty minutes into the lesson, plaintiff proceeded to step to her right, with her right foot, with the intention of hitting a ball, when her right foot became lodged in a portion of the rubber floor; she tried to lift it out but it was caught and she tipped over with her ankle twisting under her (EBT at 41-44). Plaintiff stated that she had noticed visible defects ("depressions" or "cracks") in the area but did not see this particular "depression" prior to her accident.

> Q. Did you ever notice the area where your incident occurred before the incident?
> A. Did I ever notice the area?
> Q. You said there were depressions, and there were cracks, did you notice the area where your incident occurred before the incident occurred?
> A. Say it again.
> Q. Did you ever notice the defective condition before your incident that caused your incident?
> A. So I saw that there were open the ones that are very visible around the area. I saw those. I was very careful to avoid those. Where I was standing specifically the area looked normal to me. That is why I was standing there. You couldn't see it but there was a hidden depression in the rubber (EBT at 44:8-25).

Defendant argues, inter alia, that plaintiff's complaint is barred by the doctrine of assumption of risk (NYSCEF Doc. No. 148, defendant's mem at 2). In opposition, plaintiff argues under the assumption of risk doctrine, participants are not deemed to have assumed risks that are concealed or unreasonably increased (NYSCEF Doc. No. 153, Pager aff at ¶ 13). Plaintiff also argues that defendant failed to establish the rubber floor was an open and obvious defective

condition (id. at ¶ 17). Additionally, plaintiff contends that her conduct of merely throwing balls at the clients, for them to hit in return, does not amount to the type of activity recognized under the assumption of risk doctrine (id. at ¶ 37).

"Pursuant to the doctrine of primary assumption of risk, one is deemed to have assumed, as a voluntary participant, spectator, or even bystander, certain risks occasioned by athletic or recreational activity, and to the extent of such an assumption, any legally enforceable duty to reduce the risks of such activity is limited" (Roberts v Boys and Girls Republic, Inc., 51 AD3d 246, 247 [1st Dept 2008]). "An assumption under the doctrine is thus potentially broad and may encompass risks engendered by less than optimal conditions, provided that those conditions are open and obvious and that the consequently arising risks are readily appreciable" (id. at 248).

This principle may also extend to the risks involved in the general layout and construction of a playing field (see Bryant v Town of Brookhaven, 135 AD3d 801, 802 [2d Dept 2016] ["Among the risks inherent in participating in a sport are the risks involved in the construction of the field, and any open and obvious conditions of the place where the sport is played"]; Sanchez v City of New York, 25 AD3d 776, 776 [2d Dept 2006] ["The assumption of risk doctrine also applies to any readily observable condition of the place where the activity is carried on"]).

The defendant is entitled to summary judgment pursuant to the assumption of risk dotrine because plaintiff made a conscious effort to conduct the tennis lesson after noticing the alleged open and obvious cracked and defective rubber floor. "[B]y 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" (Toro v New York Racing Assn., Inc., 95 AD3d 999, 1000 [2d Dept 2012]). Furthermore, "it is not necessary to the application of the [assumption of risk] doctrine that the injured plaintiff may have foreseen the

exact manner in which the injury occurred 'so long as he or she is aware of the potential for injury of the mechanism from which the injury results'" (id., citing Joseph v New York Racing Assn., 28 AD3d 105, 108 [2d Dept 2006]).

Plaintiff's deposition testimony demonstrates that the rubber floor upon which she conducted the tennis lesson, was in a less than optimal condition, as it was cracked throughout its surface. The assumption of risk doctrine applies to any readily observable condition of the place where the activity is carried on (see Sanchez 25 AD3d at 776). The Court finds that defendant met its burden entitling judgment as a matter of law pursuant to this doctrine.

Plaintiff further claims that she "was not aware of any risks posed by the invisible tear (which she testified she couldn't see prior to her fall); she had no appreciation of the nature of the risks; and she had not voluntarily assumed the risk of falling on a defect she couldn't see" (Pager aff at ¶ 44). However, the assumption of risk doctrine does not require the plaintiff to foresee the exact manner in which the injury will occur, so long as the individual is aware of the potential for injury (Joseph 28 AD3d at 108). Before plaintiff and the adolescent clients proceeded with the tennis lesson, plaintiff observed and appreciated the portions of the rubber floor that were cracked and defective. Moreover, before the lesson began, plaintiff deemed certain portions of the cracked and defective rubber surface safer than others and positioned herself and the adolescent clients accordingly. Ultimately, the same type of defect plaintiff observed caused plaintiff to fall. Plaintiff's efforts to try and remain in what appeared to be a safe spot on the alleged cracked and defective floor demonstrates she appreciated and assumed the risk presented (see, e.g., Ninivaggi v County of Nassau, 177 AD3d 981, 983 [2d Dept 2019] [where plaintiff testified that the surface upon which the plaintiff was playing football was "irregular" and that "he was aware of and appreciated the inherent risks, and that the irregular condition of the field was not concealed"]).

In opposition, plaintiff asserts that the assumption of risk doctrine should not apply because plaintiff was not actually playing tennis but was simply tossing the balls at the adolescent clients for them to hit in return. However, though plaintiff was not playing competitively or in an organized game, she was still engaged in the sport of tennis, and appreciated the risks which are inherent in and arise out of tennis, such as planting and lateral movements (see Felton v City of New York, 106 AD3d 488, 489 [1st Dept 2013] [court held plaintiff assumed the risks associated with playing basketball despite plaintiff coaching adolescents rather than playing in an organized game]; see also Ninivaggi, 177 AD3d at 983). The Court has considered any remaining arguments and finds them unavailing.

Accordingly, it is hereby ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of the Court.

3/14/2022
DATE

ALEXANDER TISCH, 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