

McLarty v New York Skating LLC
2022 NY Slip Op 31793(U)
June 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 13443/2015E
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

ERICA MCLARTY,

Plaintiff,

DECISION/ORDER

-against-

Index No. 13443/2015E

NEW YORK SKATING LLC and PIER 2 ROLLER
SKATING RINK @ BROOKLYN BRIDGE,

Motion Seq. No. 1

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>2-17</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>24-36</u>
Reply Affirmation.....	<u>38-40</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In this personal injury action arising from an accident at a roller-skating rink, the defendants move for summary judgment and an order dismissing plaintiff's complaint, pursuant to CPLR 3212, based upon their contention that the plaintiff's fall was a direct and foreseeable consequence of the risk she voluntarily assumed when she engaged in the recreational activity of roller-skating, and that her assumption of the risk is a complete defense to her claims. The plaintiff claims that she fell on an improperly designed ramp, located between the skating rink and the locker room at the defendants' facility, which she claims also had inadequate and insufficient handrails. In sum, she claims the design of the ramp and handrails was negligent and not part of the risk she assumed.

The accident in question occurred on July 4, 2015, at approximately 12:55 pm, at the Pier 2 Roller Skating Rink in Brooklyn Bridge Park in Brooklyn, New York. In her bill of particulars, the plaintiff states that “[t]he occurrence took place on the exit ramp leaving the skating floor to the locker room.” Specifically, when the accident occurred, the plaintiff was skating up the ramp that led from the skating area to the locker room. In her bill of particulars, the plaintiff contends that the defendants were negligent “in failing to provide padding on the exit ramp from the skating floor; in failing to extend the railing beyond the end of the ramp so as to provide the plaintiff with a safe place to exit the ramp; in failing to take reasonable and proper precautions to prevent the happening of the occurrence; in failing to place a non-skid surface on the exit ramp which would extend the end of the ramp; in failing to warn that the ramp was slippery; in constructing the ramp at an unsafe angle thus making it dangerous for persons using the ramp; in constructing the ramp so that the same was too steep; in failing to adhere to proper engineering standards; in constructing and maintaining the ramp in an unsafe manner; in failing to maintain the ramp in a safe condition for persons using the same.”

In support of the motion, the defendants offer copies of the pleadings, the plaintiff’s bill of particulars, deposition transcripts from the plaintiff and two of the defendants’ employees, a copy of the defendants’ roller skating agreement, which they claim operates as a waiver of liability, a copy of the incident report that was generated as a result of the plaintiff’s accident, NOAA weather reports for the date of the accident, a report by an employee of defendant regarding an inspection of the skates that the plaintiff had been wearing when the accident occurred, four (4) different video clips, as well as screenshots, that were taken from surveillance video that show the plaintiff, and other skaters, skating on the ramp in question without incident on the day of the

plaintiff's accident, as well as a clip that shows the plaintiff's accident. The defendants also offer an affidavit from the general manager of the skating rink and an affidavit and report from the defendants' expert, a licensed architect.

The movants contend that the ramp where plaintiff fell was already in place when they licensed the facility from the Brooklyn Bridge Park Corp. as the concession holder, and that in 2015 they "added additional railings to the two ramps to improve safety and specifically to allow guests to hold onto railings with both hands while ascending or descending the ramps if desired." The movants point to the deposition testimony of the general manager of the skating rink, who testified that to gain entry, all skaters must fill out the waiver of liability/skater agreement, and he further testified that when a guest is injured, an incident report is filled out and the skates that the injured person was wearing are inspected and a separate report is generated regarding the condition of the skates. The defendants offer the plaintiff's signed skater agreement/waiver of liability form, the incident report that was filled out after the plaintiff fell, and a copy of the skate inspection report, which found that the skates that the plaintiff was wearing were in normal working condition. The defendants further point to the plaintiff's deposition testimony wherein she testified that she learned to skate as a child, and that, prior to its closure, she previously used to go skating "every Monday night and Saturdays" at The Empire Skating Rink, which was on Empire Boulevard. Plaintiff also testified that she had been to the Pier 2 Roller Skating Rink in Brooklyn Bridge Park once prior to the date of her accident. When asked about her skating experience, the plaintiff stated, "I skate very well."

The defendants' expert, Douglas W. Peden, a licensed architect, conducted an investigation and, in his report, (Doc 16) opines that: "[t]he Pier 2 Roller Skating Rink

was not inside a building or required to be compliant with the New York City Building Code”; “[t]he floor surfaces were compliant with applicable standards and codes for walking surfaces”; “[t]he ramp was not required to be compliant with ADA. Claims that the ramp and the asphalt transition violated ADA requirements are not valid”; “[a]lthough handrails were not required at the ramp, the handrails were an aid to persons using the ramp and a visual warning of the ramp’s existence, location, and slope”; and “Erica McLarty’s claimed incident did not occur on the ramp nor was it caused by conditions of the ramp.”

The defendants’ expert further opines that “[a]s recorded in surveillance video, Ms. McLarty fell when she failed to release her hand that was gripping the handrail as she was in a forward motion on roller skates. By failing to release her grip of the handrail, she pulled herself backwards and fell to the floor.” Finally, Mr. Peden disagrees with the findings of the plaintiff’s expert, and argues that the “[c]laims made by William Marletta are not supported by the available evidence, code provisions, standards, and are unreliable and unscientific.”

The defendants further argue that the doctrine of primary assumption of the risk applies to the facts of this case, and contend that the “[p]laintiff assumed the risk of participating in a recreational sport, roller-skating, and her alleged injuries were a direct and natural consequence of the risks inherent in that sport, to wit that having strapped wheels onto one’s feet, one could well fall down and sustain injury” and that, based upon this doctrine, the plaintiff’s case should be dismissed in its entirety.

The court finds that defendants make a prima facie case for summary judgment. The burden thus shifts to the plaintiff to overcome the motion and raise a triable issue of fact.

The plaintiff opposes the motion and argues that the issue is not assumption of the risk, but that there was a dangerous premises condition which caused her to fall. She says the ramp in question was improperly designed and that the handrails on the ramp in question were not uniform in length, and that some of the handrails did not extend as far as others. The plaintiff argues that the defendants were aware of the danger presented by the ramp and its handrails, and so they installed some additional handrails, which were longer than the original handrails, but they didn't replace all of them. Plaintiff further argues that after installing the longer handrails, the defendants left some of the original handrails in place, which, according to the plaintiff's expert, William Marletta, Ph.D., "a certified safety professional", were not in compliance with the NYC Building Code, ANSI, or the ADA.

In his report, Dr. Marletta (Docs 27, 28) opines that the roller rink in question "qualifies as a place of public assembly according to the New York City Building Code" and that "[a]s such, this property is subject to the rules and regulations associated with the Building Code of the City of New York." Dr. Marletta states that "the asphalt section of the top landing is back pitched approximately 3.5 degrees, creating a hazardous and dangerous condition to pedestrians and skaters where it is required and expected to be level," opining that "[a] back pitched slope of 3.5 degrees is a significant slope" and that "[t]he slope and the change in levels provided for a dangerous trap in which roller skating could become disrupted. The back pitched slope may cause the skate to become momentarily paused and force the body to fall backwards, as Ms. McLarty is seen in the video of her accident" and he concludes that it "is a substantial contributing factor in Ms. McLarty's accident." He also found that "the difference in levels between the plastic trim and the asphalt is three-eighths inch to one-half inch high" and he

believes that “[t]his change in levels, in conjunction with the back slope of the asphalt, created an abrupt transition and trap for skaters.”

Plaintiff’s expert also states that “the ramp involved in the accident is excessively steep at 7.2 degrees”, which he concluded “is dangerous for pedestrian use” and is not in compliance with the NYC Building Code, the ADA and ANSI. Dr. Marletta further concludes that “the third (3rd) handrail terminates approximately four and one-half inches from the top landing and does not extend at least 12 inches onto the asphalt landing as required by the New York City Building Code.” Dr. Marletta is also of the opinion that “there was inadequate installation of handrail extensions, present only for two of the five handrails on this ramp, rather than on all of the handrails as is required by the New York City Building Code.” Finally, Dr. Marletta opines that “there was a failure to maintain a safe and dry floor surface for pedestrian use” and “there was a lack of adequate inspection, supervision and maintenance of the premises,” and concludes that “adequate warning signs, cones and/or barricades should be posted until proper repairs could be affected.” Dr. Marletta sums up by stating that the “departures from codes, rules, regulations and good and accepted safety practice were direct and proximate causes of this incident.”

The plaintiff contends that Dr. Marletta’s affidavit “establishes that Defendant created and/or permitted to exist a concealed, unassumed, and unreasonably increased risk to its patrons such that Defendant is not entitled to summary judgment as predicated on the assumption of risk defense.” While plaintiff acknowledges that “[a]mong 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,” she argues that the defendant “is not entitled to summary judgment on

liability because it permitted to exist on its premises an unassumed, concealed, and unreasonably increased risk” in the form of “a defective ramp with a defective middle handrail” which the defendants “invited patrons such as Plaintiff to use to go from the rink to the lockers.”

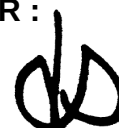
A skating rink proprietor, like any other proprietor, owes a patron the duty of reasonable care under the circumstances, but is not liable in the absence of evidence that its negligence was the proximate cause of the injuries alleged. *Gafner v Chelsea Piers, L.P.*, 27 AD3d 353, (1st Dept 2006); *Goulet v Pier 2 Roller Rink at Brooklyn Bridge Park*, 196 AD3d 467 (2d Dept 2021). Here, the plaintiff raises an issue of fact as to whether there was a dangerous premises condition which she did not assume the risk of. When there are competing expert’s reports, the court cannot grant either party summary judgment (see *Bartels v Eack*, 164 AD3d 1202 [2d Dept 2018]; *Aponte v NY City Hous. Auth.*, 197 AD3d 1283 [2d Dept 2021]). More significantly, in this motion, defendants claim the assumption of the risk doctrine prevents the court from finding them liable, while the plaintiff’s expert claims the plaintiff fell because of a dangerous premises condition, which takes the action out of the doctrine, if proven.

Accordingly, it is **ORDERED** that defendants’ motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: June 8, 2022

ENTER:



Hon. Debra Silber, J.S.C.