

Straus v Prospect Park Alliance, Inc.

2023 NY Slip Op 30305(U)

January 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 508923/2020

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

SHIRA R. STRAUS,

Plaintiff,

DECISION/ORDER

-against-

Index No. 508923/2020

**PROSPECT PARK ALLIANCE, INC.,
and LAKESIDE BROOKLYN LLC,**

Motion Seq. No. 1

Defendants.

X

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>34-45</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>50-53</u>
Reply Affirmation.....	<u>56</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 accident in question occurred on August 4, 2017, at the Prospect Park skating rink, which, in the summer, is a roller rink. At the time, the plaintiff was 27 years old and an attorney in New York. She attended a ticketed event, a roller disco event, on this particular Friday night, and apparently lost her balance and fell, causing her to be injured.

Plaintiff's amended complaint avers that her accident was "caused by the negligence of the Defendants and/or said Defendants' servants, agents, employees and/or licensees in the ownership, operation, management, maintenance and control of the aforesaid premises," and "upon information and belief, Defendants had actual notice of this defective condition for at least fifteen (15) days prior to August 4, 2017." There is no bill of particulars in the motion papers.

At her EBT, held November 2, 2021, plaintiff was asked to explain what the "defective condition" was that allegedly caused her to fall, and she stated [Doc 41 Page 34] "I was trying to go to the wall which was on my right hand side and somebody zipped past me on my right hand side between me and the wall causing me to over balance and the best way I can describe the mechanism of the accident is the cartoons where someone slips on a banana peel and their feet fly up because of the wheels on the roller skates, it was -- my feet flew up and my torso flew back very quickly. I flung my arms behind me to catch myself as this happened in a split second." When asked if this skater came into contact with her, she responded [Page 34] "they came close enough that their proximity caused me to over balance and fall." Counsel then asked plaintiff to clarify "Was there something that caused you to fall or was it that particular incident with that person or persons that zipped by you that caused you to fall? She answered "It was the person or persons that zipped by me and their proximity. She was then asked " Was there anything around the area that you noticed was the cause of your fall that could have been the additional cause of your fall? Plaintiff responded, "I do not believe so." Again, counsel probed, to make sure there was no misunderstanding, and plaintiff repeated [Page 87] "All I can say is the person or persons who whizzed past me may have brushed me or they may have simply been very close

which caused me to over balance. I cannot say for certain whether another individual came into contact with me or not.”

In support of the motion, the defendants offer copies of the pleadings, deposition transcripts from the plaintiff and of the defendants’ employee, a copy of the incident report that was generated as a result of the plaintiff’s accident [Doc 42], which includes a report by an employee of defendant regarding an inspection of the skates that the plaintiff had been wearing when the accident occurred, which indicates they had no defects.

The defendants argue that the doctrine of primary assumption of the risk applies to the facts of this case, and contend that the plaintiff 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, specifically that by putting wheels onto one’s feet, one could well fall down and sustain injury. Defendants cite many court decisions on this point and argue that, based upon this doctrine, the plaintiff’s case should be dismissed in its entirety.

Defendants’ counsel also notes that plaintiff would have signed a waiver of liability [Aff. ¶21] to participate, but neither side provides a copy. Defendants’ counsel also avers that there were five employees on site providing supervision. Counsel also points out that this event was a ticketed event, and that the maximum capacity of the rink, 450 people, was not reached that night, citing the EBT testimony of defendants’ witness. The incident report states [in the heading “conditions”] that there were approximately 250 people present.

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.

In opposition, plaintiff argues that the caselaw supports her claims, and that the defendants were obligated to provide supervision of the skaters, and that their failure to do so was negligent, citing cases from the years 1928 to 1949, which mostly involve claims sounding in the tort of negligent supervision on school outings, and, as such, are inapplicable. Plaintiff next argues that defendants had a legal obligation to provide her with safety equipment, which was available for rent or purchase, but she claims they did not mention it to her when she rented the skates and purchased socks. No questions were asked about this at her EBT, and she thus makes this claim for the first time in her post-EBT affidavit [Doc 51 ¶3], where she states “I rented roller skates and purchased socks to wear with the roller skates. The person who handled the skate rental and sock purchase . . . did not ask me if I wanted to rent any safety equipment such as a helmet or wrist guards. Moreover, I did not see any signage at the point of sale/rental indicating that there was any safety equipment of any kind available for rental or purchase.” Plaintiff then states “My accident occurred because reckless skaters passed me from behind while skating very close to me, such that their proximity caused me to lose my balance and fall backwards. Before my accident, the last time that I had roller skated was when I was much younger, approximately 15 years before my accident.”

The plaintiff’s attorney argues that “there are clearly questions of fact as to defendants’ lack of supervision, how crowded the rink was at the time and how unsafe the rink was during the time that the plaintiff was skating, prior to her injury” and that “it is clear that defendants failed the plaintiff by not providing or offering safety equipment, specifically, wrist guards.” Counsel offers no case decisions for this theory of a legal duty to offer safety equipment to skaters which he alleges was breached.

In reply, defendants argue that “plaintiff submits a self-serving inconsistent

affidavit and argues questions of fact exist concerning the defendants' lack of supervision as well as defendants' failure to provide safety equipment . . . [which] actually appears at variance with plaintiff's account of the accident as she testified to at her deposition. Plaintiff never mentioned, at her deposition, that safety equipment or lack thereof was an issue for her . . . Nor did she ever state there was no real room to freely skate or that skaters were 'reckless' at any time prior to or after her fall. These new arguments are revealed by plaintiff for the first time in opposition to this motion for summary judgment." Counsel notes that the defendant's witness testified that the LED monitors in the skate rental room displayed all items available for rent and purchase.

Discussion

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, defendants have made a prima facie case that they were not negligent, and that they are not at fault for the happening of plaintiff's accident, and plaintiff has not overcome the defendants' prima facie case and raised any triable issues of fact.

Accordingly, it is **ORDERED** that defendants' motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: January 30, 2023

ENTER ·



Hon. Debra Silber, J.S.C.