Holm v Du City Tri Runs, Inc.
2023 NY Slip Op 30962(U)
March 24, 2023
Supreme Court, Kings County
Docket Number: Index No. 509069/2020
Judge: Wavny Toussaint

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of March 2023.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

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KAREN HOLM,

Plaintiff,

- against -

DU CITY TRI RUNS, INC., d/b/a CITY TRY RUNS,

Defendant.

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Index No. 509069/2020

DECISION AND ORDER

Motion Seq. #06

The following e-filed papers read herein:

	NYSCEF Doc Nos.
Notice of Motion/Order to Shower Cause/ Petition/Cross Motion and Affidavits (Affirmations)	101-126
Opposing Affidavits (Affirmations)	131-136
Reply Affidavits (Affirmations)	140-145

Upon the foregoing papers, Du City Tri Runs, Inc., d/b/a City Try Runs ("Tri Runs") moves for an order granting summary judgment dismissing the complaint pursuant to CPLR 3212(b) (Motion Seq. 6). The plaintiff opposes the application.

BACKGROUND

On September 8, 2019, plaintiff tripped and fell over protruding nails/screws at the Riegelmann Boardwalk in Coney Island, Brooklyn, New York ("boardwalk" or " the premises") while participating as a runner in a half marathon, known as the New York City

Lives Half Marathon. The boardwalk is owned by the City of New York ("City"). The event was sanctioned by USA Track and Field ("USATF"), organized by defendant Tri Runs, and operated by its principals Alejandra Reagan and George Reagan.

Defendant City Try Runs' Summary Judgment Motion

Defendant moves for summary judgment to dismiss the plaintiff's complaint in its entirety on the basis that there is no genuine issue of fact. In support of its motion, the defendant submits, *inter alia*, the plaintiff's 50-H statutory hearing and deposition transcript; Alejandra Reagan's affidavit and transcript; George Reagan's transcript; a copy of USATF's waiver and release of liability ("waiver/release"); photographs; and a copy of plaintiff's expert disclosure.

At her statutory hearing, plaintiff testified, *inter alia*, that on the day of the race, announcements were made, instructing runners that the boardwalk was inspected, to run along the parallel boards of the boardwalk, and to avoid areas of the boardwalk that had yellow tape. She further testified that she did not see any protruding nails/screws before her accident and was approximately half a mile into the race when she tripped over protruding nails/screws. At her deposition, plaintiff testified, *inter alia*, that she was an experienced half marathon runner with four prior races predating the subject race, and that she registered and paid a registration fee to participate in the subject race but does not remember seeing nor signing a waiver/release.

Alejandra Reagan's affidavit states that she and her husband, George Reagan, owned and operated Tri Runs, and organized the subject event. As a requirement for USATF's endorsement, they adopted USATF's waiver/release. The race registration was

offered through "Active.com," an online community database where people register for events. To obtain a permit from the City's Parks Department ("Parks Department"), they agreed to a non-exclusive use of the boardwalk and to share it with the public. The Reagans and a paid helper walked the boardwalk a few days before the day of the race, and on the day of the race, to check and mark the entire racecourse for hazards. Alejandra Reagan has no personal knowledge of the two nails/screws, which allegedly caused the accident.

At her deposition, Alejandra Reagan testified, *inter alia*, that a written safety plan was provided to the Parks Department to obtain a permit. She and George Reagan went to the boardwalk a couple days before the race and on the day of the race to inspect the boardwalk. They placed yellow tape on the boardwalk, and instructed Maurice Perez ("Perez"), who was a hired helper, to do the same. At his deposition, George Reagan testified, *inter alia*, that he does not remember if he gave an announcement regarding running along the section of the boardwalk where there were vertical boards parallel to the ocean. He denies inspecting the boardwalk for defects on the day of race, and he does not know if Mr. Perez inspected the boardwalk on the day of the race.

As to the other supporting documents; the waiver/release agreement provided, *inter alia*, that the plaintiff's registration status was confirmed; stated her residence, telephone number, birthdate, and gender; and that the waiver was accepted. It was electronically signed on July 11, 2019. The photographs show, *inter alia*, yellow tape on the boardwalk with a caution flag next to it, and a plank from the boardwalk with two nails/screws protruding from it. The report from plaintiff's expert, Renny Jack Weiss ("Weiss") states *inter alia,* that "defendant unreasonably increased the risk of injury to plaintiff by failing

to ensure that the running surface was free of tripping hazards, by instructing runners to limit their course to the section of the boardwalk that was replete with tripping hazards . . . [and] failing to ensure that all defects were in fact flagged."

The Parties' Contentions

Defendant contends it neither breached nor owed a duty to plaintiff as it did not own, lease, have exclusive use of the boardwalk, nor supervise the runners of the race. Moreover, defendant contends that plaintiff was responsible for her own safety and wellbeing at all times. Defendant further contends plaintiff electronically signed the waiver/release by way of New York State Technology Law § 43304(2) (sic), and by doing so, she agreed to release the defendant from any liability, expressly assuming all risk, dangers and responsibilities of injury resulting from her participation in the event. Additionally, defendant contends that even though the plaintiff paid a fee to register for the race, a public boardwalk is not a place of amusement or recreation under General Obligations Law §5-326 and does not void or invalidate the waiver/release.

Defendant next contends that its contractual obligation to the City to ensure a safe event, its safety plan, and the Reagans and Mr. Perez's inspection of the boardwalk on the day of the race did not create a legal duty to maintain the boardwalk nor give rise to tort liability in favor of the plaintiff. Moreover, defendant contends even without the waiver, it had no legal duty to identify, warn or remedy the defects on the boardwalk. Defendant asserts that none of the third-party exceptions in *Espinal v Melville Snow Contractors, Inc.*, "(1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally

relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the owner's duty to maintain the premises safely" (98 NY2d 136, 140 [2002] [internal citations omitted]) apply, as it did not create an instrument of harm that caused plaintiff's accident, and there is no evidence she detrimentally relied on defendant to ensure the boardwalk was free of defects.

Additionally defendant contends, it had no notice of the condition of the boardwalk; that the photographs did not suggest that the protruding nails/screws were a longstanding condition; and that notice is not imputable to it as a non-owner. Moreover, defendant contends, plaintiff has not identified any notice witnesses. Defendant further contends the photographs show the boardwalk is vast, an observer would not catch every conceivable hazard, and that the two nails are trivial, non-actionable defects. Defendant describes the diameter of the nails as approximately half-an-inch; protruding minimally; not sharp, rusty, raised, exposed, or deteriorated; and appears to be silver, smooth, and visible. Defendant also asserts that the nails/screws and uneven board were not concealed, fractured, or splintered; was in a prominent place on the boardwalk, in sunlight; and there was no crowd nor obstruction of plaintiff's vision preventing plaintiff from seeing the two nails/screws.

Turning to plaintiff's expert, defendant contends Mr. Weiss lacks personal knowledge of the matters regarding the conditions of the racecourse, does not specify what his expertise is, does not cite to regulations in track and field, and failed to mention the waiver/release. Moreover, it asserts his opinion is speculative, conclusive with no probative value, unsupported in the record, and based solely on the fact that the running surface was not perfect.

Plaintiff's opposition

In opposition, plaintiff argues defendant failed to make a prima facie showing of entitlement to the relief sought. In support of the opposition, plaintiff submits, *inter alia*, the affidavit of Mr. Weiss, which stated he is an expert in the fields of Road Race Organization and Safety. He has decades of experience as a race director, champion runner, and triathlete. Mr. Weiss states that in preparing his opinion he reviewed the testimonial and documentary discovery produced. He opines, *inter alia*, that defendant made the course more dangerous. As to the waiver/release, defendant failed to provide admissible evidence that the plaintiff electronically signed it, and even if she did, the waiver/release is deficient, as it failed to state the date of the race at issue, and does not state that defendant is being released. Further, it does not state the particular dangers associated with the surface of the boardwalk. He disagrees with defendant's position that plaintiff agreed not to file suit when she signed up for the race; that plaintiff was adequately warned about the boardwalk, assumed risk of injury; and that the yellow tape was appropriate from a safety standpoint.

Plaintiff next argues that since defendant never pled the waiver/release as an affirmative defense, it has been waived. Moreover, plaintiff argues that defendant failed to show that she executed a dispositive waiver, as defendant has not provided evidence to prove the statutory defense and New York State Technology § 43304(2) does not exist. She denies executing the waiver/release, and further asserts that the waiver and release agreement would still fail even if plaintiff acquiesced to the terms of an agreement, because defendant allegedly admitted to modifying it in post-registration emails and in pre-race announcement moments before the start of the event. Plaintiff refutes defendant's

assumption of risk defense asserting defendant exposed plaintiff to increased and concealed dangers that she could not have assumed.

Plaintiff additionally asserts that all the *Espinal* exceptions apply herein, first by defendant's failure to exercise reasonable care to inspect and mark the boardwalk defects on the day of the race, which resulted in plaintiff sustaining injuries, and launched an instrument of harm by orchestrating the racecourse, thereby, making the racecourse more perilous. Second, plaintiff detrimentally relied on George Reagan's instructions and altered her course, which caused her to delineate and trip over the defect. Third, defendant displaced the City's duty to maintain the boardwalk during the period the race was taking place. Plaintiff asserts the runners were funneled onto vertical boards, creating a bottleneck, causing runners to focus on avoiding each other, and thereby making it more difficult to spot defects on the racecourse. Plaintiff additionally argues, there was no affidavit by third-party entity, Active.com to support defendant's position regarding the registration and waiver/release.

Plaintiff rejects defendant's argument that it did not have notice of the protruding screws, as defendant admitted to inspecting the boardwalk on the day of the race, and that runners from its prior events tripped on the boardwalk. Plaintiff also asserts defendant admits that the protruding screws were a hazard; that it had a duty to find and flag them; and it admitted telling runners it had done so. Plaintiff also argues defendant failed to adduce proof as to when was the last time the boardwalk was inspected.

As defendant failed to cite any case law, plaintiff argues defendant's contentions that the subject nails/screws were a trivial defect is baseless. Plaintiff further argues that

defendant failed to establish that it lacked notice, as Mr. Perez who allegedly flagged the area where plaintiff tripped and fell, was never deposed, nor is his affidavit provided.

Turning to defendant's contentions as to the expert, plaintiff argues defendant failed to cite to any authority requiring the court to disregard Mr. Weiss's findings as an expert. Indeed, says plaintiff, defendant had no objection to Mr. Weiss and his qualifications or his opinions when it learned of him months before its motion was filed. The plaintiff points out that defendant failed to retain its own expert or offer any expert affidavit; relied only upon its counsel's contentions; and failed to address plaintiff's liability contentions. Additionally, plaintiff argues that since her expert made a finding and the defendant has no expert, that issue is settled as a matter of law, as it was unrebutted. Finally, although no cross-motion was made, plaintiff asserts that she should be entitled to summary judgment pursuant to CPLR 3212(b) by searching of the record.

Defendant's Reply

In reply, defendant reiterates that the waiver is enforceable, and plaintiff's claim is void under the General Obligations Law; as it neither breached nor owed a duty to plaintiff. Defendant says none of the *Espinal* exceptions apply, as plaintiff failed to show that she was a third-party beneficiary of its safety plan; the two minimally protruding nails/screws are trivial; and Mr. Weiss failed to identify any triable issue that plaintiff did not assume the risks inherent to this activity. Additionally, defendant contends, pursuant to New York Technology Law § 306, the electronic signature may be admitted into evidence pursuant to CPLR § 4518.

Defendant next contends that plaintiff does not deny executing the waiver/release, but simply denies remembering doing so. Defendant also asserts that it did not own or operate Active.com's registration site, instead it adapted its event to Active.com's registration process inclusive of the waiver/release. Moreover, defendant contends, it is impossible to artificially produce a waiver/release, as it could only have been executed from plaintiff's computer. Defendant rejects plaintiff's accusation that the release was modified because the waiver is a self-authenticating USATF-required document. Defendant contends that while it did not assert the waiver/release as an affirmative defense, it was nonetheless free to claim release and assumption of risk as affirmative defenses; as noted by plaintiff in her June 21, 2022 motion to strike defendant's answer.

Defendant counters plaintiff's arguments that it had a duty to ensure the safety of the runners and the *Espinal* exceptions by reiterating that it was a permittee, not a property owner. Defendant also reiterates that there is no evidence of how long the defect existed. Moreover, defendant asserts that plaintiff was not intended to be protected by the permit and its safety plan.

Defendant contends that Mr. Weiss's affidavit was notarized in the State of Texas and as it does not conform to CPLR 2309(c) is therefore inadmissible. Defendant further asserts that Mr. Weiss's opinions are not based on any personal knowledge, is inadmissible, conclusory, speculative, and inconsistent. In support, defendant claims Mr. Weiss inappropriately vouches for the plaintiff, who claims no memory of signing the waiver/release; has no personal knowledge regarding the registration process, the event, the course, or plaintiff's conduct, and made assumptions that the course was not properly

inspected. Further defendant says, Mr. Weiss's contradicts himself regarding the waiver/release; as he stated the document was problematic, yet he too uses a substantially similar electronic waiver/release. In conclusion, defendant opposes plaintiff's request for summary judgment upon a search of the record, contending no triable issues of fact are raised in opposition.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. The burden rests on the party moving for summary judgment, who must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form, demonstrating the absence of material issues of fact (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dep't 2010]). Once the movant has met this burden, it shifts to the non-moving party to produce admissible evidence to establish the existence of a material issue of fact requiring a trial for resolution (*Gesuale v Campanelli & Assocs., P.C.*, 126 AD3d 936, 937 [2nd Dept. 2015]). When deciding a summary judgment motion, the Court's function is to identify material triable issues of fact (*Matter of Salvatore L. Olivieri Irrevocable Tr. dated 9/29/1994*, 208 AD3d 489, 491 [2d Dep't 2022]).

Liability

> "For a defendant to be held liable in tort, it must have owed the injured party a duty of care . . . Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property . . . Where none of these factors are present, a party cannot be

> held liable for injuries caused by the allegedly defective condition" (*Deutsch v Green Hills (USA), LLC*, 202 AD3d 909, 911 [2d Dep't 2022]).

Moreover, a contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a non-contracting third party (*Forbes v Equity One Northeast Portfolio, Inc.,* 212 AD3d 780, 781 [2d Dep't 2023]).

> "However, a party that enters into a contract to render services may be said to have assumed a duty of care, and thus, be potentially liable in tort to third persons, where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Id.*).

Here, the defendant established, prima facie, that it did not owe a duty of care to the plaintiff, as it did not own, occupy, control, or make special use of the boardwalk, as it was a permittee with nonexclusive use of the boardwalk (*Johnson v Acumen Cap. Partners, LLC,* 2023 WL 1807844, at *2 [2d Dep't 2023]).

Turning to the *Espinal* exceptions, the Court finds the record did not contain evidence that defendant "launched an instrument of harm or created or exacerbated a dangerous condition alleged to have caused the accident" (*Cohen v City of New York*, 209 AD3d 830, 832 [2d Dep't 2022]); therefore, the first exception is inapplicable. Moreover, the defendant did not owe a duty of care to the plaintiff because of the safety plan. As plaintiff was not a party to the plan, and it was not so comprehensive and exclusive as to displace the City's duty to maintain the boardwalk safely (*Rodriguez v Propark Exec. Mgt. Co., LLC*, 207 AD3d 584, 586 [2d Dep't 2022]).

However, plaintiff raised a triable issue of fact under the second *Espinal* exception, as the plaintiff asserts, she detrimentally relied on George Reagan's announcements prior to the race, which caused her to alter her course resulting in her accident. The Court notes that although George Reagan testified, he does not remember if he made announcements prior to the race, he does not deny doing so, and Alejandra Reagan's affidavit provides that pre-race announcements were made.

Waiver/Release Agreement

CPLR 3018(b) governs affirmative defenses, and provides that a defendant must plead, as an affirmative defense, "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." (*US Bank Nat'l Ass'n v. Nelson*, 169 AD3d 110, 113 [2d Dep't 2019]), aff'd, 36 NY3d 998 (2020). "Failure to plead a defense that must be pleaded affirmatively under CPLR 3018(b) is a waiver of that defense, unless it is raised by a motion under CPLR 3211(a)" (*GMAC Mortg., LLC v Winsome Coombs*, 191 AD3d 37, 40 [2d Dep't 2020]). However, a waiver of defenses may be retracted by raising the defense in a motion for summary judgment, where a court may then in its discretion deem the defendant's answer amended to include the affirmative defense (*Id.* at 43). Additionally, if a defense is waived under CPLR 3211(e), a defendant may amend the answer to include a new defense pursuant to CPLR 3025(b) (*U.S. Bank Nat'l Ass'n, etc. v Laino*, 172 AD3d 947, 947 [2d Dep't 2019]). Here, it is undisputed that defendant did not plead the waiver/release as an affirmative defense in its answer pursuant to CPLR 3018(b) or make a pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a) (*Bank of New York Tr. Co. v Chiejina*,

142 AD3d 570, 572 [2d Dep't 2016]). Were the Court to deem the answer amended, there is no affidavit from the third-party entity (Active.com) or by defendant movant authenticating the submitted waiver/release and proof that it was executed by the plaintiff. Therefore, there remains a question of fact as to whether plaintiff consented to the assumption of risk, as is contained within the waiver/release.

The doctrine of primary assumption of risk provides that:

> "by 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. Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation" (*Lungen v Harbors Haverstraw Homeowners Ass'n, Inc.*, 206 AD3d 714, 715 [2d Dep't 2022] [internal citations omitted]).
>
> "This includes risks associated with the construction of the playing surface and any open and obvious condition on it, including less than optimal conditions. It is not necessary to the application of assumption of risk that the [participant] have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results. However, participants are not deemed to have assumed risks that are concealed or unreasonably increased over and above the usual dangers that are inherent in the sport" (*A.L. v Chaminade Mineola Soc'y of Mary, Inc.*, 203 AD3d 1033, 1036 [2d Dep't 2022] [internal citations omitted]).

"Awareness of risk is to be assessed against the background of the skill and experience of a plaintiff" (*M. R. v Nastics Next Generation, Inc.*, 208 AD3d 1374, 1376 [2d Dep't 2022]). Here, although plaintiff's running experience is relevant, the defendant's submissions in support of its motion, which included photographs allegedly depicting the accident site, does not reveal that the protruding nails on the subject boardwalk, which

allegedly caused the plaintiff's accident, was clearly visible (*O'Brien v Asphalt Green, Inc.*, 193 AD3d 1061, 1063 [2d Dep't 2021]). Moreover, the plaintiff's testimony at her statutory hearing established that she did not see any protruding nails/screws prior to her accident. Therefore, there are triable issues of fact as to whether the risk was concealed.

Notice

> "[A] defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*Chiamulera v. New Windsor Mall*, 212 AD3d 770, 771 [2d Dep't 2023]).

"[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" (*Leem v 152-24 N., LLC*, 201 AD3d 918, 919 [2d Dep't 2022]).

Here, the defendant failed to eliminate all triable issues of fact as to whether it had actual or constructive notice of the protruding nails/screws on the boardwalk. The deposition testimonies of the Reagans are contradictory as to whether both George Reagan and Mr. Perez inspected the boardwalk on the day of the race. Alejandra Reagan testified that on the day of the race, she inspected the boardwalk along with George Reagan, and Mr. Perez; while George Reagan denied performing the inspection. Moreover, there is no affidavit from Mr. Perez supporting the contention that he inspected or marked the boardwalk on the day of the race. Thus, the defendant failed to present any admissible evidence as to when the subject boardwalk was last inspected, including an inspection or

maintenance record (*Mermelstein v. Campbell Fitness NC, LLC*, 201 AD3d 923, 925 [2d Dep't 2022]).

Trivial Defect

"A defendant seeking dismissal of a complaint on the basis that [an] alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Sessa v Cent. Amusement Int'l, LLC,* 203 AD3d 863, 864 [2d Dep't 2022]). A court must examine all the facts presented to determine whether a defect is trivial as a matter of law, "including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place, and circumstance of the injury" (*Butera v Brookhaven Mem'l Hosp. Med. Ctr., Inc.*, 210 AD3d 1048, 1049 [2d Dep't 2022]).

Here, the defendant relied on photographs of the boardwalk to provide a description and measurement of the defect. However, the Court notes the submitted photographs did not identify the characteristics of the alleged defect, are not in color, lacked clarity, and no measuring tool was shown in the photographs to identify the specific dimensions of the defect (*E. F. v City of New York*, 203 AD3d 887, 889 [2d Dep't 2022]). Therefore, the Court is unable to the ascertain the defect's condition and characteristics from the photographs and determine whether the alleged defective condition was trivial as a matter of law (*Francisco v Pulla*, 211 AD3d 1016, 1016 [2d Dep't 2022]).

Plaintiff's expert

Generally, an out-of-state affidavit requires a certificate of conformity pursuant to CPLR 2309(c). However, the absence of a certificate of conformity is a mere irregularity, not a fatal defect (*Wise v Boyd Bros. Transportation*, 194 AD3d 1096, 1097 [2d Dep't 2021]). An out-of-state affidavit need merely conform substantially to the template required of Real Property Law § 309–b to be adequate (*21st Mortg. Corp. v Rudman*, 201 AD3d 618, 624 [2d Dep't 2022]). Even if it did not substantially conform to the statutory template, such a defect is not fatal, and can be disregarded in the absence of a showing of actual prejudice (*Citimortgage, Inc. v Zagoory*, 198 AD3d 715, 717 [2d Dep't 2021]). Additionally, "it is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness" (*Montesione v Newell Rubbermaid, Inc.*, 192 AD3d 680, 681–682 [2d Dep't 2021]). "[A]n expert's opinion not based on facts is worthless" (*Id.*). "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*Ali v Chaudhry*, 197 AD3d 1084, 1086 [2d Dep't 2021]).

Here, it is undisputed that defendant failed to proffer its own expert affidavit. The Weiss affidavit was notarized in the State of Texas, without a certificate of conformity pursuant to CPLR 2309(c) and did not substantially conform with the statutory templates pursuant to Real Property Law § 309–b. However, such a defect is not fatal, and no substantial right of the defendant was prejudiced by disregarding it (*Williams v Light*, 196 AD3d 668, 669–670 [2d Dep't 2021]). Nonetheless, the Court finds plaintiff's expert opinion as speculative, as Mr. Weiss assumed facts not supported by the evidence,

including the course was not properly inspected (*Fenty v Seven Meadows Farms*, Inc., 108 AD3d 588, 589 ([2d Dep't 2013]).

CPLR 3212 empowers the Supreme Court to search the record and grant summary judgment in favor of a nonmoving party with respect to an issue that was the subject of a motion before the court where appropriate without the necessity of filing a formal cross motion (*Schwartz v Town of Ramapo*, 197 AD3d 753, 756 [2d Dep't 2021]). Here, although the Court has the authority to search the record and award summary judgment in favor of a nonmoving party, the Court declines to do so based upon the triable issues of fact with respect to the defendant's liability to the plaintiff as set forth above (*Gutnick v Hebrew Free Burial Soc'y for the Poor of the City of Brooklyn*, 198 AD3d 880, 884 [2d Dep't 2021]).

The parties' remaining contentions are without merit.

Accordingly, it is hereby

ORDERED that defendant Du City Tri Runs, Inc., d/b/a City Try Runs' motion for summary judgment dismissing complaint (Motion Seq. 6) is denied.

This constitutes the decision and order of the court.

E N T E R

J. S. C.

Hon. Wavny Toussaint
J.S.C.

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KINGS COUNTY CLERK
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