

**Guzman v Gutierrez**

2023 NY Slip Op 35078(U)

November 29, 2023

Supreme Court, Bronx County

Docket Number: Index No. 25251/2018E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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MARIA GUZMAN,

DECISION and ORDER  
Index No. 25251/2018E

Plaintiff,

- against -

JOSE GUTIERREZ and ALEXANDER  
GUTIERREZ,

Defendants.

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**HON. MARY ANN BRIGANTTI,**

Upon the foregoing papers, the plaintiff Maria Guzman (“Plaintiff”) moves for an order pursuant to CPLR 2221 granting her leave to renew and/or reargue the decision of this Court dated April 18, 2023. The defendants Jose Gutierrez (for ease of reference, “Jose”) and Alexander Gutierrez (“Alexander”) (collectively, “Defendants”) oppose this motion.

*Background*

This matter arises out of an accident that occurred on the morning of April 2, 2017, on a trampoline located in the backyard of a house located at 214 South 11th Avenue, Mount Vernon, New York (the “Premises”). At relevant times, Defendants owned and lived at the premises.

On January 12, 2023, Defendants moved for summary judgment. Defendants attached to their motion a Statement of Material Facts (“STMF”). Plaintiff opposed the motion, but failed to file a formal response to Defendants’ STMF. Nevertheless, the opposition did include citations to the record which contradicted some of the allegations of the STMF. In a decision and order dated April 18, 2023, the Court (Armstrong, A. J.S.C.) deemed the allegations contained in the STMF as admitted by Plaintiff due to her noncompliance with 22 NYCRR 202.8-g(c). The admissions included that there was no defective, dangerous, or hazardous condition in the trampoline. As such, the Court granted Defendants’ motion. Plaintiff now moves for leave to renew or reargue Defendants’ motion, and upon reargument/renewal, an order denying the motion. Plaintiff now submits a counter statement of material facts (“counter-STMF”), partially responding to the STMF.

*Standard of Review*

CPLR 2221(a) states that a “motion for leave to renew or to reargue a prior motion ... shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it...” In this case, while Acting Supreme Court Justice Adrian N. Armstrong issued the prior decision, he is unable to hear this motion because he has since retired from the bench. This motion, accordingly, is properly before the undersigned.

While Plaintiff seeks leave to both reargue and renew the prior motion, his moving papers do not allege that the Court “overlooked or misapprehended” matters of law or fact in reaching its prior determination (CPLR 2221[d][2]). This motion is therefore analyzed as one seeking renewal. A motion to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” and must “contain a reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e]). When there is no delay prejudicial to the defendant, a party can correct a procedurally defective document on a motion to renew (*see B.B.Y. Diamonds Corp. v. Five Star Designs, Inc.*, 6 AD3d 263 [1st Dept 2004]; *see also Postel v. New York University Hosp.*, 262 AD2d 40, 42 [1st Dept 1999]). Furthermore, the Court has discretion to grant a renewal in the interest of justice upon facts known to the movant at the time of the original motion (*see Rancho Santa Fe Ass’n v. Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]). Even if the “requirements for renewal are not met, such relief may still be properly granted so as not to ‘defeat substantive fairness’” (*Garner v. Latimer*, 306 AD2d 209, 209–10 [1st Dept 2003], *quoting Metcalfe v. City of New York*, 223 AD2d 410 [1st Dept 1996]).

*Applicable Law and Analysis*

This Court initially finds that Petitioner’s failure to include a full copy of the prior motion papers and pleadings to this motion is not fatal. This matter is filed electronically, and all of those materials are available to the Court and the parties for review (*see Leary v. Bendow*, 161 AD3d 420, 420 [1st Dept 2018]). Plaintiff seeks to correct her procedurally defective opposition by submitting a response and counter-STMF to Defendants’ STMF<sup>1</sup>. Because Plaintiff’s correction of her procedural error may be considered as “new evidence” not previously considered by the court, her failure was inadvertent, and Defendants did not show prejudice,

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<sup>1</sup> The Court declines to consider the re-formatted counter-STMF submitted for the first time in reply (NYSEF Doc.#77).

Plaintiff's motion for leave to renew is granted (*Feuerman v. Marriott Int'l, Inc.*, 201 AD3d 566 [1st Dept 2022]). This Court thus revisits the merits of Defendants' motion for summary judgment. To be entitled to the "drastic" remedy of summary judgment, the moving party "must 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 from the case" (*Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once a movant meets their initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Importantly, a "defendant cannot 'obtain summary judgment by pointing to gaps in plaintiffs' proof,' and must instead 'tender evidence that it was not negligent'" (*Miah v. Pipe Dreams Realty V Corp.*, 214 AD3d 575, 576 [1st Dept 2023], quoting *Bryan v. 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]).

First, Defendants argue that Plaintiff voluntarily assumed the risks inherent to jumping on the trampoline, and as such, is absolutely barred from recovery for her injuries. In support of its argument, Defendants cite to two Appellate Division cases in the Second and Fourth Judicial Departments in which the Courts applied the primary assumption of risk doctrine to bar recovery for trampoline-related injuries (*see Koubek v. Denis*, 21 AD3d 453, 799 N.Y.S.2d 746 [2d Dept 2005]; *Liccione v. Gearing*, 252 AD2d 956 [4th Dept 1998]). But since these cases were decided, the Court of Appeals narrowed the circumstances in which the primary assumption of risk doctrine would act as a complete bar to recovery in light of CPLR 1411 (*Custodi v. Town of Amherst*, 20 NY3d 83, 89 [2012]). The "application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venue" (*Custodi*, 20 NY3d at 89). In *Custodi*, the Court held that the primary assumption of risk doctrine did not act as a complete bar to recovery to a roller-blader injured from an uneven change in grade between a driveway of a private residence and a sidewalk (*see id.*). In applying the holding in *Custodi*, and subsequent to its decision in *Koubek*, the Second

Department did not apply the primary assumption of risk doctrine to bar recovery for a trampoline related injury at a private residence (*see Bell-Moran v. Pena*, 208 AD3d 1145, 1146 [2d Dept 2022]). The Third Department also declined to find that the primary assumption of risk doctrine acted as a complete bar to recovery for a trampoline-related injuries occurring at a private residence (*see DeMarco v. DeMarco*, 154 AD3d 1226 [3d Dept 2017]). This Court is bound by the appellate court decisions of other Judicial Departments in the absence of contrary authority in the First Department or Court of Appeals (*Rivas v. Seward Park Housing Corporation*, 219 AD3d 59, 65 n3 [1st Dept 2023], citing *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, 664-665 [2d Dept 1984]). In this case, the accident arose from a trampoline located at a private residence—it did not occur in a designated venue, it did not arise from an activity sponsored or promoted by Defendants nor from a sporting event. As such, the doctrine of primary assumption of risk is not applicable to this matter and therefore does not bar the Plaintiff's claims.

It is well-settled that a landowner must act as a reasonable person in maintaining the property in a reasonably safe condition, in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Peralta v. Henriquez*, 100 NY2d 139, 144 [2003]). To impose liability upon a landowner in a premises liability-related action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 NY2d 967 [1994]). When that dangerous condition is created by the actions of third parties on a defendant's property, defendant must show that it did not have the opportunity to control the third parties or was not reasonably aware of the need to intervene (*See Ruiz v. RHQ Assoc. LLC*, 92 AD3d 410 [1st Dept 2012], citing *Boderick v. RY Management Co., Inc.*, 71 AD3d 144 [1st Dept 2009]).

It is fatal to a plaintiff's claim if the plaintiff cannot identify the cause of a fall "because a finding that the defendant's negligence proximately caused a plaintiff's injuries would be based on speculation" (*Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144 [1st Dept 2017], citing *Siegel v. City of New York*, 86 AD3d 452 [1st Dept 2011]). However, if there is "sufficient evidence to permit a reasonable inference, based on 'the logic of common experience,'" that the defendant was negligent and such negligence caused the plaintiff's accident, the court cannot grant a defendant's motion for summary judgment (*Chimilio-Ramos v.*

*Banguera*, 62 AD3d 538 [1st Dept 2009], quoting *Schneider v Kings Highway Hosp. Ctr., Inc.*, 67 NY2d 743, 490 N.E.2d 1221 [1986]).

Where a party fails to properly object to the allegations in a summary judgment movant's Statement of Material Facts, it is in the court's discretion whether to deem movant's allegations as "admitted" by the opposing party (see *Hart v. City of Buffalo*, 218 AD3d 1140, 1150–51 [4th Dept 2023]; *Leberman v. Instantwhip Foods, Inc.*, 207 AD3d 850 [3d Dept 2022]; see also *Dowds v. City of New York*, 2021 NY Slip Op 32734[U] [Sup. Ct., N.Y. County 2021], citing *Abreu v. Barkin & Assoc. Realty, Inc.*, 69 AD3d 420 [1st Dept 2010] [noting that "blind adherence to the procedure set forth in rule 19-a" of 22 NYCRR 202.70 is not required]). "In the event that the opponent of a motion for summary judgment fails to provide any counter statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent's statement to be admitted for purposes of the motion, or may take such other action as may be just and appropriate." (22 NYCRR 202.8-g[e]). Plaintiff had an opportunity to provide a proper counter-STMF in its submission of this motion since the underlying judgment was based on its failure to oppose the STMF. The Court will thus admit the allegations in the statement of material facts to the extent they are supported by the evidence to which Defendants cite. Therefore, the Court deems admitted that Plaintiff cannot identify anything physically wrong with the trampoline that caused or contributed to Plaintiff's accident. Such an admission is not fatal, when there is sufficient evidence for the court to draw the inference that a dangerous or defective condition existed (see *Chimilio-Ramos*, 62 AD3d at 538–39).

Defendants have established that the trampoline was not defective or dangerous. However, the absence of a defective condition on the trampoline itself is not dispositive of Defendants' liability in this case (see, e.g., *Lasek v. Miller*, 306 AD2d 835, 835 [2d Dept 2003]). Property owners such as Defendants "have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*id.*, quoting *D'Amico v. Christie*, 71 NY2d 76, 85 [1987]).

In this case, Defendants failed to eliminate fact issues as to whether Alexander "either knew about or through the use of reasonable care should have known about [the unsafe use of the trampoline] and had a reasonable opportunity to prevent or control it" (*Lasek*, 306 AD2d at 835 [internal citations and quotation marks omitted]). Plaintiff testified that she was among 4-5 other

people (“children” between 12-16 years old) jumping on the trampoline when the accident occurred. Plaintiff testified that they “all were jumping” when she came down on her left foot and “felt” something that was “very hard” (PI EBT at 51) which caused her leg to twist and bend backwards (*id.* at 58-59). As a result of the accident Plaintiff sustained among other injuries, a left lower extremity anterior displacement of the femur and fracture of the tibial eminence (Plaintiff’s Verified Bill of Particulars). Alexander knew that more than one adult should not be using the trampoline (Alexander EBT at 28), and he knew that guests were using the trampoline “all night and into the morning without incident” (Alexander Affidavit at Par. 2). Defendants, however, present no evidence of whether Alexander warned or instructed guests to avoid having multiple people jump on trampoline at the same time, and there are fact issues as to whether he did anything to prevent this from happening, prior to Plaintiff’s accident.

Defendants argue that Plaintiff failed to identify any dangerous or defective condition in her testimony or Bill of Particulars which caused Plaintiff’s fall. But mere failure to specifically identify or allege the cause of a fall is not fatal to a Plaintiff’s claims when there is sufficient evidence for the court to draw the inference that a dangerous or defective condition existed and defendants’ negligence was the proximate cause of such dangerous or defective condition (*see Chimilio-Ramos*, 62 AD3d at 538–39). As discussed above, Defendants failed to eliminate issues of fact which allow the court to infer that multiple individual jumping on the trampoline is the same time is a dangerous condition which was the proximate cause of Plaintiff’s injuries.

Next, Defendants argue that they did not have a duty to prevent Plaintiff from jumping on the trampoline. While Defendants do not always have a duty to protect the injured party from the results of their own voluntary conduct (*see Sheehy v. Big Flats Community Day, Inc.*, 73 NY2d 629, 637 [1989]; *see also Macey v. Truman*, 70 NY2d 918, 519 N.E.2d 304 [1987]), as discussed above, Defendants do have a duty to protect the injured party from the conduct of third-parties on their property (*see D’Amico*, 71 NY2d at 85). The issue of Plaintiff’s voluntary actions in this circumstance does not relieve the Defendants from protecting parties from dangerous conditions (*see Orellana v. Merola Assocs., Inc.*, 287 AD2d 412 [1st Dept 2001]). Plaintiff’s actions in this circumstance are relevant to the issue of comparative negligence, which is addressed by the trier of fact (*see Tropper v. Henry Street Settlement*, 190 AD3d 623 [1st Dept 2021]).

Defendants, however, provided sufficient evidence that Jose had no opportunity to

control third-persons on his property, nor was reasonably aware of such need. Defendants provided evidence that Jose was asleep during the party, had not been present during the gathering, and therefore had no knowledge that multiple people were jumping on the trampoline at the same time, and had not been aware of any prior accidents on the trampoline (Jose EBT at 13, 23). Plaintiff provided no evidence to rebut Defendants' evidence that Jose had no opportunity or was not reasonably aware of the need to control or prevent third parties from jumping on the trampoline at the same time as Plaintiff, since it is undisputed that Jose was asleep during the gathering. As such, Defendants' motion for summary judgment is granted, only as to Jose.

Accordingly, it is hereby


ORDERED, that Plaintiff's motion to renew Defendants' motion for summary judgment is granted; and it is further

ORDERED, that upon renewal, Defendants' motion for summary judgment is granted only as to defendant Jose Gutierrez but is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: November 29, 2023

ENTER

  
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Mary Ann Briganti, J.S.C.