

Chester v Rocking Horse Ranch Corp.
2023 NY Slip Op 35306(U)
February 1, 2023
Supreme Court, Ulster County
Docket Number: Index No. EF1803-2018
Judge: David M. Gandin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

KAREN CHESTER,

Plaintiff,

-against-

ROCKING HORSE RANCH CORP., TEE BAR CORP.,
and TURK HOSPITALITY GROUP,

Defendants.

DECISION AND ORDER

Index No. EF1803-2018

Present:

David M. Gandin, JSC

The following papers were read and considered on plaintiff and defendants' motions for summary judgment:

1. Notice of Motion and Supporting Affirmation with Exhibits A-X;
2. Statement of Material Facts;
3. Memorandum of Law;
4. Response to Statement of Material Facts;
5. Affirmation in Opposition;
6. Stoddard Affidavit;
7. Affirmation in Reply with Exhibits A-B;
8. Notice of Motion and Supporting Affirmation with Exhibits A-E;
9. Stoddard Affidavit with Exhibits A-I;
10. Chafatelli Affidavit with Exhibits A-C;
11. Memorandum of Law;
12. Affirmation in Opposition;
13. Response to Statement of Material Facts;
14. Affirmation in Reply with Exhibits A-C;
15. Stoddard Affidavit in Reply;
16. Memorandum of Law in Reply.

In this negligence action plaintiff alleges that she sustained personal injury after riding on the mountain tubing attraction on defendants' premises on July 26, 2016. She claims that defendant Tee Bar Corp. negligently maintained, operated and supervised the ride by departing from good and safe practices recommended by the manufacturer of the ride. She further asserts that defendants violated industry regulations the New York State Department of Labor (DOL) promulgated governing recreational activities including mountain tubing. Plaintiff moves for partial summary judgment on the issue of liability against Tee-Bar Corp. Defendants oppose and cross-move for summary judgment asserting that plaintiff's accident was unforeseeable and that any recovery is barred by the doctrine of primary assumption of risk.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact. *Zuckerman v. New York*, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and consider the facts in a light most favorable to the nonmovant. *Szczerbiak v. Pilat*, 90 NY2d 553 (1997).

In support of the motion plaintiff submits the pleadings, deposition testimony, photographs of the mountain tubing attraction, documentary evidence and the affidavit of liability expert Edward M. Pribonic, P.E. The foregoing establishes that on July 25, 2016, plaintiff and her two daughters checked into defendants' resort with the intention of staying four nights. The following morning at approximately 10:30 a.m., plaintiff and her daughters walked by the mountain tubing ride and decided to try it before they went horseback riding. When they arrived at the start of the ride one of defendants' employees tied plaintiff and her daughters' inner tubes together so that all three could go down the ride at the same time. Plaintiff testified that prior to attempting the ride herself, she saw single and double riders going down the slide but not a group of three. Plaintiff recalled that at the top of the ride defendants' employee sprayed their inner tubes with what her daughter told her was silicone. Plaintiff stated that she immediately realized that they were going too fast. She remembered closing her eyes and then making contact with a hard surface on her face. She later learned that as she and her daughters came to the end of the mountain tubing slide, their inner tubes proceeded into the runoff area and that plaintiff's tube struck a cushion called a wooly bag in front of a barricade. Plaintiff then continued past the cushion and her face struck the side of the barricade.

Steve Turk testified on behalf of defendant Tee-Bar, the owner of Rocking Horse Ranch. Turk explained that the barricade plaintiff struck was known as a timber chute. The resort installed the chute in 2012 to decelerate and stop snow tubers in the winter. Defendants also placed wooly bags in front of the edges of the chutes to protect riders from the corners. Turk testified that he had the idea of setting up the mountain tubing ride after seeing a similar attraction at a large resort in Colorado. The owners of the resort directed Turk to Neveplast, the tubing equipment manufacturers. Neveplast visited defendants' resort and they worked in coordination to install and open the attraction. Prior to the ride opening to the public Neveplast and the New York State Department of Labor did a final inspection. Turk testified that representatives from Neveplast had an opportunity to observe the location of the timber chutes as well as the safety measures defendants undertook to protect riders from them and had no concerns. He further testified that defendants, with assistance from Neveplast, developed their own standard operating procedures for the mountain tubing attraction.

Defendants' Operations Manager Scott Butler testified that in 2016 he worked on the installation of the ride. Tee-Bar purchased materials for the ride directly from Neveplast. Neveplast employees were present for the installation of the ride through a final inspection. Butler testified that Neveplast recommended that defendants apply a silicone-based lubricant directly to the tubing track

to reduce friction. Defendants' employees would apply the gel to the track once per month with ordinary household paint rollers. Butler stated that Neveplast also advised that riders could go down the ride individually or in groups of two or three provided that the riders' tubes were tethered tightly. He further testified that per Neveplast's direction, defendants placed rubber brake mats at the bottom of the ride to slow riders. The brake mats are designed to be movable so that staff could add or remove the pads based on track conditions. Butler stated that the resort tested the ride prior to opening it every day and reassessed throughout the day to ensure that conditions were appropriate. Butler stated that based on his experience defendants did not need to apply the silicone gel as frequently as Neveplast recommended for the ride to function properly. He testified that prior to the attraction opening defendants conducted written and hands on training sessions for their employees. The training sessions included how to open and close the ride as well as how to tether multiple riders' inner tubes together. Butler asserted that, although not specifically stated in Neveplast's operator's manual, Neveplast recommended applying silicon spray directly to the bottom of riders' tubes in addition to coating the ride surface itself.

Ryan Locher, Neveplast's manager, testified that he "would never tell [Rocking Horse Ranch] to use silicone spray" on an outdoor track and that he would only make such a recommendation to a provider with an indoor facility. He stated that he would only recommend the use of silicone spray "in a pinch" if the facility couldn't get Neveplast's regular sliding agent, and that its use would increase the speed of the ride. He also opined that tethering multiple riders together would serve to increase the speed of the ride.

Plaintiff further submits and relies upon the affidavit of liability expert Edward M. Pribonic, P.E. Pribonic states that he has 48 years of experience in engineering design, 30 years of which specialized in designing and inspecting amusement park rides. After viewing defendants' mountain tubing attraction he opined that defendants unreasonably increased the risks inherent to the activity by deviating from Neveplast's recommended practices and by failing to implement adequate safety precautions. He concludes defendants were negligent in applying additional silicon spray directly to riders' inner tubes because this practice was not articulated in the manufacturer's manual. He further opined that defendants inadequately protected riders from the danger the timber chutes posed by placing brake pads too far down the ride and not adding enough wooly bags across the front of the chutes. Lastly, Pribonic concludes that defendants were negligent in training their staff on how to open and maintain the mountain tubing ride by failing to provide explicit guidelines on, *inter alia*, where to set up wooly bags and brake pads.

Plaintiff's submission demonstrates her *prima facie* entitlement to judgment as a matter of law. An owner of a premises which sponsors sporting and recreational activities owes a duty to exercise care to make the conditions of such activity as safe as they appear to be. See *Morgan v. State*, 90 NY2d 471 (1997). In assessing defendant's duty, the standard is whether the alleged defect is "unique and created a dangerous condition over and above the usual dangers that are inherent in the sport." *Schiavone v. Brinewood Rod & Gun Club, Inc.*, 283 AD2d 234 (1st Dept 2001) (internal quotation marks omitted). Plaintiff testified at her deposition that she had never been mountain tubing before. She claims that she was not provided any instruction from defendants' employee at

the top of the ride before she went down and relied on the employee to tie her and her daughters' inner tubes together. The record also demonstrates that defendants would apply a silicone-based lubricating spray directly to a patron's tube to increase the velocity of the ride. Multiple witnesses testified that the timber chutes at the base of the attraction were not completely covered by wooly bags or padding sufficient to prevent a rider from hitting them. Based on the foregoing, plaintiff has established that defendants violated the applicable standard of care by failing to provide her with a reasonably safe experience. Lastly, the practice of using silicone spray to speed up a rider and a lack of protection around the base and edges of the timber chutes did not constitute a danger inherent to the activity of mountain tubing or such a readily apparent hazard that plaintiff is deemed to have accepted the risk of injury therefrom.

In opposition to plaintiff's motion for summary judgment and in support of their own, defendants submit the pleadings, deposition testimony and the affidavits of defendants COO Andrew Chafatelli and engineer Paul Christopher Stoddard. Defendants maintain that they did not breach any duty of care owed to plaintiff because her accident was not foreseeable. They emphasize that defendants had operated the mountain tubing attraction for three months before the accident and have continued to operate it since without incident. They assert that during this time no other tube riders have traveled far enough to reach the timber chutes. Defendants further contend that they are not liable because plaintiff assumed the risk of injury by voluntarily participating in the activity.

Defendants fail to rebut plaintiff's *prima facie* showing and consequently have not demonstrated their entitlement to judgment as a matter of law. The doctrine of primary assumption of risk is inapplicable in the instant case. A person who voluntarily participates in a recreational activity only "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." *Morgan*, at 484. Relieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified only when a consenting participant is aware of the risks, has an appreciation of the nature of the risks, and voluntarily assumes the risks. *Id.* Participants are not deemed to have assumed concealed or unreasonably increased risks. See *Benitez v. New York City Bd. of Educ.*, 73 NY2d 650 (1989). By going on the ride, plaintiff did not assume the risk that its design or operation would be insufficient to stop her tube in a safe manner.

Defendants applied silicone-based lubricant to the bottom of riders inner tubes to decrease friction and speed up the ride. Despite Butler's assertion that Neveplast told defendants that this practice was acceptable and Locher's testimony that in limited situations the spray may be used, he explained that he would never recommend this practice on an outdoor track. Locher further corroborated that applying the spray to an already lubricated track would increase a rider's velocity. Accordingly, the record supports plaintiff's theory that defendants unreasonably increased the risk of injury mountain tubing posed by spraying plaintiff's tube. For similar reasons, defendants have not demonstrated that plaintiff's accident was completely unforeseeable. Defendant's employees testified that in the winter months it was not uncommon for guests participating in snow tubing to reach the timber chutes, which were erected specifically to slow and stop riders. Moreover, the fact that defendants had the foresight to place safety equipment such as the wooly bags in front of the

chutes demonstrates the foreseeability of the risk of injury from striking the chutes. The mere fact that no one had previously struck the chutes while mountain tubing before the incident does not render the plaintiff's accident unforeseeable. Lastly, Stoddard's affidavit in opposition to plaintiff's motion in which he attributes plaintiff's accident to her daughter's actions lacks probative value as there is no evidence in the record that she or plaintiff were comparatively negligent. See *Wagner v. Parker*, 172 AD3d 954 (2d Dept 2019). Wherefore, it is

ORDERED that plaintiff's motion for partial summary judgment against defendant Tee Bar Corp. on the issue of liability is granted. It is further

ORDERED that defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court. The signing of this decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

Dated: February 1, 2023
Kingston, New York

ENTER:



DAVID M. GANDIN, J.S.C.

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty (30) days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty (30) days thereof.