

Lucas v Outdoor Venture Group, LLC
2024 NY Slip Op 35650(U)
August 15, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 607128/2020
Judge: Maureen T. Liccione
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Short Form Order

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SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY**P R E S E N T:****Hon. Maureen T. Liccione**

Justice Supreme Court

-----x
KERRI LUCAS,

Plaintiff,

-against-

OUTDOOR VENTURE GROUP, LLC and THE
ADVENTURE PARK ON LONG ISLAND, LLC,Defendants.
-----x

Mot. Seq. No. 001 – MG/CaseDisp

Orig. Return Date: 09/25/2023

Mot. Submit Date: 11/13/2023

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Upon the e-filed documents numbered 19 through 56 and upon due deliberation, it is determined as follows:

ORDERED that defendant's motion for summary judgment and dismissing plaintiff's negligence action in its entirety, is granted; and it is further

ORDERED AND ADJUDGED that plaintiff's complaint is dismissed.

Plaintiff commenced this action by filing the Summons and Verified Complaint on or about June 15, 2020, against defendant Outdoor Venture Group, LLC. Plaintiff's Verified Complaint includes a cause of action sounding in negligence as a result of plaintiff's alleged accident at its outdoor aerial adventure park commonly known as "The Adventure Park At Long Island" (Park) on October 12, 2019. Plaintiff allegedly collided with her stepson while she was ziplining on the "Riptide" course located at the Park.

Defendant now moves for an order pursuant to CPLR 3212 (b) granting defendant's summary judgment and dismissing plaintiff's negligence action in its entirety. Defendant argues that no duty of care was owed to plaintiff based on the assumption of risk doctrine and the Participant Agreement/Waiver and Release (Waiver) that plaintiff executed, and that defendant

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breached no duty of care as the zipline was safe and free of defects. In support of its summary judgment motion, defendant submits, inter alia, the Waiver, a Permit to Operate the Amusement Device issued by the NYS Department of Labor, daily and annual inspection reports of the Park, a third party inspection report, plaintiff's and defendant's deposition transcripts, park signage and safety video, the incident report, and the affidavit and report of defendant's expert Randolph S. Smith. Plaintiff opposes the motion.

At her deposition, plaintiff admitted to having electronically signed the Waiver the day before the accident. On the day of the accident, she watched the safety video provided by the Park, and observed signage at the Park discussing aids, rules, and instructions. She testified remembering seeing in the safety video that only person at a time was allowed on an element. Plaintiff admitted that she was informed through signage or video to call staff for assistance, if necessary. She admitted that she and her stepson went through several courses, including numerous ziplines, at the Park before the accident without problems. Prior to the alleged accident, she and her stepson were both aware that only one person was allowed on the zipline at a time, and that they had to call for help if they needed it. At the time of the alleged accident, her stepson was eight years old.

Regarding the accident itself, plaintiff testified that she did not see anything wrong with the zipline prior to riding it. Her son ziplined but did not make it to the other platform by a few inches and ended up "slipping back a little bit" (NYSCEF Doc No. 35, p. 53). Plaintiff then ziplined before her son made it to the other platform due to her foot allegedly "slipping" (*id.*, p. 55), collided with her stepson, her face made contact with his head, and was injured. Plaintiff testified that the platform she allegedly slipped on was not any different from the other platforms and no one else was on the platform. Plaintiff alleged that her stepson did not yell for help before she started ziplining, that she did not see any employees attempting to help her stepson, and that she did not request for help for him. The incident report form indicates that "Kerry was told by us prior to the zipline to NOT be on the same element w. her kid b/c she was doing each one with him" (NYSCEF Doc No. 33).

Bahman Azarm, the founder of defendant Outdoor Venture Group, LLC and its CEO and president at the time of the accident, testified that there are inherent risks associated with the ziplining activity and if a participant does not follow the rules, a participant is at risk of being injured. Mr. Azarm indicated that the Riptide course, where the alleged accident occurred, is a blue line course and that participants age seven to nine are not allowed on blue line courses. Mr. Azarm

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testified that Riptide is a self-guided course, but that staff members are present at the course. According to Mr. Azarm, the alleged accident had nothing to do with the equipment or the design of the course, no prior similar collisions had occurred, and all courses in the Park were inspected daily and yearly. He further stated that participants hook onto lifeline around the tree when standing on a zipline platform and cannot launch by accident since they must disconnect from the lifeline to ride. Participants are trained in what to do if they get “stuck” on a course, that is to call staff for help. According to Mr. Azarm, safety helmets are not used at the Park because they present a risk.

In his affidavit and report, defendant’s expert, Mr. Smith, described the Park as a series of self-guided physical activities conducted at a height in a recreational setting, utilizing a safety system used as a “belay system.” Based on his industry experience and investigation, Mr. Smith indicated that the ordinary risks presented by the Riptide self-guided course were obvious and were not enhanced or increased. Pursuant to Mr. Smith, the level of staffing and supervision was “robust,” and the operational plan and safety system met or exceeded the requirements outlined in ANSI/ACCT 03-1019 Standards. Mr. Smith’s affidavit and report indicate that the Riptide course was free from defective or dangerous conditions with respect to its design, installation, maintenance, and repair, and it was not missing a braking system or protective gear (such as helmets, which were not required) at any time relevant to plaintiff’s alleged accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issues of fact are presented (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 403 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once such proof has been offered, the burden then shifts to the opposing party, which, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her

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injuries (*Withopf v Rapid Transit Servs., Inc.*, 210 AD3d 827, 829 [2d Dept 2022]; *Esen v Narian*, 155 AD3d 612, 613 [2d Dept 2017]; *Fox v Marshall*, 88 AD3d 131, 135 [2d Dept 2011]). “In the absence of a duty, there is no breach and no liability” (*Coral v State*, 29 AD3d 851, 851 [2d Dept 2006], citing *Pulka v Edelman*, 40 NY2d 781, 782 [1976]; see *Pasquaretto v Long Island Univ.*, 106 AD3d 794, 795 [2d Dept 2013]). “The question of whether a defendant owes a duty of care to another person is a question of law for the courts” (*Malone v Cnty. of Suffolk*, 128 AD3d 651, 652 [2d Dept 2015]).

The doctrine of assumption of risk is not a defense based on a plaintiff’s culpable conduct, but, rather, is a measure of the defendant’s duty of care to participants in certain types of athletic or recreational activities (*Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 656-57 [1989]; *Braille v Patchogue Medford Sch. Dist. of Town of Brookhaven*, 123 AD3d 960, 961 [2d Dept 2014]). According to the doctrine, a plaintiff who freely accepts a known risk “commensurately negates any duty on the part of the defendant to safeguard him or her from the risk” (*Custodi v Town of Amherst*, 20 NY3d 83, 87 [2012], quoting *Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 395 [2010]). As the Court of Appeals recently described the doctrine defines “the standard of care under which a defendant’s duty is defined and circumscribed because assumption of risk in this form is really a principle of no duty, or no negligence and so denies the existence of any underlying cause of action” (*Grady v Chenango Valley Cent. Sch. Dist.*, 40 NY3d 89, 95 [2023] [internal quotation omitted]).

More particularly, the assumption of risk doctrine applies where a consenting participant in sporting and amusement activities “is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks” (*Custodi v Town of Amherst*, 20 NY3d at 87; *Haggerty v N. Dutchess Hosp.*, 199 AD3d 783, 783 [2d Dept 2021], quoting *Bukowski v Clarkson Univ.*, 19 NY3d 353, 356 [2012]; *Guzman v Iceland*, 18 AD3d 704, 705 [2d Dept 2005]). Under the doctrine of assumption of the risk, a voluntary participant in a sporting or recreational activity “consents to those commonly appreciated risks which are inherent in and arise out of the nature of the ... [activity] generally and flow from such participation” (*Cannizzaro v Cnty. of Westchester*, 212 AD3d 702, 703 [2d Dept 2023], quoting *Morgan v State*, 90 NY2d 471, 484 [1997]; *Leslie v Splish Splash at Adventureland, Inc.*, 1 AD3d 320, 321 [2d Dept 2003]). “Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation” (*Maharaj v City of New York*, 200 AD3d 769, 769 [2d Dept 2021]). “If the risks

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of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty” (*Ramos v Michael Epstein Sports Prods., Inc.*, 173 AD3d 1079, 1080 [2d Dept 2019]). The assumption of risk doctrine also encompasses risks involving less than optimal conditions (*see Bukowski v Clarkson Univ.*, 19 NY3d at 357 [player assumed risk of pitching in an indoor facility without a protective screen]; *Sykes v County of Erie*, 94 NY2d 912, 913 [2000] [playing on an irregular surface is a risk inherent in outdoor basketball activities]; *Maddox v City of New York*, 66 NY2d 270, 274-75 [1985] [baseball player assumed the risk of playing on a wet and muddy field]). The Appellate Division, Second Department, has applied the assumption of risk doctrine to bar claims by plaintiffs who suffered injuries while at amusement or adventure parks (*see e.g. Cannizzaro v Cnty. of Westchester*, 212 AD3d 702 [falling off amusement park ride]; *Leslie v Splish Splash at Adventureland, Inc.*, 1 AD3d 320 [injury while riding a water slide]; *Loewenthal v Catskill Funland, Inc.*, 237 AD2d 262 [2d Dept 1997] [injury while go-carting at amusement park]).

It is not necessary that the injured plaintiff 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” (*Ramos v Michael Epstein Sports Prods., Inc.*, 173 AD3d at 1080, quoting *Siegel v Albertus Magnus High Sch.*, 153 AD3d 572, 574 [2d Dept 2017]; *see Maddox v City of New York*, 66 NY2d at 278). A participant’s awareness of risk is to be assessed against the background of the skill and experience of the particular plaintiff (*Ramos v Michael Epstein Sports Prods., Inc.*, 173 AD3d at 1080; *Siegel v Albertus Magnus High Sch.*, 153 AD3d at 574; *Ferrari v Bob’s Canoe Rental, Inc.*, 143 AD3d 937, 938 [2d Dept 2016]). On the other hand, participants are not deemed to have assumed risks “that are concealed or unreasonably enhanced” (*Grady v Chenango Valley Cent. Sch. Dist.*, 40 NY3d at 95; *Custodi v Town of Amherst*, 20 NY3d at 88; *Morgan v State*, 90 NY2d 471, 484 [1997]).

Here, defendant demonstrated its prima facie entitlement to judgment as a matter of law by establishing that the plaintiff, an adult, assumed the risk of colliding with another Park participant on a zipline by voluntarily participating in the ziplining activity. Defendant presented evidence in the form of plaintiff’s deposition transcript that plaintiff was aware of and appreciated the risk inherent in ziplining, and that she voluntarily assumed the risk (*see Cannizzaro v Cnty. of Westchester*, 212 AD3d at 703; *Leslie v Splish Splash at Adventureland, Inc.*, 1 AD3d at 321). Plaintiff testified that she was aware that only one person was allowed on a zipline, had watched

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a safety video in the Park where she was instructed that only one person could be on the zipline at the time, had seen signage around the Park discussing aides, rules and instructions, and had signed the Waiver. Signage at the Park states “Only one person at a time is allowed on an element” (NYSCEF Doc No. 34). The Waiver included an assumption of risk section and listed “falls and abrupt and possibly harmful contact with other persons” among the risks associated with the use of the Park (NYSCEF Doc No. 35). Furthermore, plaintiff indicated that she had navigated numerous other ziplines on the day of the accident without any incidents, so she had experience with ziplining.

In addition, the record demonstrates that all relevant safety measures were followed by the Park operators, including having safety signs and videos, and inspecting the Park and particularly, the Riptide course. Specifically, Mr. Smith, defendant’s expert, averred that the Riptide course was reasonable safe for participants and “free from defective or dangerous conditions with respect to its design, installation, maintenance and repair, and it was not missing a braking system or protective equipment at any time relevant to Plaintiff’s alleged accident” (NYSCEF Doc No. 20). The expert specified that the “ordinary risks associated with participating in this sort of self-guided course are obvious and were not enhanced or increased, nor has Plaintiff pointed to anything that increased the inherent risk” (*id.*). Defendants showed that it fulfilled its duty of making the “conditions as safe as they appear to be” (*Morgan v State*, 90 NY2d at 484).

In opposition, plaintiff failed to raise a triable issue of fact as to whether the injured plaintiff was subjected to “unassumed, concealed or unreasonably increased risks” (*Bryant v Town of Brookhaven*, 135 AD3d 801, 803 [2d Dept 2016]; see *Grady v Chenango Valley Cent. Sch. Dist.*, 40 NY3d at 99; *Bukowski v Clarkson Univ.*, 19 NY3d at 357). Plaintiff failed to establish the existence of a “dangerous condition over and above” the obvious danger inherent in ziplining (*Cannizzaro v Cnty. of Westchester*, 212 AD3d at 703). In fact, plaintiff testified that there was no one else on the platform waiting with her, did not point to any issues with the condition of the zipline or the platform, and did not identify any transient or other condition on the platform that caused her foot to slip. Plaintiff provided no expert opinion disputing Mr. Smith’s expert opinion about the safety of the course and the zipline.

Furthermore, plaintiff’s argument that defendant failed to provide any sort of helmet or face protection to minimize the risk of head injuries in the event an accident occurred is without merit, as plaintiff provided only the affirmation of her attorney in support of such argument, and

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no expert opinion or admissible evidence (*see Leggio v Gearhart*, 294 AD2d 543, 544 [2d Dept 2002] [“the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation”]). On the other hand, defendant submitted the report of his expert who affirmed that neither European or US standards require the use of a helmet on such a course, and that the “type of injury suffered by Ms. Lucas would not have been prevented or lessened in severity by the use of a helmet” (NYSCEF Doc No. 20).

Plaintiff also failed to raise a triable issue of fact as to whether defendant negligently supervised plaintiff’s ziplining activity. In support of her contention that defendant is liable under the theory of negligent supervision, plaintiff relied on the statement of Jonathan Taveras, an employee of defendant in an investigation memorandum, which stated that plaintiff’s stepson was not of the appropriate age for the Riptide course and that the monitoring of the platforms by staff that the right ages were allowed on a course “may have been overlooked” (NYSCEF Doc No. 53). However, as appropriately pointed out by defendant, such a hearsay statement found in an unsworn investigation memorandum from defendant’s insurance company, is not admissible evidence and may not be considered in opposition to a summary judgment motion (*see Vickers v Francis*, 63 AD3d 1150, 1151 [2d Dept 2009]; *Toussaint v Ferrara Bros. Cement Mixer*, 33 AD3d 991, 992 [2d Dept 2006]; *Salmon v Wendell Terrace Owners Corp.*, 5 AD3d 372, 373 [2d Dept 2004]). The only other evidence brought by plaintiff in support of the negligent supervision claim is Mr. Azarm’s testimony “den[ying] there being any policy in place to ensure two riders were not on a zip line at the same time” (NYSCEF Doc No. 44). But a review of Mr. Azarm’s deposition transcript did not reveal such a testimony. In fact, as to the issue of negligent supervision, Mr. Azarm testified that the main platform where all the courses start has a sign with the age requirements for the different courses, including the one that plaintiff and her stepson went on, and that the Park would rely on the participant and the participant’s parent to prevent a child age seven to nine from accessing a blue course, such as the Riptide. Furthermore, signage at the Park stated “[o]bserve and follow instructions on all posted signs,” included age requirements for the courses (NYSCEF Doc No. 34). Furthermore, the Waiver signed by plaintiff provided that risks associated with the use of the Park were, inter alia, “carelessness and misjudgments of participants and staff of the Park, including by failing to follow proper procedures, instructions and the operating policies” (NYSCEF Doc No. 35). Mr. Smith’s affidavit averred that the subject zipline course

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“including the levels of supervision, met accepted standards and practice in the industry” and his report stated that plaintiff chose to ignore the rules of park, that plaintiff should not have proceeded onto the elements to assist her stepson and that the “consistent pattern of violation of these rules [by plaintiff] ultimately caused Ms. Lucas’ injury” (NYSCEF Doc No. 20).

Lastly, plaintiff points to a maintenance record from October 1, 2019, two weeks prior to the alleged accident, indicating, inter alia, that on the Riptide course the “zipline is too fast must lower” and Mr. Azarm’s testimony that “too fast” meant the “arrival speeds of the subject zip line that plaintiff was injured on” and that the speed was only corrected several months after the accident (NYSCEF Doc No. 44). Plaintiff alleges that such testimony creates an issue of fact as to whether the arrival speed of the zip line was a dangerous condition that defendant was on notice of on the date of plaintiff’s accident. However, this contention is made in an attorney affirmation, not via an expert report or affidavit or any other admissible evidence, and is, at best, speculative and conclusory. Plaintiff must demonstrate “the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation” (*Fotiatis v Cambridge Hall Tenants Corp.*, 70 AD3d 631, 632 [2d Dept 2010]). Additionally, in applying the doctrine of assumption of risk, a court must evaluate whether the conditions caused by the defendant’s negligence are “unique and created a dangerous condition over and above the usual dangers that are inherent in the ... recreational activity” (*Ferrari v. Bob’s Canoe Rental, Inc.*, 143 AD3d at 938). Here, plaintiff did not allege that the allegedly increased arrival speed was a “dangerous condition over and above the usual dangers,” but, rather, was merely a dangerous condition.

Therefore, as plaintiff assumed the risk of colliding with another participant by voluntarily participating in the ziplining activity, defendant did not owe plaintiff a duty of care. As defendant did not owe plaintiff a duty of care, she is unable to establish a negligence action against defendant and defendant is entitled to summary judgment.

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The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: August 15, 2024
Riverhead, NY


HON. MAUREEN T. LICCIONE, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION