**L.P. v Frost Val. YMCA**

2025 NY Slip Op 35374(U)

January 10, 2025

Supreme Court, Bronx County

Docket Number: Index No. 817557/2022E

Judge: Wilma Guzman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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L.P., an infant by her mother and natural Guardian, NOEMI CALDERON and NOEMI CALDERON, Individually,

Plaintiffs,

-against-

FROST VALLEY YMCA,

Defendant.

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**DECISION & ORDER**

Index No.: 817557/2022E

Motion Sequence No. 1

GUZMAN, J.

The infant Plaintiff in this case, L.P., was injured April 22, 2022, while participating in an outdoor activity at the Frost Valley YMCA ("Frost Valley"), an outdoor recreational center located in upstate New York. L.P., who was in tenth grade at the time, went to Frost Valley as part of an overnight field trip organized by her school.

The activity at issue, called the "Leap of Faith," required participants climb a tree to a wooden platform, jump off, and attempt to touch a ball suspended in the air. Participants were required to use a harness, helmet, and other protective equipment. After jumping, they were lowed to the ground through use of belay ropes attached to a mechanical belay device that was operated by Frost Valley employee.

L.P. was last in line for the activity, watching as her fellow classmates jumped off the platform and were subsequently lowered to the ground with the belay ropes. When it was her turn, she jumped off the platform and was suspended in the air momentarily and then lowered to the ground. However, when she was approximately 5-10 feet off the ground, she was suddenly dropped, causing her to fall as she hit the ground and sustain a fractured ankle.

Frost Valley answered the complaint and asserted various affirmative defenses, including, *inter alia*, defenses based on culpable conduct, waiver, and assumption of risk. On the motion before the Court, Plaintiffs move for an Order dismissing Frost Valley's affirmative defenses, and granting partial summary judgment on the issue of liability. Frost Valley opposes the motion and cross-moves for summary judgment dismissing the complaint.

It is well-settled that "[t]he 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." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985). Because summary judgment is a "drastic remedy," it should only be employed "when there is no doubt as to the absence of triable issues." *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 (1974) (emphasis added). Issue-finding, not issue-determination, is the role of the court on a motion for summary judgment. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 (1st Dep't 2021). The court must view the evidence in the light most favorable to the non-moving party, and give the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012). If the moving party fails to meet this initial burden, summary judgment must be denied "regardless of the sufficiency of the opposing papers." *Id.* at 503 (internal quotation marks, citation and emphasis omitted).

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries." *Cuminale v. 160-55 Crossbay Blvd., LLC*, 229 A.D.3d 682, 682, 216 N.Y.S.3d 36, 37 (2d Dep't 2024) (citations omitted). Although a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence and culpable conduct on the part of the plaintiff. *Maliakel v. Morio*, 185 A.D.3d 1018, 129 N.Y.S.3d 99 (2d Dep't 2020).

Here, the Court notes that Defendant has withdrawn its first, second and ninth affirmative defenses,[1] leaving in contention its Third Affirmative Defense (culpable conduct), Fourth Affirmative Defense (assumption of risk), Fifth Affirmative Defense (written release), Seventh Affirmative (based on CPLR Article 14), and Eighth Affirmative Defense (fifty percent liability).

In support of their motion, Plaintiffs have submitted, *inter alia*, a contemporaneous video recording of the subject accident, taken by L.P.'s friend, Noemi Calderon's 50-H hearing

[1] *See* NYSCEF Doc. 26 at 16 (footnote 2).

testimony[2]; and affidavits from L.P. and her mother Noemi Calderon. In her affidavit, L.P. states as follows:

> When we arrived at the 'Leap of Faith,' I saw for the first time what the event was and had never before done anything like it. I was at the end of the line and watched a lot of other students do the Leap of Faith before it was my turn. Only one student at a time could participate. The Defendant's employee placed a harness on the participant before starting. We were to climb a tree to a platform. Then leap off the platform and try to touch a ball that hung above the platform. The employee had a device to hold the rope that was attached to the student to prevent falling. The students ahead of me whom I watched were lowered to the ground gently and without injury. [. . .] During my participation, I was initially suspended in the air and was unharmed. At first, there was a slight drop and stop, and I screamed because it was not gentle like the prior students' descents. I was then dropped quickly most of the way down and it felt like the employee did not want to stop the rope because it slowed for a moment only and then while I was still high off the ground I was dropped completely. When I landed, I hit the ground hard and felt immediate pain and screamed a second time. At the end of the video, you can hear the Defendant's employee say, "Sorry."

*See* NYSCEF Doc. 23. L.P. further states that she reviewed the video taken by her friend and it is an accurate portrayal of how the accident occurred. The video shows L.P. suspended in the air with a harness, high above the ground, with a rope extending from the harness. The video is focused on L.P. and does not show any employees or the actual mechanism of lowering L.P to the ground. As she was being lowered, the rope suddenly dropped a few feet, upon which she screamed. She was then lowered more, gradually, until she was approximately 5-10 feet off the ground in the air, when she was suddenly dropped all the way to the ground and fell over.

In view of this proof, Plaintiffs have established, prima facie, that the accident was not caused by any culpable conduct of L.P. *See Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch.*, 65 N.Y.2d 161, 490 N.Y.S.2d 751 (1985) (noting that "culpable conduct" refers not only to negligent conduct, but any "conduct which, for whatever reason, the law deems blameworthy"). Contrary to Defendant's contention, L.P.'s hearing testimony at the 50-h hearing that she landed

[2] A separate action was filed against the New York City Department of Education, the City of New York and Manhattan Bridges High School.

on a tree branch does not raise an issue of fact as to her alleged culpability in the happening of the accident. Accordingly, Frost Valley's affirmative defenses relating to culpable conduct are dismissed.

The third and fourth affirmative defenses plead assumption of risk. Assumption of the risk is not an absolute defense but rather a measure of the defendant's duty of care. As a general matter, a voluntary participant in a sporting or entertainment activity "consents to the risk of 'those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation." *Turcotte v. Fell*, 68 N.Y.2d 432, 439, 5510 N.Y.S.2d 49 (1986); *also see, e.g., Navarro v. City of New York,* 87 A.D.3d 877, 929 N.Y.S.2d 236 (1st Dep't 2011) (defendant, a high school softball player, assumed the risk of being hit by a bat during practice drills); *Quigley v Frost Val. YMCA*, 85 A.D.3d 752, 752, 924 N.Y.S.2d 851, 851 (2d Dep't 2011) (finding that plaintiff assumed the risk of a horse acting in an unintended manner, which is a danger inherent in the sport of horseback riding); *Katleski v. Cazenovia Golf Club, Inc.*, 225 A.D.3d 1030, 1032, 207 N.Y.S.3d 231, 233 (3d Dep't 2024) (noting that being hit without warning by a shanked shot is a commonly appreciated risk of participating in the sport of golf).

Nevertheless, a defendant generally has a duty to exercise reasonable care to protect athletic participants from "unassumed, concealed or unreasonably increased risks." *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 658, 543 N.Y.S.2d 29 (1989). Here, L.P. did not assume the risk that she would not be belayed safely to the ground or otherwise be "dropped" to the ground. *See, e.g., Mussara v. Mega Funworks, Inc.*, 100 A.D.3d 185, 192-193; 952 N.Y.S.2d 568, 573 (2d Dep't 2012) (where the water slide "did not function as it was intended" and the dangerous condition posed by the ride was unique and over and above the usual dangers that are inherent in riding down a water slide, plaintiff did not assume the risk of his injuries); *Buffalino v. XSport Fitness*, 202 A.D.3d 902, 163 N.Y.S.3d 208, 212 (2d Dep't 2022) (risk that parts of elliptical machine would detach or hinge out was not inherent in recreational activity of exercising on that machine, so primary assumption of risk did not apply to plaintiff's fall); *Lipari v. Babylon Riding Ctr., Inc.*, 18 A.D.3d 824, 825, 796 N.Y.S.2d 632, 633 (2d Dep't 2005) (defendant offered no evidence that plaintiff, a novice horseback rider, assumed the heightened risk created by the alleged negligent conduct of the trail guides in leaving him unattended in the rear of the line of horses).

In opposition, Frost Valley contends that "a mechanical belay device was in use, and all apparatus and equipment were in safe and working condition" and that L.P.'s § 50-h testimony is "devoid of any description regarding the manner in which participants prior to her were lowered." It further contends that "[g]iven the apparatus setup and inherent shock placed on the line and belay device when a participant 'leaps,' it is possible—if not likely—infant Plaintiff L.P. observed others in her tenth-grade class descending from the Leap of Faith in an irregular matter." *See* NYSCEF Doc. 26 at 13-15. These contentions do not show that L.P. assumed the risk in being "dropped" as she was belayed to the ground. This affirmative defense is therefore dismissed.

Frost Valley's fifth affirmative defense is predicated on a written liability waiver that was executed by L.P.'s mother. The waiver states as follows:

**STUDENT WAIVER OF LIABILITY**

> I hereby accept any and all responsibility for, and assume the risk of any and all injury or damage to my dependent children which might arise directly or indirectly as a result of, and or participation in, the Frost Valley YMCA program. I hereby expressly release, discharge and hold harmless from any liability whatsoever the Frost Valley YMCA and all employees and volunteers in their capacities as representatives of the YMCA. Except for injuries caused intentionally, or by willful misconduct, I certify that I am familiar with the contents of this release, that I have read and understand the same, and that it is my intention by signing this release that the same is binding not only of me, but my heirs, administrators, executors, successors and assigns. This document may be photocopied.

*See* NYSCEF Doc. 4. In her affidavit, Noemi Calderon, states that she did not fully understand this language because it wasn't provided to her in Spanish, presumably her native language. Nevertheless, agreements to release a party from "any and all responsibility or liability of any nature whatsoever" do not bar claims sounding in ordinary negligence. In order for a contract clause to exculpate a party from its own negligence, the parties' intention to do so must be "expressed clearly and in unequivocal terms." *Gross v. Sweet*, 49 N.Y.2d 102, 110, 424 N.Y.S.2d 365 (1979) (internal quotation marks and citation omitted). Although the term "negligence" need not be used, words conveying a similar import must appear in the writing. Id. at 108. Here, the language of the release does not reflect a clear and unequivocal intent to limit

the Defendant's liability for negligence. *See Kim v. Harry Hanson, Inc.*, 122 A.D.3d 529, 530, 997 N.Y.S.2d 391, 392 (1st Dep't 2014). This affirmative defense is therefore dismissed.

Insofar as Frost Valley contends that it would be premature to dismiss its affirmative defenses since discovery is not complete, it has failed to explain how discovery might lead to any relevant evidence, or that there are any facts essential to justify opposition to this motion that are exclusively within the knowledge and control of Plaintiffs. "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion." *Guerrero v. Milla*, 135 A.D.3d 635, 636, 24 N.Y.S.3d 63 (1st Dep't 2016) (internal quotation marks omitted).

Next, Plaintiff moves for partial summary judgment on the issue of liability on the theory of res ipsa loquitur. Res ipsa loquitur is a form of circumstantial evidence that creates a permissible inference of negligence that may be accepted or rejected by the trier of fact. *Dermatossian v New York City Tr. Auth.*, 67 N.Y.2d 219, 226, 501 N.Y.S.2d 784 (1986); *see Morejon v. Rais Constr. Co.*, 7 N.Y.3d 203, 211, 818 N.Y.S.2d 792 (2006) (noting that res ipsa loquitur is "nothing more than a brand of circumstantial evidence" which "allows but does not require the jury to infer that the defendant was negligent").

In order to prevail on a theory of res ipsa loquitur, a plaintiff must establish that "(1) the occurrence is not one which ordinarily occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part." *Ezzard v. One E. Riv. Place Realty Co.*, LLC, 129 A.D.3d 159, 162, 8 N.Y.S.3d 195, 202-198 (1st Dep't 2015).

The Court finds that Plaintiffs have established, prima facie, that the doctrine of res ipsa loquitur theory applies in this case. L.P. fell to the ground while being belayed down by a Frost Valley employee—which does not ordinarily occurs in the absence of negligence; it was caused by equipment, or a mechanism, that was within Defendant's exclusive control; and the accident was not caused by any voluntary action or contribution by Plaintiff.

Frost Valley has failed to show the existence of a genuine issue of fact in opposition. Conclusory statements and unsupported allegations are insufficient to defeat a motion for summary judgment. A party opposing the motion must "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial" . . . and it is insufficient to merely set forth averments of factual or legal conclusions." *Schiraldi v. U.S.*

*Min. Prods.*, 194 A.D.2d 482, 483, 599 N.Y.S.2d 572 (1st Dep't 1993) (internal quotation marks omitted).

In view of this determination, Frost Valley's cross-motion for summary judgment is denied as academic. However, even if the Court had determined that a triable issue of fact precluded summary judgment in Plaintiff's favor, it would have nevertheless denied Frost Valley's motion. "A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that [it] was not at fault in the happening of the subject accident." Plaintiffs' bill of particulars alleges, *inter alia*, that Frost Valley "failed to hold onto the rope/tether/line or the like thereby causing the infant plaintiff, L.P. to fall and crash to the ground abruptly, without warning." *See* NYSCEF Doc. 28.

Defendant submitted proof that the Leap of Faith activity was regularly inspected and underwent a comprehensive inspection less than three months prior to the incident; all safety harnesses, belay ropes and devices, and carabiners passed inspection without condition; the business records of Frost Valley reflect that its staff completed daily inspections; all equipment and areas were safe and in working condition; and the instructor operating the Leap of Faith on April 28, 2022 had completed training in accordance with Frost Valley's policy. *See* NYSCEF Doc. 29 [affirmation of Tom Holsappe, Chief Administrative Office of Frost Valley YMCA]. Nevertheless, Defendant has submitted no proof that the employee who was handling the belay rope or mechanism at the time of L.P.'s accident properly held onto the rope and/or safely lowered Plaintiff to the ground. According, it is hereby:

ORDERED AND ADJUDGED that Plaintiff's motion for an Order dismissing Defendant Frost Valley YMCA's affirmative defenses, and for partial summary judgment on the issue of liability is granted; and it is further

ORDERED AND ADJUDGED that Defendant's cross-motion for summary judgment dismissing the complaint is denied; and it is further

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ORDERED AND ADJUDGED that Plaintiffs shall serve a copy of this Decision & Order with Notice of Entry upon all parties within twenty days of the date of Entry.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
January 10th, 2025

HON. WILMA GUZMAN, J.S.C.