To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED
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ON_____2012
WESTCHESTER
COUNTY CLERK

FILED
JUL -3 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

----------x

DANIEL CARRIERO,

Plaintiff,

-against-

MARGARTIA NAZARIO, LAURA RIVERA and AQUA POOLS,

Defendant.

----------x

Index No. 20504/2008
DECISION AND ORDER

The following documents numbered 1 to 26 were read on defendants Margarita Nazario's and Laura Rivera's motion for summary judgment dismissing the complaint

Defendants' Notice of Motion/Affirmation/Exhibits A-Q	1-19
Plaintiff's Affirmation in Opposition/Exhibits A-D	20-24
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Factual and Procedural Background

Defendants Margarita Nazario and Laura Rivera own property at 537 Webster Avenue, New Rochelle, New York. They owned and maintained an above ground swimming pool on the premises. The pool was a round, above ground swimming pool, and had a depth of five feet. There was a small wooden deck built against one side of the pool and a separate ladder built to allow access to the pool over another portion of the pools wall. There was a small raised area at the bottom of the pool that formed an "island" of sort, although the location and height of the "island" is disputed.

On July 20, 2004, plaintiff Daniel Carriero, then a 14 year old infant, was swimming with Jonathan Ortiz, the son of defendant Laura Rivera. Rivera was at work and unaware

that the two boys were using the pool that day. At some point, the two boys began a diving contest to see who could dive the furthest out. Plaintiff and Jonathan Ortiz successfully dove into the pool a few times without incident. However, as plaintiff dove into the pool again he struck his head on the raised area at the bottom of the pool and suffered serious injuries.

Plaintiff commenced this action against defendants on September 22, 2008. Defendants Nazario and Rivera now move for summary judgment dismissing the complaint on the ground that plaintiff dove headfirst into a pool he knew contained shallow water, thus voluntarily exposing himself to the inherent risks that ultimately resulted in his injury; and on this basis defendants owed plaintiff no duty and/or his decision to dive was the sole and proximate cause of the resulting injuries.

In support of its motion, defendants rely on the deposition testimony of plaintiff. At his deposition, plaintiff testified that on the day of the accident, he was 14 years old and just completed the ninth grade. On July 20, 2004 he went to the home of Jonathan Ortiz, son of defendant Laura Rivera both whom he had known for some time. He had visited the house on many occasions prior to that afternoon and knew that there was a pool in the back yard. He had swam in the pool 20-30 times beginning in 2003, a year before the accident. He acknowledged that there were several visible "WARNING NO DIVING" signs on the pool. He also stated that he knew about the raised area before the day of the accident, and on previous occasions dove into the pool with full knowledge of its existence. Plaintiff acknowledged that when he dove into the pool just before the accident, he knew the water was only 4-5 deep.

Defendants argue that they owed no duty to plaintiff because when he dove into the pool fully aware that it was shallow and thus chose to unreasonably expose himself to the

inherent risks of the recreational activity. Defendants also rely on the deposition testimony of Laura Rivera. At her deposition, Rivera testified that she was at work and therefore not present during the time of the accident. She testified that there were rules for her children's conduct: no guests at the house and nobody, including her children, were to be in the pool when she was not present. Finally, she testified that the pool came with the "WARNING NO DIVING" stickers and remained visible at the time of the accident.

Defendants also rely on photographs taken of the property and pool involved in the accident. Defendants point out that the shallowness of the pool is apparent, especially when compared to the nearby bushes and adjacent external filter. Furthermore, that the photographs depict the "WARNING NO DIVING" stickers and are visible to anyone approaching the pool, even from a distance.

Defendants argue that there is no factual dispute that plaintiff's impromptu decision to engage in a diving contest in a pool he knew was not suitable for diving was the sole cause of his injury.

In opposition, plaintiff contends that Rivera is not entitled to summary judgment because there are issues of fact regarding her negligence because she created a dangerous condition greater than the usual dangers that are inherent in swimming in pools. In support of this position, plaintiff relies on the deposition testimony of Laura Rivera, who acknowledged that she told and directed the person who installed the above ground pool to raise a portion of the floor lining high enough to permit her young children to stand in the pool and keep their faces above the water. Plaintiff also relies on the deposition testimony of Martin Silver, president of Bel-Aqua Pool Supply, Inc., who testified that the first step when installing an above ground pool is leveling the ground and that he

has never heard of anyone placing a layer of sand in an unleveled manner to raise the bottom of a pool.

Plaintiff also relies on the deposition testimony of Joseph Didomizio, a manager at Aqua-Play Pool and Spa. At his deposition, Didomizio testified that he also had never heard of any purchaser of an aboveground pool who raised the height of the bottom.

In further support of this position, plaintiff relies upon his affidavit in which he states that before he dove into the pool on July 20, 2004, Jonathan Ortiz told him that the raised pool bottom had been removed. He also states that before he dove into the pool that day he did not observe any raised portion of the pool bottom or any marking at the bottom to warn of such a condition. Finally, plaintiff states that he would not have dove into the pool if he had known or seen the raised area at the bottom of the pool.

In reply, defendants argue whether or not Jonathan Ortiz ever made this statement is inconsequential, as it constitutes inadmissible hearsay. Defendants note that Jonathan is not a party to this action, so any statements attributed to him do not constitute admissions against interest or qualify for any other exception to the hearsay rule. Moreover, there is no proof, other than hearsay statements attributed to Jonanthan, that plaintiff was unaware of the raised area and therefore does not qualify for an exception to the rule when opposing summary judgment. Defendants point to plaintiff's deposition testimony in which he testified that he had been in the pool on several prior occasions and was fully aware of the raised area on the bottom. As a result, defendants contend that, even if admissible, the statement only serves to raise a feigned issue of material fact. Defendants argue that plaintiff's decision to dive headfirst into a pool he knew contained shallow water was the sole and proximate cause of the accident.

Discussion

A party moving for summary judgment carries the initial burden of establishing his or her entitlement to judgment as a matter of law. (*See Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). "Once this showing has been made ... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. See Id.

Here, the defendants argue that they are entitled to summary judgment because plaintiff voluntarily exposed himself to a known risk of injury that was inherent in diving into a pool that contained shallow water. Therefore, as a result of plaintiff's decision to assume this unreasonable risk, he did not, as a matter of law, have a reasonable expectation of protection against those risks. Thus if defendants owed no duty, they could not have committed a breach. Moreover, even if a duty was owed, plaintiff's reckless and unforeseeable act of diving into a pool he knew contained shallow water was the proximate cause of his injuries.

Defendants have established prima facie entitlement to summary judgment dismissing the complaint. Plaintiff had been in the pool on multiple prior occasions, was aware of the shallowness of the pool, acknowledged the "WARNING NO DIVING" signs that were clearly visible, and testified at his deposition he was aware of the alleged raised area in the pool. Despite the obvious danger, plaintiff decided to dive head first into the pool. The burden now shifts to plaintiff to raise an issue of fact which would preclude summary judgment dismissing the complaint.

Plaintiff argues that he did not assume the risk of his injury because the defendant caused a portion of the pools bottom to be raised and thus created a unique and

dangerous risk above and beyond those normally inherent in the activity. Plaintiff further contends that the proximate cause of his injury was not his own actions, but rather the same raised area that imports a duty on the defendant.

To establish a prima facie case of negligence, a plaintiff must establish that the defendant owed him a duty to use reasonable care, and that it breached that duty. *(See Turcotte v. Fell*, 68 N.Y.2d 432). In the context of sports and recreational activities the owner or operator will be relieved from liability for inherent risks of the activity, as a matter of law, when a consenting participant is aware of the risks, has an appreciation of the risks, and voluntarily assumes the risk. (*See Morgan v. State*, 90 N.Y.2d 471, 484 [1997]). However, also pertinent to whether defendant owed a duty of care is whether the condition caused by the defendant are "unique and created a dangerous condition over and above the usual dangers that are inherent in the sport." *(Id*. at 485).

Here, plaintiff has not established any triable issue of fact to defeat summary judgment. Plaintiff had been in the pool, comprehended the risk of diving in shallow water, was well aware of the raised area in the pool, and had on prior occasions chosen to engage in diving into the pool. Therefore, even if the raised area was "unique" as plaintiff contends, he knew of the condition and voluntarily chose to participate nonetheless. Thus, he assumed the risk inherent with his activity.

Furthermore, even if defendant owed him a duty of care the plaintiff must still show that the defendant's negligence was a substantial cause of the events which produced the injury. (*See Boltax v. Joy Day Camp*, 67 N.Y.2d 617, 619 [1986]). Here, plaintiff has not set forth how alleged negligence on the part of the defendant was the proximate cause of his accident. It was plaintiff's own actions of diving into a pool that he knew contained water too shallow to permit diving that was reckless and the proximate

cause of his injuries. "By virtue of [his] general knowledge of pools, his observations prior to the accident, and plain common sense must have known that, if he dove into the pool, the area into which he dove contained shallow water, and thus posed danger of injury." *(Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 974-75 [1988]). Consequently, as plaintiff's conduct was the sole proximate cause of his injuries, defendants are entitled to a judgment as a matter of law.

Based on the foregoing, defendants' motion for summary judgment is GRANTED.

Dated: White Plains, New York
July 2, 2012

HON. WILLIAM J. GIACOMO, J.S.C.

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