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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden PART 11

Justice

Index Number : 117553/2009

WOLLRUCH, PHILIP

VS.

JAEKEL, ROBERT

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision/Order.

FILED

MAR 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 15, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X Index No. 117553/09

PHILIP WOLLRUCH and ESTHER WOLLRUCH,

Plaintiff,

-against-

ROBERT JAEKEL and EMPIRE SKATE CLUB,

Defendants.

----------X

Joan A. Madden, J.:

In this personal action arising out of injuries sustained by plaintiff Philip Wollruch ("Wollruch") during an on-line skating event, plaintiffs move for summary judgment on their claims against defendant Robert Jaekel ("Jaekel") on the grounds that Jaekel violated provisions of New York's Vehicle and Traffic Law ("VTL") and that this violation constitutes negligence per se.[1] Jaekel opposes the motion and cross moves for summary judgment, asserting that plaintiffs' claims are barred by the assumption of risk doctrine.

Background

In this action, plaintiffs seek to recover damages for injuries Wollruch sustained on August 17, 2008, while participating in an in-line skating event sponsored and organized by defendant Empire Skate Club of New York, Inc. ("Empire"). The accident occurred at the intersection of 5th Avenue and 35th Street in Manhattan, when Jaekel, who was also skating in the event, came into contact with Wollruch causing them both to fall to the ground. The complaint

1By decision and order dated August 17, 2010, the court granted plaintiffs' motion for summary judgment against defendant Empire Skate Club of New York, Inc., based on its failure to answer or otherwise respond to the complaint and directed that an inquest or assessment of damages be held at the time of trial.

asserts causes of action for negligence and loss of consortium on behalf of plaintiff Esther Wollruch.

At his deposition, Wollruch testified that he had participated in two skating events during the Empire weekend skating event, and that he had been skating since he was fifty years-old, for approximately thirteen years, prior to the accident. (Id. at 16–17). Wollruch also stated that he had "no formal skating classes," but that he had received tips and techniques for various skating maneuvers (Id. at 17), but had participated in a skating workshop (Id. at 10). Wollruch stated that inline skating was his "passion," so he would skate two or three times a week, and had been skating in the Empire Skating event for approximately eight to nine years. (Id. at 28–29). Wollruch also testified that he had participated in other similar events, ranging anywhere from 40–300 participants. (Id. at 28). Wollruch testified that in his previous skating experiences, he had fallen down a few times, and that he had been 'brushed' by other skaters before, but had never collided with skaters. (Id. at 55–58).

According to Wollruch, participants were skating in the streets, with moving vehicles, and there were no barricades preventing vehicles from driving next to the skaters. (Id. at 39). Wollruch testified that there were event volunteers who would direct you where to turn and help reorganize the group when skaters would fall behind, and that the weather conditions were clear. (Id. at 42, 49).

Wollruch testified that while stopped and waiting for a traffic light at the intersection of 5th Avenue and 35th Street to turn from red to green, he was struck from the right rear side by Jaekel who made contact with Wollruch's right leg, and simultaneously fell on top of him. (Id. at 74, 80-84). Immediately before Jaekel struck him, Wollruch heard a screeching noise, and did not have time to move out of the way. (Id. at 74–75). There were no witnesses to the accident;

however, Wollruch stated that an event volunteer and Jaekel helped Wollruch to a seated position on a street curb. (Id. at 89, 92– 93).

Jaekel testified that he had skated in three events during the Empire skate weekend. (Id. at 20). According to Jaekel, there were eight to ten Central Park skate guards skating in the group, who gave participants instructions to stay to the right and to not go through the traffic lights. (Id. at 29). Jaekel testified that he reached a declining portion of the road one block before the incident had occurred, and was trying to apply the skate brake to slow his speed, when another skater "crossed his path," causing him to lose his balance. (Id. at 40, 42). Jaekel further testified that when he fell to the ground, he first made contact with another skater, and then put his wrists on Wollruch and pulled him down. (Id. at 46–49). Jaekel testified that his skates had never come into contact with Wollruch, but that Wollruch twisted his knee when Jaekel put his hands on Wollruch's waist. (Id. at 50).

Plaintiffs move for summary judgment, arguing that the record establishes that Jaekel violated the VTL when he hit Wollruch from behind, that there was no nonnegligent explanation for the accident, and therefore his actions constitute per se negligence. See Mullen v. Rigor, 8 A.D.3d 104 (1st Dept 2004)(holding that driver of stopped vehicle which is struck from behind is entitled to summary judgment in the absence of a nonnegligent explanation for failing to keep his car at a safe distance from the stopped vehicle). Moreover, plaintiffs point out that under VTL § 1231 the provisions of the VTL are applicable to in-line skaters.[2]

2VTL § 1231 provides that "[e]very persons riding a bicycle or skating or gliding on in-line skates upon a roadway shall be granted all the rights and be subject to all the duties applicable to the driver of a vehicle by this title, except to special regulations of this article and except as to those provisions of this title which by their nature can have no application."

Jaekel opposes the motion, noting that VTL § 1231 "excludes those provisions of (the VTL) which by their nature can have no application," and argues that the circumstances here fall within this exclusion, and in particular that an in-line skater in a sporting event cannot be charged with a duty to maintain a safe distance from those skating in front of him. Jaekel also asserts that plaintiffs did not identify VTL § 1129(a),[3] relating to collisions from behind and on which plaintiffs apparently rely, in their bill of particulars.

Jaekel also cross moves for summary judgment based on the assumption of risk doctrine. In support of its cross-motion, Jaekel relies on an expert affidavit from Gordon Schmidt ("Schmidt"), who states that he has thirty-four years of experience as a sports science expert. According to Schmidt, the particular skating event in question "would be considered *free* skating, which is a form of recreational skating also known as 'urban' skating or 'free riding.'" (Schmidt affidavit ¶ 5). Schmidt states that Jaekel's loss of balance is consistent with a loss of control, and "the actions of the person who crossed his path were outside of Jaekel's control." (Id. ¶ 5). Schmidt opines that based on his review of the deposition testimony and other evidence, Wollruch assumed the risks of participating in skating (Id. ¶ 7). Schmidt further opines that Wollruch's actions of wearing protective equipment, as well as his testimony regarding previous experienced contact with skaters, show that Wollruch was aware of the risks involved with the skating event in question. (Id.). Schmidt concludes that Wollruch's injuries were a result of the inherent risks and falls associated with inline skating events. (Id. ¶ 8).

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3 VTL § 1129(a) provides that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

In reply, plaintiffs assert that they are not alleging a violation of VTL § 1129, and that the case should be analyzed under VTL § 1231. Moreover, Wollruch asserts that the assumption of risk doctrine does not apply here, as the instant case is governed by the VTL.

Discussion

On a motion for summary judgment, the proponent "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. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

In general, when in-line skaters (or bicyclists) use public roadways, they are "entitled to all the same rights and subject to all of the duties applicable to the driver of a vehicle by this title." VTL § 1231. However, VTL § 1231 also provides that it does not apply where the "provisions of [the VTL] by their nature can have no application." Id.; see also Redcross v.State, 241 A.D.2d 787, 790 (3rd Dept), lv denied, 91 NY2d 801 (1997).

In the instant case, the court finds that pursuant to VTL § 1231, the provisions of the VTL § 1129(a), by their nature, do not apply, to participates in a skating event, and thus do not apply to the circumstances here. See generally Secor v. Kohl, 67 A.D.2d 358 (2nd Dept 1979). Thus, plaintiffs' reliance on case law holding that a driver of a stopped vehicle, who is struck from behind, is entitled to summary judgment as a matter of law is misplaced.

Furthermore, the cases relied on by the plaintiffs are not to the contrary as they do not involve circumstances in which the parties are participants in a sporting event. See, e.g., Aiello

v. City of New York, 32 A.D.3d 361 (1st Dept 2006) (holding that under VTL § 1231, a bicyclist on a roadway is required to comply with VTL § 1172(a) regarding stopping at a stop sign at an intersection to yield to the right of way to an oncoming vehicle). Moreover, while in reply plaintiffs argue that they are not relying on VTL § 1129(a), they fail cite any other provision of the VTL which would arguably apply to the circumstances here, and VTL § 1231 does not provide a basis for liability in the absence of such provision.

As there is no indication that the Legislature intended for VTL § 1231 to apply to instances where an in-line skater is struck from behind by another in-line skater during an in-line skating event, plaintiffs' motion for summary judgment must be denied.

In contrast, for the reasons below, Jaekel's cross-motion for summary judgment based on the assumption of risk doctrine must be granted. The defense of "primary" assumption of the risk holds that "[p]articipants engaging in a sport or recreational activity are deemed to have assumed the commonly appreciated risks inherent in that activity." See Morgan v. State of New York, 90 N.Y.2d 471,484 (1997). The doctrine is based on the rule that "participants properly may be held to have consented by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of participation." Turcotte v. Fell, 68 NY2d 432, 439 (1986). In sporting activities involving skating, it has been held that collisions with other skaters are common and constitute an inherent risk participants assume when skating. See Zambrana v. City of New York, 262 A.D.2d 87, 87 (1st Dept. 1999), aff'd, 94 N.Y.2d 887 (2000); see also Kleiner v. Commack Roller Rink, 201 A.D.2d 462 (2nd Dept 1994); see also Lopez v. Skate Key, 174 A.D.2d 534 (1st Dept 1991).

Although the doctrine of "primary" assumption of risk was originally applied to professional athletes participating in sporting events, the doctrine has since been applied to bar recovery by amateur athletes. Maddox v. City of New York, 108 AD2d 42, 44 (2d Dept), aff'd, 66 NY2d 270 (1985); see also Bleyer v. Recreational Management Service Corp., 289 A.D.2d 519 (2nd Dept 2001) ("Ice and roller skaters assume the risk of being hit by out-of-control skaters"). Plaintiff's actual awareness of the risk must be determined against the background of his or her skill and experience. See Morgan, 90 N.Y.2d at 486; see also Duffy v. Suffolk County High School Hockey League, Inc., 289 A.D.2d 368 (2nd Dept 2001).

However, even though participants assume inherent risks involved with sport or recreational activities, participants will not be deemed to have assumed the risks of other people's reckless or intentional conduct or concealed or unreasonably increased risks. See Morgan, 90 N.Y.2d at 485 ("[I]n assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sports'"). Id., quoting Owen v. R.J.S. Safety Equipment, Inc., 79 N.Y.2d 967, 970 (1992). In addition, "[a] showing [of] some negligent act or inaction, referenced to the applicable duty of care owed to [a plaintiff] by [the] defendants, which may be said to constitute 'a substantial cause of the events which produced the injury' is necessary." Id., quoting Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 659 (1989) (citations omitted).

Here, Jaekel has made a *prima facie* showing that the assumption of the risk defense applies by providing evidence that Wollruch voluntarily participated in the skating event, had

experience as a recreational in-line skater, skated two or three times a week, and had regularly participated in various skating events, including eight or nine times in the event at issue. Moreover, the record includes evidence that Wollruch was injured as a result of a collision with Jaekel, and that his injuries were a foreseeable and inherent risk of skating. This evidence includes Wollruch's testimony that he witnessed participants in in-line skating events fall down and participants brush up against each other, and an expert affidavit stating that collisions were an inherent risk of in-line skating. See, e.g., Zambrana v. City of New York, 262 A.D.2d at 87; see also Lopez v. Skate Key, Inc., 174 A.D.2d 534 (1st Dept 1991).

Furthermore, plaintiffs have failed to controvert this showing. As indicated above, plaintiffs' reliance on the VTL is misplaced. Moreover, since Wollruch was participating in an organized sporting event at the time of his injuries, the circumstances here are not analogous to those cases in which the assumption of the risk doctrine has been found inapplicable to a plaintiff engaged in exercise or a leisure activity at the time of the accident. Compare Ashbourne v. City of New York, 82 A.D.3d 461, 463 (1st Dept 2011) (holding that plaintiff did not assume the risk of falling on a negligently maintained sidewalk when rollerblading since "this is not a case where plaintiff and defendant were participants in an organized skating event").

Finally, plaintiffs fails to provide any evidence that Jaekel acted intentionally or in such a reckless matter such as to create an inherent danger beyond those risks normally associated with the sport of skating. See Surace v. Lostrappo, 176 Misc.2d 408 (Sup. Ct. Nassau Co. 1998) (holding that plaintiff assumed the risk of injury even though the defendant was an inexperienced skater who had previously advised the plaintiff of her skating deficiencies, she had not "acted in such a reckless manner that her conduct would result in injury."); see also

Newcomb v. Guptill Holding Corp., 31 A.D.3d 875, 877 (3rd Dept 2006) (holding that "[w]hile there was conflicting testimony regarding whether defendant simply lost his balance or fell while trying to avoid some children who cut in front of him, both scenarios constitute inherent risks of roller skating which plaintiff assumed").

Conclusion

In view of the above, it is

ORDERED that the plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that the Jaekel's cross-motion for summary judgment is granted, and the complaint is severed and dismissed as against Jaekel; and it is further

ORDERED that pursuant to the court's previous order granting a default judgment in favor of plaintiffs and against Empire, plaintiffs shall appear in Part 11, room 351, on April 3,, 2012 at 9:30 am for an inquest and assessment of damages against Empire.

DATED March 15 2012

J.S.C.