SHORT FORM ORDER

INDEX No. 09-8323
CAL. No. 11-01125OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 9-28-11
ADJ. DATE 12-9-11
Mot. Seq. # 003 - MG;C/Disp

NICOLE LOUISE MALLOY, an infant under the age of 18 years by her mother and natural guardian, MARY ANN MALLOY,

Plaintiff,

- against -

SPLISH SPLASH AT ADVENTURELAND, INC., and FESTIVAL FUN PARKS, LLC,

Defendants.

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 12; 13-14 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15-24; 25-26 ; Replying Affidavits and supporting papers 27-28 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendants, Splish Splash at Adventureland, Inc. and Festival Fun Parks, LLC., pursuant to CPLR §3212 for summary judgment dismissing the complaint is granted with prejudice.

This negligence action arises from an incident which occurred on July 7, 2007, when the infant plaintiff, Nicole Louise Malloy, allegedly sustained injury on the Barrier Reef ride at Splish Splash Water Park, Riverhead, New York (hereinafter Splish Splash). The plaintiff alleges that the defendants were negligent in the design, construction, operation and supervision of the ride, and further contends that the sides of the slide, the excessive force and speed of the water, as well as the downgrade and force at a sharp turn, propelled her into the side of the ride, causing her to sustain injury to her jaw consisting of a fractured right mandible. Additionally, the plaintiff alleges that the defendants had actual and constructive notice of these conditions.

The defendants now seek summary judgment dismissing the complaint asserting that they owed no duty of care to the infant plaintiff; the Barrier Reef ride was safe for those

patrons who chose to ride it; they did not create the alleged dangerous condition of the ride and had no actual or constructive notice of the alleged defective condition; they were not the proximate cause of the accident; and that the infant plaintiff was fully aware of and appreciated the risk of injury associated with riding the Barrier Reef attraction, and assumed the risk of injury as a matter of law.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***id.***). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for her failure to do so (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1989]). The opponent must assemble, lay bare and reveal her proof in order to establish that the issues set forth in her pleadings are real and capable of being established at a trial (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party (CPLR §3212 [b]).

In support of this motion, the defendants have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; various discovery responses; and copies of the transcripts of the examinations before trial (hereinafter EBT) of Nicole Louise Malloy, Mary Ann Malloy, and Michael Bengston (hereinafter Bengston) on behalf of the defendants, each dated May 4, 2010.

At her EBT, Nicole Louise Malloy testified that on July 7, 2007, she arrived at Splish Splash at approximately 11:00 a.m. with three of her friends. It was her first time there, and she was sixteen years of age. She did not go on any of the rides at the water park the entire time she was there as she was afraid of heights, and stayed at the bottom of the slides watching her friends. At about 5:00 p.m., she decided to go on the Barrier Reef ride. She did not remember seeing warning signs posted anywhere prior to the incident. She continued that when she went on the Barrier Reef ride, she told the male attendant working at the ride that she was nervous and afraid of heights. She stated that he instructed her just to keep her hands across her chest, and that she would be okay. She had crossed her arms in front of her chest, as instructed, prior to going down the slide. Her feet were straight up, she was lying on her back, wearing a bathing suit. As she went down the slide, she slid from side to side out of control, and the right side of her head and face smashed the side of the slide at the bottom. She thought the reason her head and face hit the side of the slide at the bottom was because there was not enough water at the end of the slide to enable her to slide into the water pool. She did not report the incident to anyone at the park.

In an action for negligence, a plaintiff must establish that the defendant owed her a duty to use reasonable care, and that it breached that duty (***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Liability attaches to the owner or possessor of property only if the owner/ possessor created the condition or had actual or constructive notice thereof. To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (see ***Ortiz v Splish Splash***, 17 Misc3d 1104A, 851 NYS2d 59 [Sup. Ct., Nassau County 2007]; citing ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]).

At his EBT, Bengston testified that he has been the general manager of Splish Splash at Adventureland, Inc., Water Park in Riverhead, New York since October 2005. He stated that Festival Fun Parks was an L.L.C., under which Splish Splash operated. He had no specific training for working at the water park, except for industry experience. Guests entered the park through an admission gate where they paid a fee and were issued a ticket which was scanned and torn in half. The guest retained one part of that ticket which contained legal language, but Bengston did not know what was written on the ticket.

Bengston testified that there were about thirty-six slides at Splish Splash. The Barrier Reef slide was about twenty five feet high at the tower and was reached by stairs. The slide had one continuous, closed-in curve as it descended. The guest rode down the slide on the water which wet the fiberglass surface of the slide and channeled the guest in a particular direction. The water was pumped through a motor to the top of the attraction. The water then flowed down the attraction. Bengston continued that there were no specifications concerning how much water was to be running down the slide at any given moment. He did not know the rate of speed attained by a rider of the Barrier Reef slide. He stated that the water pumps for the rides were inspected at the beginning of every day by the maintenance department to ascertain that they were working. A daily inspection record was kept at the park. He further testified that there were written specifications for the ride. Thus it has been established that the defendants did not have actual or constructive notice of the conditions complained of by the infant plaintiff, or that the defendants failed to meet their duty to maintain the premises, particularly the Barrier Reef ride, in a reasonably safe condition.

Bengston testified that there was an attendant at the top of the Barrier Reef ride, and a life guard at the bottom by the four foot pool. The attendant at the top was trained in CPR and first aid, and was instructed how to operate the attraction with standard operating procedure. He did not know who the attendant assigned to the Barrier Reef ride was at the time of the accident. He testified that there was a sign with rules and attendants were directed to reiterate the rules to the guests, instructing them to remain lying down with arms crossed over the chest, and with legs crossed at the ankles.

The defendants assert that the plaintiff assumed the risk of injury as a matter of law by participating in the amusement rides. Courts have consistently applied the doctrine of assumption of risk in circumstances such as those before this Court. The doctrine operates to relieve owners and operators of sporting venues from liability for inherent risks of engaging in

a sport or recreation activity (see ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]). Here the defendant assert that the infant plaintiff assumed the risk of injury as a matter of law. As stated in ***Turcotte v Fell***, *supra*, professional athletes participating in sporting events are placed in a category of "primary" assumption of the risk, which limits the defendant's duty to exercise due care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty. Relieving an owner or operator of a sporting venue from liability for the inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks, has an appreciation of the nature of the risks and voluntarily assumes the risks (see ***Morgan v State of New York***, *supra*; ***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726, [1985]).

The Court of Appeals in ***Morgan v State of New York***, *supra*, extended the ***Turcotte v Fell,*** *supra*, principle to non-professional athletes and held that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the sport generally and flow from such participation.... Awareness of the risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff." In ***Ortiz v Splish Splash***, 17 Misc3d1104A, 851 NYS2d 59 [Sup. Ct., Nassau County 2007], the plaintiff alleged that the defendants were negligent in the ownership, operation, maintenance, management, supervision and control of the subject water park. The plaintiff claimed that the water jets caused her to slip and fall in the tub area of the ride before she was ready to start down the slide. The complaint was dismissed because the plaintiff assumed the risk inherent in riding the water slides at Splish Splash. The Court concluded that the infant plaintiff was aware of the risk of injury when she voluntarily chose to ride down the slide and that she assumed the risk. There was no evidence presented that the alleged dangerous condition was concealed, or that the slide presented an unreasonably increased risk for injury.

The doctrine of primary assumption of risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased (***Miskanic v Roller Jam USA, Inc.***, 71 AD3d 1102, 898 NYS2d 180 [2d Dept 2010]). In the instant action, the infant plaintiff had been at Splish Splash since 11 a.m. on the date of the accident, and this was the only ride she went on as she was afraid of heights. The infant plaintiff watched her friends go on the various rides and observed what they were doing as they rode down the slides of various heights. Therefore, it cannot be said that the infant plaintiff was not aware of the risks for participating in this type of activity. The risk she consented to was a commonly appreciated risk inherent in the sport. She testified that the reason her head and face hit the side of the slide at the bottom was because there was not enough water at the end of the slide to enable her to slide into the water when she came down the slide. However she testified that her feet were facing straight up when the instructions were to keep her ankles crossed while going down the ride. The infant plaintiff was a voluntary participant in a recreational activity, and consented to those commonly appreciated risks inherent in and which arise from the nature of the activity generally, and which flow from the participation (*see*, ***Leslie v Splish Splash at Adventureland, Inc.***, 1 AD3d 320, 766 NYS2d 599 [2d Dept 2003]; ***Reidy v Raman***, 85 AD3d 892, 925 NYS2d 581 [2d Dept 2011]). The infant plaintiff was aware of the risk of injury when she voluntarily chose to ride down the slide and she assumed the risk. There was no

evidence presented that the alleged dangerous condition was concealed, or that the slide presented an unreasonably increased risk for injury. No factual issue has been raised to preclude summary judgment to the defendants.

Accordingly, defendants' motion (003) for summary judgment dismissing the complaint is granted.

SETTLE JUDGMENT

Dated: MAY 16 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION