Mina v Jamaica Bay Riding Academy
2012 NY Slip Op 31985(U)
July 19, 2012
Sup Ct, Queens County
Docket Number: 21470/09
Judge: Kevin J, Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Kevin J. Kerrigan, Justice — Part 10

Elizabeth Mina, an infant by her parent and natural guardian, Christina Jeannetti, Plaintiffs,	Index Number: 21470/09
- against -	Motion Date: 5/1/12
Jamaica Bay Riding Academy, Dr. David Lichtenstein, Queens County St. Patrick's Day Parade & Cultural Committee, Bryan Bernath and Bryan's Auto Parts East, Inc., Defendants.	Motion Cal. Number:13
	Motion Seq. No.: 1

The following papers numbered 1 to 39 read on this motion by defendant David Lichtenstein for summary judgment dismissing the complaint and all cross claims; a cross motion by defendant Queens County St. Patrick's Day Parade and Cultural Committee (Parade Committee) and a cross motion by defendants Bryan Bernath (Bernath) and Bryan's Auto Parts East, Inc. (Bryan's Auto) for the same relief on their behalf; and a cross motion by defendant Jamaica Bay Riding Academy, Inc. s/h/a Jamaica Bay Riding Academy (Jamaica Bay) for summary judgment dismissing the complaint and any and all cross claims and counterclaims.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.........	1-4
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Answering Affidavits - Exhibits.................	17-30
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Initially, it is noted that all objections to the timeliness of the motion and cross motions are without merit. The instant applications for summary judgment were previously improperly made

by motion or cross motion in *Pappas v The City of New York*, another action pending in this court under Index No. 9915/2009, with which this action has been joined for trial. Those applications were denied without prejudice by order dated December 7, 2011 (Index No. 9915/20009). The various summary judgment applications were timely for the purposes of this action when initially made in *Pappas* since they were made within 120 days of the filing of the note of issue herein. (CPLR 3212[a].) The so-ordered stipulation in *Pappas* requiring that summary judgment motions in that action be made returnable not later than March 22, 2011, was not applicable to this separate action. Under these circumstances, the applications will be entertained on the merits.

The infant plaintiff, Elizabeth Mina, was injured when she fell from the horse she was riding in the Queens County St. Patrick's Day Parade in Rockaway Beach on March 1, 2008, after the horse ran off out of control. Mina, together with defendants Lichtenstein and Bernath, rode as part of an equestrian unit of six riders identified in the line of march prepared by defendant Parade Committee, the parade organizer, as "Bryan's Auto Equestrian Unit." The horses used by the equestrian unit were provided by defendant Jamaica Bay. It is alleged by plaintiff that the injuries she sustained resulted from the negligent acts and/or omissions of defendants.

In his motion for summary judgment, defendant Lichtenstein maintains that he attempted to assist plaintiff Mina when her horse suddenly broke into a canter. He contends that he was faced with a sudden and unexpected situation not of his own making and that since his actions were reasonable and prudent in that context, he was not negligent. In addition, Lichtenstein asserts that the principle of danger invites rescue relieves him of any charge of negligence. The deposition testimony of plaintiff and her father presented by movant, however, demonstrates the existence of issues of fact concerning Lichtenstein's conduct and the circumstances leading to plaintiff's injuries which prevent a determination as a matter of law with regard to the elements of these defenses. (*See Rivera v New York City Tr. Auth.*, 77 NY2d 322 [1991]; *Provenzo v Sam*, 23 NY2d 256 [1968]; *Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443 [2005].)

Defendant Lichtenstein also contends that he is shielded from liability for plaintiff's injuries because Mina assumed the risks commonly associated with horseback riding. Under the doctrine of primary assumption of the risk, participants in a sport or recreational activity "may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the

participation". (*Turcotte v Fell*, 68 NY2d 432, 439 [1986]; *see Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *Dalton v Adirondack Saddle Tours, Inc.*, 40 AD3d 1169 [2007]; *Kirkland v Hall*, 38 AD3d 497 [2007].) Participants are legally deemed to have accepted personal responsibility for risks which are commonly encountered or "inherent" in an activity. (*See Bukowski v Clarkson Univ.*, ___ NY3d ___, 2012 NY Slip Op 4274 [2012]; *Morgan*, 90 NY2d at 484.) The doctrine defines and limits the scope of the duty of care owing to those who elect to participate in sporting and recreational activities though knowing the risks, and if the doctrine is applicable, and its elements satisfied, a defendant is relieved of legal duty to the injured party and cannot be charged with negligence. (*See Morgan*, 90 NY2d at 485; *Turcotte*, 68 NY2d at 439; *Tilson*, 30 AD3d at 859.) With respect to recreational or sporting events involving horses, the risks that a horse would bolt, suddenly break into a run, or otherwise act in an unpredictable or unintended manner that results in a rider being thrown or falling from the horse, are inherent in the activity. (*See Stanislav v Papp*, 78 AD3d 556 [2010]; *Dalton*, 40 AD3d at 1171; *Kirkland*, 38 AD3d at 498; *Tilson v Russo*, 30 AD3d 856 [2006]; *Eslin v County of Suffolk*, 18 AD3d 698 [2005].) While a participant will not be deemed to have assumed unreasonably increased risks, where the risks of the activity are fully comprehended or perfectly obvious, the doctrine is applicable. (*See Toro v New York Racing Assn.*, ___ AD3d ___, 2012 NY Slip Op 3633 [2d Dept 2012].)

As noted above, the submissions here show that there are questions of fact as to defendant Lichtenstein's actions and the events leading up to the accident. Even accepting plaintiff's version of the facts as true for the purposes of this motion, however, the conduct attributed to defendant Lichtenstein does not defeat the applicability of the doctrine of assumption of the risk. Plaintiff Mina, an admittedly experienced rider, chose to ride in the parade despite her claimed knowledge that Lichtenstein's horse was "jumpy" while the group rode on the beach prior to the parade and continued to be jumpy, even bucking at times, during the first hour of the parade, and despite believing that Lichtenstein had been drinking alcohol and smoking marijuana. The assertions that Lichtenstein eventually lost control of his horse and dismounted, and that plaintiff then lost control of her horse when it followed as Lichtenstein's horse ran off, describe what are known, usual dangers of horseback riding. Plaintiff Mina testified that she had previously ridden horses that had been "spooked" and had been trained in how to control them as well as in how to make an emergency dismount from a galloping horse, which she had done on one prior occasion. The inherent risks of being injured when horseback riding include the scenario in which the unpredictable

actions of a jumpy horse that cannot be controlled by its rider causes another horse to start to gallop, and that horse's rider to lose control and eventually fall from the horse. (*See generally Stanislav*, 78 AD3d at 557; *Eslin*, 18 AD3d at 699.)

The injury causing events alleged here were known, apparent or reasonably foreseeable by plaintiff. (*See Turcotte*, 68 NY2d at 439; *Tilson*, 30 AD3d at 857; *Kinara v Jamaica Bay Riding Academy*, 11 AD3d 588 [2004].) It cannot be said that Lichtenstein's alleged conduct unreasonably increased the risk of plaintiff's participation where plaintiff's own testimony demonstrates that she was aware of the risks, had an appreciation of the nature of the risks and voluntarily assumed the risks. (*See Toro*, ___ AD3d at ___, 2012 NY Slip Op 3633 at ***2; *Dalton*, 40 AD3d at 1171; *Joseph v New York Racing Assn., Inc.*, 28 AD3d 105, 108-109 [2006].) Accordingly, defendant Lichtenstein's motion for summary judgment is granted.

Plaintiff's assumption of the risks inherent in horseback riding, as discussed above, also operates to bar her claims against Bernath, Bryan's Auto and the Parade Committee. The proof in the record concerning the actions of defendants Bernath, Bryan's Auto and the Parade Committee shows that these defendants did not breach any duty to plaintiff by creating an unreasonably increased risk. (*See Morgan*, 90 NY2d at 485; *Turcotte*, 68 NY2d at 439; *Quigley v Frost Val. YMCA*, 85 AD3d 752 [2011].)

Even absent the applicability of the doctrine of assumption of the risk, defendants Bernath, Bryan's Auto and the Parade Committee would be entitled to summary judgment on other bases. The evidence in the record establishes that defendant Bernath was not negligent in the riding of his horse in the parade, and that he, individually, did not cause or contribute to plaintiff's injuries. Although the sequence of events leading up to the subject accident is in dispute, only two horses and riders are implicated under either version of the facts. Neither Bernath nor the horse he was riding was involved in the occurrence. Thus, Bernath may not be held liable to plaintiff. (*See generally*, *One Beacon Ins. Co. v CMB Contr. Corp.*, 84 AD3d 902 [2011]; *Nozine v Anurag*, 38 AD3d 631 [2007].)

The attempt to impose liability on defendant Bryan's Auto is also misplaced. The proof submitted demonstrates that the parade was made up of various units which applied to the Parade Committee for permission to participate. Although the six equestrians therefore entered the parade as a unit named "Bryan's Auto Equestrian Unit," the evidence shows that the unit was not an organized or existing group but merely a loose collection of

friends and/or acquaintances who joined together for the purpose of entry into the parade. A similar group made up of mostly the same riders had participated in the parade each year since 2000 under various unit names. With the exception of defendant Bernath, the riders in the unit were not shareholders, officers or employees of Bryan's Auto. Defendant Bryan's Auto did not have the authority to regulate the selection of the horses or the riders or to control the actions of the riders before or during the parade. Under these circumstances, Bryan's Auto did not owe a legal duty to plaintiffs. (*See Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]; *see also Fox v Marshall*, 88 AD3d 131, 135-136 [2011].) In the absence of a duty, there can be no breach and without a breach there is no liability. (*See Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *Fox*, 88 AD3d at 135; *Fernandez v Elemam*, 25 AD3d 752, 753 [2006].)

While the deposition testimony of the parties may raise issues of fact as to whether any of the riders in the equestrian unit were drinking alcohol and/or smoking marijuana before and/or during the parade, defendant Parade Committee has demonstrated that it did not know of any such activities, and no issue of fact as to its knowledge has been raised in opposition. It is undisputed that the Parade Committee's rules prohibited any alcohol use. The Parade Committee did not have any ability to control the participants' activities prior to the parade, and did not witness nor receive any reports of alcohol or drug use during the parade. The Parade Committee obtained a permit for the parade from the New York City Police Department (NYPD) and its representatives attended two planning meetings with Community Affairs officers from the local precinct to discuss security and crowd control issues. The security functions at the parade were directed and controlled by the NYPD, which had more than 100 officers on duty at the parade, while the Parade Committee assigned members and volunteers in the staging area to organize the line of march and placed spotters along the parade route to monitor the progress of the parade. On this record, the Parade Committee took reasonable measures to deal with issues of disorderliness and security at the parade, and did not breach any duty it owed in this regard. (*See generally Maheshwari v City of New York*, 2 NY3d 288 [2004]; *Yule v Town of Huntington*, 204 AD2d 439 [1994].)

Insofar as plaintiff's claim against the Parade Committee arises from the behavior of the horses involved in the incident, plaintiff's right to recover for the Parade Committee's alleged negligence in permitting the horses to be in the parade, and/or in failing to provide proper supervision for the horses, can be no greater than the ability of a party injured by a domestic animal to proceed against the owner of the animal or the party that

controlled the premises where the animal was present. A cause of action for injuries inflicted by a domestic animal may only succeed where the animal had vicious propensities and the animal's owner or the party in control of the premises knew or should have known of such propensities. (*See Petrone v Fernandez*, 12 NY3d 546 [2009]; *Bard v Jahnke*, 6 NY3d 592 [2006]; *Collier v Zambito*, 1 NY3d 444 [2004]; *Appel v Charles Heinsohn, Inc.*, 59 NY2d 741 [1983], *affg* 91 AD2d 1029 [1983]; *Tennant v Tabor*, 89 AD3d 1461 [2011]; *Krieger v Cogar*, 83 AD3d 1552 [2011]; *Jones v Pennsylvania Meat Mkt.*, 78 AD3d 658 [2010]; *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 [2008]; *Claps v Animal Haven, Inc.*, 34 AD3d 715 [2006].) The term "vicious propensities" has been held to include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation. (*See Collier*, 1 NY3d at 446; *Appel*, 59 NY2d 741, *affg* 91 AD2d at 1030; *Krieger*, 83 AD3d at 1553; *Claps*, 34 AD3d at 716.)

Defendant Parade Committee has made a prima facie showing that it was not aware, nor should it have been aware, that the two horses involved in the accident had any vicious propensities. (*See Christian*, 54 AD3d at 708; *Ali v Weigand*, 37 AD3d 628 [2007]; *Claps*, 34 AD3d at 716.) The Parade Committee neither saw nor received any complaints of abnormally aggressive or dangerous behavior on the part of the horses. The opposing parties have failed to raise a triable issue of fact as to whether the Parade Committee had notice of any vicious propensities. (CPLR 3212[b]; *see*, *Christian*, 54 AD3d at 708; *Ali*, 37 AD3d at 629.)

Accordingly, the cross motion by defendants Bernath and Bryan's Auto and the cross motion by defendant Parade Committee are granted.

In its cross motion, defendant Jamaica Bay contends that it cannot be held liable for plaintiff's injuries because there is no evidence it had knowledge that any of the horses it provided for the parade had vicious propensities and/or because Mina assumed the risks commonly associated with horseback riding. Jamaica Bay also asserts that the decision of the members of the equestrian unit to ride the horses delivered to them by Jamaica Bay severed any causal connection between Jamaica Bay's alleged negligence and the injuries sustained by plaintiff.

The cross motion by Jamaica Bay is denied. A defendant moving for summary judgment does not satisfy its burden of demonstrating its entitlement to judgment as a matter of law merely by pointing out gaps in its opponent's case, but must affirmatively show the prima facie merit of its proffered defenses. (*See Johnson v Culinary Inst. of Am.*, ___ AD3d ___, 2012 NY Slip Op 3810 [2d Dept

2012]; *Blackwell v Mikevin Mgt. III, LLC*, 88 AD3d 836, 837 [2011]; *Shafi v Motta*, 73 AD3d 729, 730 [2010].) Jamaica Bay has not submitted evidence sufficient to meet this burden.

Anthony Danza, a co-owner of Jamaica Bay who arranged to provide the horses to the equestrian unit, testified at an examination before trial that Jamaica Bay did not keep any records of any transactions through which it acquired horses or of the horses it owned at any particular time. He further testified that he did not know the names of all the horses Jamaica Bay owned in March 2008, and with one possible exception, had no knowledge as to which horses were provided for the parade. In addition, Danza offered only conclusory statements concerning the general practices Jamaica Bay followed before allowing a horse to be used in a parade. Jamaica Bay has not offered any other evidence identifying the horses Danza selected for the equestrian unit or any evidence regarding the prior behavior of the horses involved in plaintiff's accident or the basis for concluding that those horses were appropriate for parade conditions.

Participants in recreational or sporting events will not be deemed to have assumed concealed or unreasonably increased risks. (*See Morgan*, 90 NY2d at ___; *Toro*, ___ AD3d at ___, 2012 NY Slip Op 3633 at ***2.) Given the unique conditions involving noise and crowds that a parade presents, the failure of the owner of a stable to exercise due care in training and selecting the horses to be provided for such use may create an unreasonably increased risk of which the riders who rely on the stable for this purpose are not aware and to which they have not consented. Jamaica Bay has failed to make a prima facie showing that it did not unreasonably increase the risks inherent in riding a horse by providing horses unsuitable for use in a parade. (*See Zayat Stables, LLC v NYRA, Inc.*, 87 AD3d 1063 [2011]; *Corica v Rocking Horse Ranch, Inc.*, 84 AD3d 1566, 1567 [2011].)

Should it be found that Jamaica Bay unreasonably increased the risks faced by plaintiff, Jamaica Bay would not be relieved of its legal duty to plaintiff, and whether the horses at issue had known vicious propensities for harm would become relevant to the liability of Jamaica Bay. (*Cf. Tilson*, 30 AD3d at 859.) The previously described evidence offered by Jamaica Bay fails to demonstrate, prima facie, that the horses involved in the incident did not have the propensity to do an act that might endanger a party in a given situation or, if the horses did have such vicious propensities, that Jamaica Bay neither knew nor should have known of these propensities. (*See Jones*, 78 AD3d at 659; *cf. Tennant*, 89 AD3d at 1462; *Levino v Kadison*, 70 AD3d 651 [2010]; *Claps*, 34 AD3d at 716; *Appel v Charles Heinsohn, Inc.*, 91 AD2d 1029

[1983], *affd* 59 NY2d 741 [1983].) Under these circumstances, the burden on the cross motion did not shift to plaintiff and summary judgment is precluded without regard to the sufficiency of the opposition papers. (*See Nancy Ann O. v Poughkeepsie City School Dist.*, ___ AD3d ___, 2012 NY Slip Op 3613 [2d Dept 2012]; *Caggiano v Cooling*, 92 AD3d 634 [2012]; *see also Jones*, 78 AD3d at 659.)

The intervening act of the equestrians in deciding to ride the horses in not an unforeseeable result of the situation created by Jamaica Bay's alleged negligence, and is not independent of or far removed from Jamaica Bay's alleged acts or omissions, so as to constitute a superseding cause that would break the causal nexus and relieve Jamaica Bay of liability as a matter of law. (*See Kriz v Schum*, 75 NY2d 25 [1989]; *Kush v City of Buffalo*, 59 NY2d 26 [1983]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980].) Thus, the issue of proximate cause remains a question of fact. (*Id.*)

Dated: July, 19, 2012

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J.S.C.