[* 1]

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

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 118326/2009
WEE, SUE ANN
VS
AGT CRUNCH NEW YORK
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 ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

Plaintiff and defendants AGT Crunch New York, LLC, and AGT Crunch Acquisition, LLC discontinue their claims and cross-claims against defendant Roc-Le Triomphe Associates, LLC, pursuant to their 9/8/11 stipulation. The court denies the AGT Crunch defendants' motion for summary judgment pursuant to the accompanying decision. C.P.L.R. § 3212(b)

FILED
JUL 27 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/13/12

Lucy Billings
LUCY BILLINGS J.S.C.
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: PART 46

----------x

SUE ANN WEE,

Plaintiff

-against-

AGT CRUNCH NEW YORK, LLC, AGT CRUNCH NEW YORK, LLC d/b/a CRUNCH FITNESS, AGT CRUNCH ACQUISITION, LLC, AGT CRUNCH ACQUISITION, LLC d/b/a CRUNCH FITNESS, and ROC-LE TRIOMPHE ASSOCIATES, LLC,

Defendants

----------x

Index No. 118326/2009

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiff sues for shoulder injuries she sustained performing an inversion maneuver, requiring a dancer to turn her body upside down on a pole, during or immediately after a pole dancing class June 22, 2009, at defendants' fitness facility. After defendants moved for summary judgment, the parties stipulated that plaintiff and co-defendants released all claims against defendant Roc-Le Triomphe Associates, LLC, the owner of the premises. After oral argument and unsuccessful attempts at settlement, the court denies the remaining defendants' motion for summary judgment for reasons explained below. C.P.L.R. § 3212(b).

I. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment dismissing the action, defendants must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all

material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If defendants satisfy this standard, the burden shifts to plaintiff to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for defendants' motion, the court must construe the evidence in the light most favorable to plaintiff and accept her version of the facts as true. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

II. DEFENDANTS ESTABLISH A PRIMA FACIE DEFENSE THAT PLAINTIFF ASSUMED THE RISKS INHERENT IN POLE DANCING.

Defendants select the following deposition testimony to set forth a prima facie showing that plaintiff assumed the risk of injuries inherent in her pole dancing activities. Plaintiff testified at her deposition that she voluntarily participated in the pole dancing class; in fact, on the day of her injury, she was at defendants' gym facility specifically to participate in its pole dancing class. Her pole dancing experience consisted of attending approximately five previous pole dancing classes there, which included attempting the inversion maneuver on two or three prior occasions. On the day of her injury, she specifically requested to perform the inversion maneuver. Plaintiff's instructor during the pole dancing class June 22, 2009, Roland

Brown, testified at his deposition that plaintiff attempted the inversion after the class already had ended. Roberts v. Boys and Girls Republic, Inc., 10 N.Y.3d 889 (2008); Marcano v. City of New York, 99 N.Y.2d 548, 549 (2002); Morgan v. State of New York, 90 N.Y.2d 471, 484, 488 (1997); Navarro v. City of New York, 87 A.D.3d 877, 878 (1st Dep't 2011).

III. PLAINTIFF REBUTS DEFENDANTS' SHOWING.

Plaintiff nevertheless rebuts defendants' showing and defeats their motion for summary judgment, by raising factual issues material to her assumption of the risks in performing the inversion maneuver under the particular circumstances as she describes them in her further deposition testimony. Contrary to Brown's testimony, plaintiff performed the inversion during the class, under his direct watch and supervision. She specifically asked him to spot her; in response, he stood near her as if prepared to assist her while she performed the maneuver; yet he never intervened other than to insist that "you can do it," even while she called out for help. Aff. of Nicholas Warywoda (June 14, 2011) Ex. C, at 25. Plaintiff also relies on Brown's deposition testimony describing her as a beginner and an inexperienced pole dancer and confirming that Brown watched her perform the maneuver, but did not intervene other than with oral encouragement.

Plaintiff thus raises various material factual issues bearing on the extent to which defendants may rely on her assumption of risk as a defense. First, as a beginner, she could

not fully appreciate the risk of pole dancing. Second, she did not intend to perform or believe she was performing the inversion maneuver unassisted and therefore did not assume the risk of performing the inversion unassisted. To the contrary, plaintiff reasonably relied on Brown's direct and immediate supervision, so that his negligent failure to assist or rescue her enhanced the risk of the activity. Morgan v. State of New York, 90 N.Y.2d at 485; Mathis v. New York Health Club, 261 A.D.2d 345, 346 (1st Dep't 1999); Myers v. Friends of Shenendehowa Crew, Inc., 31 A.D.3d 853, 854, 856 (3d Dep't 2006); Petretti v. Jefferson Val. Racquet Club, 246 A.D.2d 583, 584 (2d Dep't 1998). See Calouri v. County of Suffolk, 43 A.D.3d 456, 457-58 (2d Dep't 2007). Because plaintiff raises material factual issues as to whether she assumed the risk of her injuries, her claims regarding defendants' negligent hiring, supervision, training, and retention of their instructor Brown and defendants' vicarious liability for his negligence survive defendants' motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, the court denies the motion for summary judgment by defendants AGT Crunch New York, LLC, and AGT Crunch Acquisition, LLC. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: July 13, 2012

LUCY BILLINGS, J.S.C.

wee.140