[* 1]

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

PRESENT: Hon. Judith J Gische Justice PART 10

Index Number : 104046/2010
SCHECK, WOLF
vs
SOUL CYCLE EAST 83RD STREET
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

FILED

AUG 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: JUL 26 2012

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Wolf Scheck and Lynn Scheck,

Plaintiff (s),

-against-

Soul Cycle East 83rd Street, LLC d/b/a Soulcycle and Julie Rice,

Defendant (s).

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DECISION/ORDER
Index No.: 104046/10
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3212) w/DHS affirm, exhs	1
Plfs' opp w/ADL affid	2
Defs' reply w/DHS affirm, exh	3
Various stips of adj	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a negligence action for personal injuries. Now that issue has been joined and the note of issue was filed, defendants move for summary judgment. Plaintiffs raise the issue of the untimeliness of this motion, arguing that the motion was brought more than 120 days after the Note of Issue was served and filed.

CPLR 3212 provides that any party may move for summary judgment after issue has been joined and, if no date is set by the court, such motion shall be made "no later than [120 days] after the filing of the note of issue..." SCROLL (the Supreme Court Records On Line Library) shows that the Note of Issue was stamped "received" in the

Trial Support Office on June 27, 2011, but the fee was paid and accepted by the New York County Clerk's Office on June 29, 2011. Defendant's motion was served by mail on October 26, 2011. A motion on notice is "made" when it is served (CPLR 2211). Papers are filed when they are delivered to the court clerk or the clerk's designee (see Matter of Grant v. Senkowski, 95 N.Y.2d 605 [2001]). Furthermore, not only does the Note of Issue have to be filed with the County Clerk, it must be accompanied by the payment of the appropriate fee, as prescribed by CPLR 8020 (Uniform Civil Rules for the Supreme Court and the County Court, 22 NYCRR 202.21).

Since the Note of Issue was paid for and filed with the County Clerk on June 29, 2011, and defendants' motion was "made" on October 26, 2011, when it was served by mail, it was timely made within the 120 day statutory period (CPLR 3212 [a]; Gazes v. Bennett, 38 A.D.3d 287 [1st Dept 2007]; *see also*, Nolan v. J.C.S. Realty, 79 AD3d 414 [1st Dept 2011]). The motion, therefore, will be decided on its merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]).

Facts and Arguments

This action arises from events that occurred on December 25, 2009 ("date of the accident") at "Soulcycle," located on 83rd Street and Lexington Avenue in Manhattan during an indoor cycling class. The complaint alleges that Wolf Scheck was injured while in this "spin" class. According to Mr. Scheck, taking a spin class is not the same as just riding a regular street bicycle or stationary bicycle found at any gym. He did not, however, know this before he took the class. Mr. Scheck contends he was not properly instructed or supervised in how to use the equipment and that this constitutes negligence on the part of the defendants. Mr. Scheck denies he assumed the risk of

injury just by participating in the class. He claims that the danger of this activity was not readily apparent to the casual observer and was increased by the defendants' actions.

Defendants are Soul Cycle East 83rd Street, LLC ("Soul Cycle"), the company that owns, maintains, operates, etc., the Soul Cycle facility where the accident is claimed to have occurred and Julie Rice ("Rice"), a member of the Soul Cycle LLC. Defendants contend they are entitled to summary judgment dismissing the complaint because Mr. Scheck, by voluntarily participating in Soul Cycle's spin class assumed the risks inherent to the participation of that recreational activity, thereby relieving them of any duty to prevent the type of accident he complains of. Defendants deny they improperly instructed Mr. Scheck in the use of the equipment. Defendants seek the dismissal of all claims against Ms. Rice on the basis that she was not personally involved in the happening of the accident and there are no factual allegations against Ms. Rice individually. They maintain she is corporate officer.

Mr. Scheck and Mrs. Scheck[1] were each deposed about the accident. Mr. Scheck testified at his EBT that his wife suggested they try a spin class. Mrs. Scheck testified at her EBT that friends had told her how they lost weight "spinning" and she was eager to try it. Neither of the Schecks had any idea what it meant to "spin" or what kind of bicycle was involved. Both of them, however, have regular exercise routines. Mr. Scheck is a two-time marathon runner, he does weight training and plays tennis. Each of the Schecks has a gym membership and has belonged to other gyms in the past.

Mrs. Scheck registered the couple for the class online after calling the facility and

[1]Mrs. Scheck has a derivative claims for loss of consortium/services.

asking some questions. She was told on the phone they should come to class 15 minutes early so staff could go through "the whole [regimen] for you and explain everything carefully, because I said I don't want there to be anything that goes wrong." When Mr. Scheck arrived for the spin class, his wife was already there. He did not check himself in or do anything other than put his things in a locker. Mrs. Scheck testified that when she arrived, she learned that Soul Cycle showed only one of them was registered for the class, even though she had payed online for two participants. Apparently that was corrected and both Mr. and Mrs. Scheck were allowed to take the class.

Once inside the classroom, a female employee approached them and asked whether they had done a spin class before. Each of them said no. Mr. Scheck testified this person suggested they sit in the back because it might be easier for them to watch what everyone else was doing. This person told Mr. Scheck to get on the bike while she adjusted the seat for him. She also showed him where the brake was, but not how to use it. Mr. Scheck testified that he did not test the brake out to see how it worked. This process took about two (2) minutes. Noticing that he was not wearing the correct shoes, the female employee told Mr. Scheck to go get bike shoes from the front desk, which he did. These shoes (later described by others who were deposed), have a cleat that locks the rider's shoes to the pedals, preventing their feet from slipping off.

The female employee who taught the class, later identified as Marybeth Regan, was someone different than the person who had shown Mr. Scheck the equipment. Ms. Regan was seated at the front of the class on a raised platform. Once the class was under way, some of the cyclists started pedaling very fast. Mr. Scheck, however,

maintained a slow pace, pedaling very slowly. Five (5) or ten (2) minutes into the class, the instructor told the cyclists to stand up for the next exercise. Scheck obliged and as he raised himself with his right leg elevated and his left leg extended, "the machine grabbed my [right] leg and pulled it around..." The pedals kept revolving, almost on their own, all the while with Scheck's feet strapped in. Scheck heard a "pop" and intense pain. One or two persons help extricate him from the bike and he was taken to the hospital by ambulance. He later discovered he had torn the quadriceps muscle in his right leg.

Madison Warren worked at the 83rd Street facility. She was the front desk associated on the day of the accident. Ms. Warren testified at her EBT that there were only three (3) people working that day, including herself, because it was Christmas Day. Ms. Warren was asked about the procedures for purchasing classes online and what new spinners usually do when they arrive for a class. According to Ms. Warren, new spinners are asked to sit in back of the class and this is reflected in a sheet showing that the Schecks were moved from one set of bikes to another in the back. She also testified that when purchasing classes online, someone can buy more than one class, or classes for more than one person. It is required, however, that the person making the purchase check a box indicating s/he has seen the waiver before s/he can complete the transaction. A hard copy of the waiver is at the front desk and participants are asked to sign and initial them upon arrival. Ms. Warren did not know whether Mr. Scheck was handed a hard copy of the waiver when he arrived for the spin class. No log of who trains each new person is maintained by the facility. Generally, the instructor teaches to the skill level of the class: if there are many beginners, the class is easier. Regardless, of the overall skill level, instructors usually warn beginners not to get up out

of the saddle. Ms. Warren testified that there is a training manual instructing staff on what to do with beginner/new spinners. Among the instructions is: 1) offer them water, 2) provide free shoes, and 3) set up the bike for them. It is also required that the resistance knob and brake mechanisms be described and the new rider is instructed to "stay in the saddles if they're uncomfortable." Ms. Warren does not recall who assisted Mr. Scheck that day and the two employees who worked there on the day of the accident are no longer with the company.

Ms. Regan, the Soul Ccycle instructor, recalls helping Mrs. Scheck get her bike ready for the class and spending a lot of time with this particular student. She testified she has a "spiel" she gives to beginners, consisting of how to use the resistance, where the emergency brake is and assuring them that there is no need to keep up with anyone else. Although she gave these instructions to Mrs. Scheck, she does not recall telling Mr. Scheck the same thing. Ms. Regan states she always asks beginners to raise their hand so she can spot them and keep an eye on them. She does not recall whether Mr. Scheck raised his hand or, if he did, whether she saw him.

Ms. Warren and Ms. Regan were each separately asked to describe the differences between a spin bike and a stationary bike. Ms. Warren responded that, unlike a regular bicycle, a spin cycle has a single fixed wheel. Unlike a regular stationary bike, each pedal will result in one revolution of the wheel. Ms. Warren testified that she had never ridden with anyone else who had used a similar bicycle. So long as the front wheel is spinning. The only way to stop the wheel from turning, and the pedals from turning as well, is to use the break. A rider cannot keep both feet still

and let the wheel spin. Just pushing with your feet to attempt to stop the wheel is futile "unless you have very strong legs."

Ms. Regan testified that instructs beginners that the bike has a weighted wheel and "you know [how] on a bike you can coast and stop your legs, Not on this. It's a weighted wheel, so if you stop your legs you're going to keep going. So you need to either turn the resistance up, or push down on the brake." standing up in the saddle, it is important that a rider not lean on the handlebars because "you can fall forward..." She also stated that the special shoes Mr. Scheck was wearing bound his feet to the pedals and, if you fall forward, "the legs would keep going..." from the momentum "until you push down on the brake." Ms. Regan specifically recalled that did not give these instructions to Mr. Scheck or tell him that "righty tighty" is how resistance is increased. According to Ms. Regan, this is an instruction she gives on an individual basis, not to the entire class. When asked whether the spinner had specific instructions or warning on it, setting forth these precautions, Ms. Regan replied "no." She also testified that the weighted wheel bike looks different than a stationary bike.

Applicable Law

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]).

Discussion

While the parties basically agree on the law, they dispute its application to the facts at bar. Plaintiff contends that by all appearances, the spin bike he voluntarily agreed to use during his class looks like any other stationary bike and that when he signed up to take a spin class he assumed it was like riding any other stationary bike he had seen in other gyms. Thus, his argument is he assumed a lower risk than it turned out to actually be. Taking this argument further, plaintiff urges the court to deny defendants' motion because he did not assume the more heightened risk and, therefore, the doctrine of implied assumption of risk applies. Plaintiff cites extensively to the Court of Appeals opinion in Trupia v. Lake George Central School Dist. (14 NY3d 392 [2010]). Trupia involved a 12 year old student enrolled in a summer school program. The child was injured when, while attempting to slide down a banister, he fell off. In the Court of Appeal's lengthy opinion Chief Judge Lipmann wrote that:

> We do not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out of school—only that the inference of such an assumption as a ground for exculpation may not be made in their case, or for that matter where adults are concerned, except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled.

Plaintiff maintains, based on this language, that the doctrine of the assumption of risk is no longer a complete bar to recovery, except in very limited circumstances which are not present in this case. Defendants, on the other hand, urge the court to apply the doctrine of primary assumption of risk. The doctrine of primary assumption of risk is

commonly applied in situations involving sports, both amateur and professional. A key distinction in these doctrines is that CPLR 1411, which addresses issues of comparative negligence, is applicable by its terms to implied assumption of risk (Abergast v. Board of Education, 65 NY2d 161 [1985]) whereas a voluntary participant in a sporting event assumes the known risks normally associated with that sport (see Morgan v. State of New York, 90 N.Y.2d 471, 484 [1997]). Thus, defendants argue Mr. Scheck knew or should have known, and therefore consented to the foreseeable consequences of his participation in the spin class (Turcotte v. Fell, 68 N.Y.2d 432, 439 [1986]).

Plaintiff's interpretation of the Trupia decision is unduly restrictive and ignores other, important language in that decision:

> We have recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise. We have not applied the doctrine outside of this limited context and it is clear that its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation...

It is clear from the rest of the Trupia opinion that the doctrine of primary assumption of risk was not a possible defense for the defendant-school because the injury producing activity was unsupervised "horseplay" (i.e. school negligence) not an activity normally associated with the heightened risks attendant to sports activities. The Court did not, as plaintiff suggests, sweep away a legion of cases in which courts have

recognized that certain sport activities present significantly heightened risk of injury. This point is evident from the Court of Appeals' more recent decision in Bukowski v. Clarkson University (19 NY3d 353 [2012]). Bukowski involved a student whose jaw was broken when he was struck in the face with a baseball. The accident occurred when, for the very first time, he was pitching live in a cage. The court affirmed dismissal of plaintiff's case because "there was insufficient evidence from which a jury could have concluded that plaintiff faced an unassumed, concealed, or even enhanced risk . . ."

A participant in a recreational activity will not, however, be deemed to have assumed unreasonably increased risks (Morgan v. State, 90 NY2d 471 [1997] [player tripped on torn net]). Furthermore, the defendant has a duty to make the conditions as safe as they appear to be (Gortych v. Brenner, *supra*, citing Turcotte v. Fell, 68 NY2d at 439). Thus, when measuring the defendant's duty to a plaintiff, the risks undertaken by the plaintiff also have to be considered (Turcotte v. Fell, supra at 438).

Mr. Scheck agreed to take a spin class that was led by an instructor in a gym like setting. He provided shoes he was unfamiliar with, the seat was adjusted for him and he was given preliminary instructions about how the resistance on the bike worked. He was also shown the brake on the bike. No one explained the relationship between the tension knob, the brake and how the weighted wheel worked, although the instructor and Ms. Warren each acknowledged the uniqueness of the bikes used at the facility. The entire instructional phase took two minutes, even though the person assisting him knew he was new to the class and had never "spun" before. The Soul Cycle training

manual requires that new spinners be given certain preliminary instructions that apparently were not provided to Mr. Scheck.

A participant in a sporting activity is held to have consented to the risks inherent in it "[i]f the risks of the activity are fully comprehended or perfectly obvious" and 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 the participation" (Turcotte v. Fell, supra at 439). There is appellate authority that use of a gym facility is not participation in a sporting event (Corrigan v. Musclemakers Inc., 258 A.D.2d 861 [3rd Dept 1999]; Petretti v. Jefferson Valley Racquet Club, Inc., 246 A.D.2d 583 [2nd Dept 1998]). Furthermore, where the plaintiff is a neophyte, the level of his or her experience is taken into account (Petretti v. Jefferson Valley Racquet Club, Inc., supra). Although the doctrine of primary assumption of risk has been applied in a recreational setting where a biker is injured (Gortych v. Brenner, 83 A.D.3d 497 [1 Dept 2011]; Cotty v. Town of Southampton, 64 A.D.3d 251 [2nd Dept 2009]), a primary distinguishing factor is that those cases involved bikers pedaling outdoors and their injuries were due to a defective condition on the road or path they were on. In each of those cases, defendants were denied summary judgment because they failed to make a prima facie showing that the primary assumption of risk doctrine was applicable to the activity in which the plaintiff was engaged at the time of his or her accident.

In this case, defendants have failed to prove, as a matter of law, that plaintiff

assumed the risks inherent in participating in a spin class. Not only were plaintiff's feet clipped into pedals, the pedals continue to move even though he wanted to stop them from moving. Mr. Scheck stated that once he was propelled over, he could not reach the brake because it was under his body. Plaintiff has raised triable issues of fact whether the activity he agreed to participate in was as safe as it appeared to be and whether he assumed the risks which he was subjected to (Petretti v. Jefferson Valley Racquet Club, Inc., 246 A.D.2d 583 [2nd Dept 1998]). There are also triable issues of fact whether the defendants properly instructed him in how to use the equipment. Therefore, defendants' motion to dismiss the complaint against Soul Cycle is denied.

Defendants' motion to dismiss the claims against Ms. Rice is granted, as plaintiff has presented no argument about why that branch of their motion should be denied. No factual claim is made that she was involved in the accident or that she acted outside her capacity as a member of the company. Therefore, the claims against Ms. Rice are hereby severed and dismissed in their entirety.

Conclusion

Defendants' motion for summary judgment is granted only to the extent that the claims against Ms. Rice are severed and dismissed. The balance of defendants' motion for summary judgment is, however, denied not only because Soul Cycle has failed to prove it is entitled to such relief as a matter of law, but also because there are triable issues of fact. The issue of the timeliness of this motion is decided in favor of the defendants and plaintiff's objection to this motion as untimely is denied.

This case is ready to be tried. Plaintiff shall serve a copy of this decision and order on the Mediator who is assigned to this case and also on the Office of Trial Support so the case can be scheduled for trial.

Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
July 26, 2012

So Ordered:

Hon. Judith J. Gische, JSC