SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

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TIFFANY ENOCHER, an infant by her Mother and Natural Guardian, PATRICIA CANTY and PATRICIA CANTY, Individually,

Plaintiffs,

-against-

ROCKVILLE CENTER UNION FREE SCHOOL DISTRICT and SKI SHAWNEE, INC., Individually and D/B/A SHAWNEE MOUNTAIN SKI AREA and MAXIMUM TOURS, INC.,

Defendants.

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ROCKVILLE CENTER UNION FREE SCHOOL DISTRICT,

Third-Party Plaintiff,

-against-

THE MAXIMUM TOURS LLC,

Third-Party Defendant.

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Index No.: 013028/11
Motion Sequence...01, 03
Motion Date...05/22/12
XXX

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Notice of Motion (Mot. Seq. 03).....x
Memorandum of Law.....x
Plaintiffs' Affirmation in Opposition.....x

Affirmation in Response.....x
Affirmation in Support.....x

Upon the foregoing papers, the motion (Mot. Seq. 01[1]) by the Defendant, Maximum Tours, Inc. ("Maximum Tours"), seeking an Order of this Court granting Summary Judgment, pursuant to CPLR § 3212, dismissing the complaint of the Plaintiffs, Tiffany Enocher, an infant by her mother and natural guardian, Patricia Canty, and Patricia Canty, individually, and any and all cross-claims against it; and the motion (Mot. Seq. 03) by the Defendant, Rockville Center Union Free School District ("School District"), seeking an Order of this Court granting Summary Judgment, pursuant to CPLR § 3212, dismissing the complaint of the Plaintiffs and any and all claims against it, are determined as hereinafter provided.

A negligence/personal injury action was filed by the Plaintiffs initially against the Inc. Village of Rockville Centre and the School District in April, 2010, under Index No. 007145/10, arising from an accident where the Infant Plaintiff fell from a ski lift during an elementary school skiing field trip[2]. The School District commenced a Third-Party action against Maximum Tours in April, 2011. Maximum Tours' instant motion arises from an underlying, but related, negligence action filed by the Plaintiff against this Defendant in this

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[1]Motion Sequence 01 was brought under Index Number 013028/11 and will be considered under this Index Number pursuant to the Order of this Court (Marber, J., 2/8/12) consolidating the two actions under Index Number 007145/10.

[2]According to the record, the Defendants, Ski Shawnee, Inc., individually and d/b/a Shawnee Mountain Ski Area, have not appeared in this action.

Court in September, 2011, under Index No. 013028/11.

The Plaintiffs allege, inter alia, that the School District and Maximum Tours failed to adequately supervise the Infant Plaintiff and protect the safety and well-being of students on the ski trip.

On January 17, 2009, the Infant Plaintiff, then a fifth grade student in the Rockville Centre Union Free School District, participated in a school sponsored ski trip at Shawnee Mountain in Pennsylvania. According to Maximum Tours, who arranged this and other ski trips for the School District, its role was limited to transporting the students to the trip and arranging for the students to access the activities offered by Shawnee Mountain. Towards the end of the trip, the Infant Plaintiff sustained injuries when she fell from the chair lift. She was riding alone and the safety bar was not lowered.

The Infant Plaintiff had prior experience skiing on at least three family trips, where she used ski lifts. She also took skiing instruction during her prior family ski trips and during the subject trip. According to the Defendants, the Plaintiff, Patricia Canty, executed the Shawnee permission form and consented for her mother to execute the Maximum Tours reservation form on her behalf.

It is disputed as to how the Infant Plaintiff fell from the chair lift. However, the crux of her allegations is that she was unable to pull down the safety bar, and consequently, she did not feel that she was secured in the chair.

Maximum Tours argues that no liability can attach to it as it owed no duty to

the Plaintiff regarding the safety and/or operation of any equipment at the ski lodge. Further, they argue the Infant Plaintiff assumed the known and obvious risks associated with the activity of skiing.

Maximum Tours submits, as supporting evidence, the pleadings under Index No. 007145/10 and Index No. 013028/11, and the following transcripts: the Infant Plaintiff's November, 2009 Section 50 (h) hearing and June, 2011 Examination Before Trial; the Examination Before Trial of Nicholas Fredericks, President of Shawnee Ski resort; the Examination Before Trial of Joseph Paluseo, the Infant Plaintiff's fifth grade teacher; the Examination Before Trial of Scott Bochner, President Maximum Tours; and the Examination Before Trial of the Plaintiff, Patricia Canty.

The Defendant, School District, argues that the applicable standard in this case is that the school exercise reasonable care to protect students participating in extracurricular sports from unassumed, concealed or unreasonably increased risks. The School District also argues that the Plaintiff failed to demonstrate that the School District had specific knowledge of the conditions that caused the injury. Prior school sponsored ski trips with a similar adult to student ratio occurred virtually without incident. Additionally, the School District points out that there had been no reports of any prior accidents or incidents involving chair lifts.

In support of its motion, the School District submits: copies of the pleadings under Index No. 007145/10; the foregoing transcripts as well as transcripts of non-party witnesses, Kaitlin Smalling, and Hailey Dahlberg; fliers advertising the ski trip; release forms

executed by the Plaintiff and her designee; a list of chaperones and assigned students as provided by School District teachers; and pictures of the ski lift.

The Plaintiffs, in opposition, argue that both Defendants were negligent in its supervision of the Infant Plaintiff. As to Maximum Tours, the Plaintiffs contend that it contracted with the School District to provide the ski trip and has accordingly, assumed responsibility for supervision of the students. As such, the Plaintiffs contend that chaperones should have been stationed at the foot of the skiing hills to ensure that the students were complying with safety rules and to protect them if they failed to invoke such safety measures, which included the wearing of a helmet.

The Plaintiffs submit an affidavit from an expert in school management, Evelyn Finn, as evidence, in addition to pictures of the signs posted at the ski lifts and the actual ski lift and chair.

The standards of summary judgment are well-settled. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.(see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d

320, 324 [1986]).

To hold a defendant liable in common-law negligence, a plaintiff must demonstrate: a duty owed by the defendant to the plaintiff; a breach of that duty; and that the breach constituted a proximate cause of the injury (see *Ingrassia v. Lividikos,* 54 A.D.3d 721 [2nd Dept. 2008]). Generally, the existence of a defendant's duty is a legal question to be determined by the court in the first instance. In making such a determination, courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was reasonably foreseeable (see *Lynfatt v. Escobar,* 71 A.D.3d 743 [2nd Dept. 2010]).

It is also well settled that although schools are under a duty to adequately supervise the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision, they are not insurers of the safety of their students, for they cannot be reasonably expected to continuously supervise and control all of the students' movements and activities (*Totan v. Board of Educ. of City of New York*, 133 A.D.2d 366 [2nd Dept. 1987]). In order to find that a school has breached its duty to provide adequate supervision, the plaintiff must show that the school had sufficiently specific knowledge or notice of the dangerous conduct which caused injury and that the third-party acts could reasonably have been anticipated (*Hernandez v. Christopher Robin Academy* , 276 A.D.2d 592 [2nd Dept. 2000]).

As to the standard of care, this Court is guided by the rationale and facts under

Monti v. Herricks Union Free School Dist., 15 Misc.3d 1110(A), NY Sup Ct 2007. While the Defendant school advertised the ski trip, there is nothing in the record indicating that it was part of a required course. The Infant Plaintiff's participation in the ski trip was voluntary. The general factors that invoke the doctrine of inherent compulsion, to wit, a direction by a superior to do the act and an economic compulsion, are not present. Therefore, the applicable standard of care is whether the School District exercised ordinary and reasonable care. The standard of care applicable to organizers of sporting or recreational events is to exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed, or unreasonably increased risks (*Monti v. Herricks Union Free School Dist*).

In the instant matter, the School District Defendant sustained its burden of establishing that it had no actual or constructive notice of any dangerous conduct. The Defendant offered such ski trips with Maximum Tours for the past six or seven years, (see Notice of Motion, Exhibit P). According to this Defendant, the only injury reported was a minor one and not one concerning the use of ski lifts. Further, there were no reports of any safety or behavior issues with the participating students, and there were no reports of students complaining about being unable to access the safety bar. The Defendant School District employed the buddy system during prior ski trips, and a similar supervision model was used for the trip at issue. The subject event was attended by 36 children, 12 adults -2 teachers and 10 parent chaperones. It is also noted that the chaperone instruction sheet indicated that the

students would be allowed to ski unsupervised on the trip.

Similarly, as with the *Monti* plaintiff, the Court considered the skiing ability of the plaintiff. The Infant Plaintiff testified that she had skied on prior family trips, and her maternal grandmother, who executed the release and permission forms, indicated that the Infant Plaintiff was an intermediate skier. Additionally, the Infant Plaintiff took a ski lesson and she skied up and down the intermediate hill for several runs (School District Notice of Motion, Exhibit D, Tr. T. Enocher, p. 65, ln. 2-4). Prior to her fall, the Infant Plaintiff ascended the hill without incident, by way of the chair lift at issue, without lowering the safety bar and without her assigned ski buddy (School District Notice of Motion, Exhibit D, Tr. T. Enocher, p. 100, ln. 11-22). There was no such indication that the Infant Plaintiff required special instruction and/or supervision.

Although the Court does not have to reach the issue regarding the assumption of risk, the lengthy argument and discussion as set forth by the Defendants, warrants consideration. While knowledge of the risk plays a role, whether the risk is inherent in the activity engaged in, is the crucial determination. The test for the Court is whether the conditions caused by the Defendants' alleged negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport. The Plaintiff must have knowledge of any defect caused by the Defendants and an appreciation for the risk associated with his participation for the assumption of risk doctrine to apply *Anand v. Kapoor*, 61 A.D.3d 787 [2nd Dept.2009]).

This Court, pursuant to *DeLacy ex rel. DeLacy v. Catamount Development Corp.*. 2002 WL 553707 (N Y Sup Ct 2002), does not find that the Infant Plaintiff's fall from the ski lift is a normal occurrence arising out of the activity of skiing based on the record before it. The Infant Plaintiff was not injured while skiing down the slope and did not collide with an object on the slope or with other skiers. Falling from a chairlift raises questions of fact as to whether the acts of omissions of the parties or the design of the chairlift caused or contributed to the accident, and whether the parties had some obligation to protect young riders from the hazard of falling from the lift (see *DeLacy ex rel. DeLacy v. Catamount Development Corp*)[3]. Although the *DeLacy* court denied the defendant's summary judgment motion, that case is distinguishable from instant matter in that the *Delacy* defendant is the actual operator and/or owner of the ski establishment. Here, the corresponding party would be the Shawnee Defendants, who are non-moving parties.

As to the Defendant, Maximum Tours, a tour operator has no duty to warn group members of a possible hazardous condition on property it neither owns nor occupies. However, where the tour operator assumes a duty to the plaintiff, such as where one of its employees directs the tour participant to proceed in a particular manner, the operator may be held liable if its conduct placed the plaintiff in a more vulnerable position. Here, the Third-Party Defendant established its entitlement to judgment as a matter of law by demonstrating

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[3]It is noteworthy that the *DeLacy* defendant was the actual proprietor of the ski lift and that court found a question of fact as to whether a duty was breached on behalf of that defendant.

that it did not own or operate the premises where the incident occurred or assume a duty of care by directing the Infant Plaintiff's activities within the premises (see *Maraia v. Church of Our Lady of Mount Carmel,* 36 A.D.3d 766 [2nd Dept. 2007]).

Moreover, the Plaintiff, through the Infant Plaintiff's maternal grandmother, executed and completed the Maximum Tours Reservation Tours Form which provided in relevant part:

> "...[Tour] Operator acts only in the capacity of agent for the passenger and therefore accepts no responsibility beyond making the initial arrangements for the package...Passengers acknowledge that there are inherent risks in skiing and other winter sports and accordingly agree not to hold Tour Operator, its agents or organizers liable for injury, loss or damage to persons or property therefrom. In addition, Tour Operator cannot be held responsible for...non-operation of lofts at ski areas...Persons hiring skis, boots and poles or other equipment use same at their own risk and assume any and all liability for personal injury or property damage resulting from said use..." (see Maximum Notice of Motion, Exhibit N) [4].

Based on the foregoing, the Maximum Defendants have expressly set forth the nature of its relationship with the Infant Plaintiff. Such relationship, therefore, precludes any liability on the part of the Defendant, either on a theory of negligence or breach of contract. The disclaimer in the form negates any intent of the Defendant to assume a contractual obligation for the Infant Plaintiff's safety during the trip (see *Dorkin v. American Exp. Co.*, 43 A.D.2d 877 [3rd Dept. 1974]).

Here, the Infant Plaintiff was a participant in a ski trip sponsored by tour

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[4]It is noted that the Infant Plaintiff's mother was in the hospital at the time the form was executed and she gave her consent for her mother to sign on her behalf.

company who basically provided tickets for winter sport events and transportation to the ski park. Since Maximum Tours was merely sponsoring the ski trip and neither controlled nor maintained the operation of the ski slope where the accident occurred and was not realistically in a position to assume such control, the existence of a duty owed to the Infant Plaintiff has not been established. Further, there is no evidence that Maximum Tours directed the Infant Plaintiff's activities on the day of the trip (see *Mongello v. Davos Ski Resort*, 224 A.D.2d 502 [2nd Dept. 1996]).

As to both Defendants, the Court is also guided by the standard applicable to amusement and carnival ride cases. It is well settled that liability for an injury sustained on an amusement or carnival ride is premised upon control, supervision, and or management of the injury causing ride. Liability for a dangerous condition is generally predicated on either ownership, control or a special use of the property. The evidence presented by the moving Defendants indicated that neither owned or controlled the chair lifts or the property upon which the lifts were situated (see *Lopez v. Allied Amusement Shows, Inc.*, 83 A.D.3d 519 [1st Dept. 2011]).

Accordingly, the School District and Maximum Tours have met their prima facie entitlement to summary judgment.

In opposition, in order for this Court to find that the Defendants failed to provide adequate supervision, the Plaintiffs must show that the School District had sufficient specific knowledge or notice of the dangerous conduct and that the alleged breach of duty

was a proximate cause of the injuries sustained (see *Ronan v. School Dist. of City of New Rochelle,* 35 A.D.3d 429 [2nd Dept. 2006]). Additionally, the Plaintiffs must show that Maximum Tours exercised control and/or guided the Infant Plaintiff's activities during the field trip.

The Plaintiffs argue that in the exercise of reasonable care, chaperones should have been stationed at each slope, to guide and instruct. Implicit in the Plaintiffs' argument, is a suggestion that had a chaperone been present when the Infant Plaintiff attempted to ride the ski lift by herself, the chaperone may have prevented the accident or even kept the Infant Plaintiff from riding without the safety bar in place. The Court in *Monti v. Herricks Union Free School Dist.*, rejected a similar argument set forth by the plaintiff and regarded such argument as speculative. There, that plaintiff argued that the placement and/or stationing of chaperones, could have prevented that plaintiff from falling while skiing down the beginner trail. Here, the Plaintiffs' arguments and/or suggestions are also speculative at best. A showing of some negligent act or inaction referenced to the applicable duty of care owed to Infant Plaintiff by the Defendant, which may be said to constitute a substantial cause of the events which produced the injury, is necessary (see *Morgan v. State of New York,* 90 N.Y.2d 471; *Cissone v. Bedford Central School District,* 21 A.D.3d 437).

Even assuming there is a question of fact as to the adequacy of supervision, liability for any such negligent supervision does not lie absent a showing that it constitutes a proximate cause of the injury sustained. As such, the Plaintiffs have not shown that the

school had sufficient specific knowledge or notice of the dangerous conduct which caused injury (see *Mayer v. Mahopac Cent. School Dist.*29 A.D.3d 653 [2nd Dept. 2006]). Further, the Plaintiffs failed to demonstrate that the Defendants' alleged lack of supervision proximately caused the Infant Plaintiff's injury, particularly when the Plaintiffs have not sufficiently set forth the cause of the accident.

The Plaintiff first testified that her chair lift jerked and that her hands became slippery causing her to be unable to hold on the seat, resulting in her fall (School District Notice of Motion, Exhibit D, Tr. T. Enocher, p. 113, ln. 4-24), and then later testified that her ski fell off and then she lost her balance in an attempt to pull the safety bar down (School District Notice of Motion, Exhibit E, Tr. T. Enocher, p. 256, ln. 8,9). The non-party witnesses testified that the Plaintiff lost both skis, and that she was "crying" and "in hysterics", prompting them to offer words of reassurance (School District Notice of Motion, Exhibit L, Tr. H. Dahlberg, p. 32, ln.25-32, Exhibit K, Tr. K. Smalling, p. 29-33). Further, neither witness observed the Infant Plaintiff attempting to reach the safety bar, but instead observed her leaning forward on the seat to look for her skis, with both hands holding the chair, immediately before she fell.

In further support of their opposition to the Defendants' motions, the Plaintiffs rely on the affidavit of an expert. The expert, however, offered conclusory opinions without any factual support. Where an expert states his conclusion without reliance on any facts or data, his opinion has no probative value (see *Maldonado v. Lee,* 278 A.D.2d 206 [2nd Dept.

2000]). Here, the expert opines as to what the Defendants "should have" done to prevent the accident and ensuing injury without any factual basis for her opinion.

The Court has considered the remaining arguments set forth by the Plaintiffs, and has determined that they are unavailing.

Accordingly, it is hereby

ORDERED, that the motion (Mot. Seq. 03) by the Defendant, Rockville Center Union Free School District, seeking an Order of this Court granting Summary Judgment, pursuant to CPLR § 3212, dismissing the complaint of the Plaintiffs and any and all claims against it, is **GRANTED**; and it is further

ORDERED, the motion (Mot. Seq. 01) by the Defendant, Maximum Tours, Inc., seeking an Order of this Court granting it summary judgment, pursuant to CPLR § 3212, dismissing the complaint of the Plaintiffs, and any and all cross-claims against it, is **GRANTED**; and it is further

ORDERED, that the Plaintiffs' complaint and all related cross-claims against these defendants, are **DISMISSED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

DATED: Mineola, New York
July 25, 2012

Hon. Randy Sue Marber, J.S.C.
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