Regan v City of New York
2012 NY Slip Op 32660(U)
October 12, 2012
Sup Ct, New York County
Docket Number: 100471/10
Judge: Barbara Jaffe
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SCANNED ON 10/23/2012
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C.
Justice

PART 5

Index Number : 100471/2010
REGAN, SCOTT
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT Cal # 102

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). 1

Answering Affidavits — Exhibits ______ | No(s). 2

Replying Affidavits ______ | No(s). 3

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
OCT 23 2012
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 10/12/12 OCT 12 2012

______, J.S.C.
BARBARA JAFFE J.S.C.

1. CHECK ONE: .... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: .... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

SCOTT REGAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF PARKS AND RECREATION, RANDALL'S ISLAND SPORTS FOUNDATION, INC., and EDSO SPORTS, INC.,

Defendants.

Index No. 100471/10

Argued: 6/12/12
Motion seq. nos.: 002

DECISION AND ORDER

FILED
OCT 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated April 12, 2012, defendant Edso Sports, Inc. (Edso) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it.

By notice of motion dated April 3, 2012, defendants City, City of New York Department of Parks and Recreation (Parks), and Randall's Island Sports Foundation, Inc. (Foundation) (collectively, City) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross claims against them. Plaintiff opposes.

The motions are consolidated for decision.

On July 16, 2009, at approximately 7:45 pm, plaintiff was playing in a softball game organized by Edso on field 11 located on Randall's Island Park, when he was allegedly injured when he tripped and fell over a large boulder located in the outfield. (Affirmation of J.

Papapanayotou, Esq., dated Apr. 12, 2012 [Papapanayotou Aff.], Exh. 1). Edso had been granted permission to use the field pursuant to a permit issued by Parks, and plaintiff had signed an Edso Sports Roster, which provides at the bottom as follows: "Edso Sports, its Directors and Representatives, have no responsibility or liability for damage to property or injury to any person, whether players, spectators or others, no matter how caused. This is the sole responsibility of, and is assumed by, the Teams, Players, Participants and Spectators and the Companies they represent." (*Id.*).

At a 50-h hearing held on October 27, 2009, plaintiff testified, as pertinent here, that on the date of his accident, the weather was sunny and clear. He had played on field 11 more than 10 times before the accident, but the field had been changed right before his accident by the placement of boulders around the outfield fall, which separated the foul territory of the field from a parking lot behind the field. During the game, a fly ball was hit over his head and while running to catch it, he ran into one of the boulders. Plaintiff was aware that the boulders were on the field, but did not see the one he fell over before he hit it as it was only approximately a foot and half to two feet high and 18 inches wide. (*Id.*, Exh. 3).

At an examination before trial (EBT) held on May 26, 2011, Philip Scott McAuliffe, a Parks supervisor in charge of maintaining and operating Randall's Island Park, testified that Parks placed the boulders, which he described as very large, at the edge of the outfield of field 11 between the fall of 2008 and the spring of 2009 in order to prevent cars from entering the outfield. The boulders had an average height of three to five feet and there were more than 10 of them in the outfield. They were movable only by heavy equipment and would have been visible from the field's home plate. McAuliffe is unaware of any prior accidents involving the boulders

on field 11, and acknowledged that boulders are not usually part of the structure of a baseball or softball outfield, and that there was no indication or warning of any kind in the outfield that the boulders were present. Edso was not involved in the placement of the boulders but was advised of their placement. (*Id.*, Exh. 4).

On August 22, 2011, Pauline Gambuto, Edso's Commissioner, testified at an EBT that City never advised Edso about the boulders and that it had first learned of them when Edso employees went to the field at the beginning of the season in April 2009. She was unaware of any other injuries involving the boulders. (*Id.*, Exh. 2).

In October 2011, plaintiff's expert measured the boulder on which plaintiff fell, finding that it is six feet, five inches long, six feet, two inches wide, and one foot, five inches high. He states that the boulder was within the field and thus constituted a dangerous obstruction of which players would be unaware absent a warning track or fencing. (Affirmation of James P. Nally, Esq., dated Apr. 12, 2012 [Nally Aff.], Exh. C).

I. EDSO'S MOTION

Edso argues that it may not be held liable to plaintiff as it neither created the dangerous condition nor had the authority to correct it by removing the boulders, that plaintiff assumed the risk of injury by playing on the field with the boulders present, and that he signed a waiver relieving Edso of liability. (Papapayanatou Aff.).

While plaintiff opposes Edso's motion, he does not address Edso's arguments. Thus, absent any dispute that Edso neither caused nor created the dangerous condition, nor had any control over the boulders or their placement, or that it had no notice of any prior incidents with the boulders, it has established, *prima facie*, that it may not be held liable to plaintiff.

II. CITY'S MOTION

City contends that plaintiff assumed the risk of injury as the boulders constituted a risk inherent in playing on field 11 and were open and obvious. (Affirmation of Yael Barbibay, ACC, dated Apr. 3, 2012).

Plaintiff maintains that City unreasonably increased the risk inherent in playing on the field by its placement of the boulders, which were not part of the structure and configuration of field 11, and denies that the boulders were open and obvious. (Nally Aff.).

The Court of Appeals has recently held that those who participate in athletic and recreational activities voluntarily assume "significantly heightened risks" and thereby negate a defendant's liability in order to preserve the "beneficial pursuits as against the prohibitive liability to which they would otherwise give rise." (*Trupia v Lake George Central School*, 14 NY3d 392 [2010]). A plaintiff engaged in athletic and recreational activity is deemed to have assumed only "fully comprehended or perfectly obvious" risks, those "dangers inherent in the sport." (*Morgan v State of New York*, 90 NY2d 471, 483 [1997]). On the other hand, a risk is not assumed where it is unique and constitutes a dangerous condition "over and above the usual dangers that are inherent in the sport" (*id.* at 485), or where the defendant's conduct unreasonably increases the risk (*Cotty v Town of Southampton*, 64 AD3d 251, 254 [2d Dept 2009]). However, a participant resumes the risk associated with the construction of a playing field and any open and obvious conditions thereon. (*Id.*).

Here, plaintiff admitted that he saw the boulders before he began playing on field 11, and based on his own expert's measurements, the boulders were large enough to be seen by plaintiff. They were thus open and obvious, and even if they constituted a dangerous condition or

obstruction, plaintiff voluntarily assumed the risk of running into them in the outfield by choosing to play despite knowing their obvious presence. (*See Trevett v City of Little Falls*, 6 NY3d 884 [2006] [as proximity of pole to basketball court was open and obvious, risk of colliding with it inherent in playing on that court, and thus plaintiff assumed risk of injury]; *Castro v City of New York*, 94 AD3d 1032 [2d Dept 2012] [plaintiff voluntarily participated in softball game on field despite knowing that doing so could bring him in contact with open and obvious raised sewer grate on field on which he fell]; *Palladino v Lindenhurst Union Free School Dist.*, 84 AD3d 1194 [2d Dept 2011] [plaintiff injured while playing handball when he stepped on improperly placed grate of which he had been aware]; *Brown v City of New York*, 69 AD3d 893 [2d Dept 2010] [plaintiff assumed risk of injury when, while playing football on field, his knee struck cement strip located approximately five feet outside field; plaintiff was aware of strip and it was open and obvious]; *Robinson v New York Hous. Auth.*, 268 AD2d 290 [1st Dept 2000] [plaintiff assumed risk of playing on field with low-lying tree branches as he was aware of tree and branches before starting game]; *Brown v City of Peekskill*, 212 AD2d 658 [2d Dept 1995] [plaintiff aware of existence of dangerous curb at basketball court where he was injured]; *Tarigo v Club Med Hualtulco*, 207 AD2d 709 [1st Dept 1994] [plaintiff fell over flag that marked boundary of playing field and which he had seen before starting to play]).

Notwithstanding plaintiff's expert's opinion that the boulders unreasonably increased the risk of injury to a player on the field, he cites no violation by City of any specific safety standard. (*See Brown*, 69 AD3d at 894 [expert affidavit failed identify violation of any specific safety standard applicable to field]).

Accordingly, it is hereby

ORDERED, that defendant Edso Sports, Inc.'s motion for summary judgment is granted, and the complaint and any cross claims are dismissed against said defendant with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that defendants The City of New York, City of New York Department of Parks and Recreation, and Randall's Island Sports Foundation, Inc.'s motion for summary judgment is granted and the complaint and any cross claims are dismissed against said defendants with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

DATED: October 12, 2012
New York, New York

FILED
OCT 23 2012
NEW YORK
COUNTY CLERK'S OFFICE
BARBARA JAFFE