At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on October 9, 2012.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

CHRISTINA J. TONE and STEVEN TONE,

Plaintiffs,

v.

SONG MOUNTAIN SKI CENTER and SOUTH SLOPE DEVELOPMENT CORP. and their Agents, Servants and Employees, and PETER HARRIS, Individually and d/b/a Song Mountain Ski Center, and Individually as a member, officer, shareholder and director of SOUTH SLOPE DEVELOPMENT CORP. and SONG MOUNTAIN SKI CENTER,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2009-7913
RJI No.: 33-10-1650

APPEARANCES: **MICHELLE RUDDEROW, ESQ., OF WILLIAMS & RUDDEROW, PLLC**
For Plaintiffs

MATTHEW J. KELLY, ESQ., OF ROEMER, WALLENS, GOLD & MINEAUX, LLP
For Defendants

The defendants have moved for summary judgment dismissal of the complaint against them, which alleges that the plaintiff suffered a fractured hip at Song Mountain on February 25, 2007 while attempting to exit a chair lift. The defendants move for dismissal on the grounds that all of the evidence shows that the ski lift was properly designed and operated and that the plaintiff assumed the risk of her injury.

As the proponent of the motion, the defendants are required to establish their entitlement to dismissal as a matter of law through the tender of admissible evidence. *See, Hunt v. Kosterellis*, 27 AD3d 1178 (4th Dept. 2006). The defendants have done so here through their reliance, *inter alia*, on the plaintiff's deposition testimony. The plaintiff testified that she was skiing with her nine year old son at the time and that she was an intermediate level skier with approximately fifteen years of experience. She owned her own skis and boots and had skied more than fifty times. On the date of the accident, she took two runs down the mountain and on both occasions rode the triple chair lift without incident. On her third occasion up the mountain she again rode the triple chair lift. Her son was with her, as was her ex-husband. Plaintiff testified that she sat on the right side of the chair, her son sat in the middle and the ex-husband sat on the left side. According to plaintiff, while riding up the chair lift she noticed that her skis were crossed with her son's skis, so she let her son get off the chair lift first. Her ex-husband also got off the chair lift, but plaintiff waited. During her deposition, the plaintiff was shown the "Incident Report Form" completed at the time, which she signed. The form indicates that plaintiff said that she let her son get off first because their skis were crossed and that "I waited too late, and when I jumped approximately 6 feet, landed on my left hip." When asked at her deposition what she did after her son got off, she responded that she did not remember, that she did not recall trying to get off, but that it happened so quickly that when the chairlift made its turn she "just flew off."

The defendants also rely upon an inspection report completed by the Department of Labor on December 12, 2006, two months before the accident. An inspection of the chairlift was conducted by the Industry Inspection Bureau. Two violations unrelated to the design of the lift or

exit ramp were found at that time and two unrelated violations were subsequently determined. Defendants note, however, that no deficiencies were found with respect to the design of the lift or exit ramp, the speed of the lift, or the location of the safety gate on the lift.

In addition, the defendants rely upon New York State regulations referenced in the Department of Labor inspections and standards promulgated by the American National Standards Institute which address industry wide safety standards for a variety of products and industries. Those regulations provide that the maximum relative carrier speed in feet per minute for chair lifts states that a triple chairlift carrying skiers may travel at a maximum speed of five hundred feet per minute. Defendants also provide an affidavit of Peter Harris, the President of South Slope Development Corporation, the operator of Song Mountain. Harris indicates that the chairlift traveled at a maximum speed of four hundred to five hundred feet per minute, which is equal to less than five miles per hour. He also claims that plaintiff failed to depart from the chairlift at the appropriate time, despite being warned by the unload signs. In addition, he indicates that the lift has certain safety mechanisms and if the plaintiff was to stay on the lift as it turned around the bull wheel heading downhill, her skis would hit the safety gate, which would stop the lift and allow for a safe evacuation of the lift. Plaintiff instead jumped from the lift before the safety gate, resulting in her being injured. He notes that the design of the lift specifically would have prevented the injury if she had remained on it, and the fact that the lift operated property is demonstrated by the fact that of the three people on the lift, two of them exited the lift in accordance with proper procedure and were not injured.

Defendants have also established in the first instance that any argument that the lift attendants were not properly trained is without merit, since Harris testified at his deposition that

Song Mountain uses an industry standard lift operating training program designed by the National Ski Areas Association and that the program includes an in depth training DVD, training manuals and tests. The defendants also rely upon the deposition testimony of Carl Blaney, a long time attendant, who testified that the lift attendants took annual quizzes prior to the start of the season in order to demonstrate that they understood their duties in operating the lifts. It is also argued that plaintiff's contention that the lift should have been slowed because plaintiff's nine year old son was riding is incorrect. Blaney testified that the lift would not have been slowed for that reason, nor is there any evidence that simply because a child is riding the lift that it should be slowed. Defendants also point to the lift attendant's daily log for the date of the accident, which demonstrates that the triple chair lift was fully checked on that date to ensure that all systems were working properly. The stops switches and safety gate were working, the ramps were snow covered and at a proper grade, the phones were working properly and the counter weight on the lift was clear and within normal limits. It is argued that since all of the evidence demonstrates that the lift was operating properly, the cause of the accident was solely plaintiff's failure to disembark at the appropriate location, followed by her failure to remain seated once she missed the off load ramp. The defendants have met their burden in establishing that since there is no evidence that they improperly maintained the ski lift or that it was negligently designed, plaintiff cannot make a showing that the risks to her were increased or hidden. *See, Sontag v. Happy Valley, Inc*., 38 AD3d 1350 (4th Dept. 2007); *see also, Painter v. Peek'n Peak Recreation, Inc*., 2 AD3d 1289 (4th Dept. 2003).

The defendants have also met their burden in the first instance of establishing that the plaintiff assumed the risk of her injury. Defendants point to the General Obligations Law, which addresses safety in skiing. The triple chair lift is identified as a "passenger tramway", a mechanical device intended to transport skiers for the purpose of providing access to ski slopes and trails as defined by the Commissioner of Labor... *See, GOL §18-102.* Under "duties of passengers" the following are listed: to familiarize themselves with the safe use of any tramway prior to its use and...to board or disembark from passenger tramways only at points or areas designated by the ski area operator. *See, GOL §18-104; see also, 12 NYCRR 54.4(a).* A ski area operator is relieved from liability for risks inherent in the sport of downhill skiing, including the risks associated with the use of a chair lift when the participant is aware of, appreciates and voluntarily assumes the risk. *See, DeLacy v. Catamount Development Corp.*, 302 AD2d 735 (3rd Dept. 2003). In assessing whether one injured in the course of participating in a sporting or recreational event has assumed the risk posed by an assuredly dangerous condition, the critical inquiry is whether that condition is unique, constituting a hazard over and above the usual dangers that are inherent in the sport. *See, Simoneau v. State of New York*, 248 AD2d 865 (3rd Dept. 1998), *citing, Morgan v. State of New York*, 90 NY2d 471 (1997). Defendants have established that plaintiff was an experienced skier and had skied extensively at Song Mountain. It is further argued that the plaintiff assumed the risk of her injury by failing to comply with the requirements of the safety and skiing code by disembarking at the appropriate location. Plaintiff testified that she failed to get off the lift at the dismount area and had she stayed on she would have tripped the safety gate, which would have stopped the lift automatically. Inasmuch as the

defendants have met their burden in the first instance, the burden shifts to the plaintiff to raise an issue of fact. *See, Hunt, supra.*

The plaintiff points to a recent Fourth Department case where the plaintiff skier was riding a chair lift with her son, a snow boarder. Plaintiff's skis became entangled with the snow board and her son panicked and began yelling that he could not untangle the skis, despite frantic attempts. *See, Miller v. Holiday Valley, Inc*., 85 AD3d 1706 (4th Dept. 2011). Plaintiff's son exited the lift, but he pulled the plaintiff out of the lift chair in the process and she was injured. *See, id*. Plaintiff alleged that the top lift attendant should have slowed or stopped the lift because she and her son reached the unloading area. *See, id*. The court found that a question of fact existed as to whether the alleged failure to operate the ski lift in a safe manner was a proximate cause of the accident. *See, id*. In so finding, the court noted plaintiff's deposition testimony that her son was yelling and making frantic attempts to untangle the skis and snow board and that plaintiff's expert relied on that testimony in concluding that "the top lift attendant had sufficient time to observe plaintiff's distress and to engage in what defendant's night lift operation supervisor characterized as the exercise of judgment to slow or stop the lift." *Id*. Defendants correctly argue that there is no evidence in the present case that plaintiff and her son caused any type of commotion prior to reaching the unloading area or tried to alert the attendant in any way for the top lift attendant to have noticed they were having any difficulty. The plaintiff has failed to come forward with proof in admissible form as in *Miller, supra*. that either the ski lift operator saw or should have seen that the plaintiff was in distress. Nor does plaintiff provide an expert opinion that based upon the facts here, the operator had time to take an action that would have prevented plaintiff's fall. Plaintiff has likewise failed to raise an issue of fact as to whether she

assumed the risk of her injury. Plaintiff does not dispute her experience as a skier or that she was familiar with the subject lift, as required by law. See, *GOL §18-104; see also, 12 NYCRR §54.4.* Nor has she submitted evidence to raise an issue of fact as to whether the defendants "created a dangerous condition over and above the usual dangers inherent in the sport of [downhill skiing]" *Bennett v. Kissing Bridge Corporation, 17 AD3d 990 (4th Dept. 2005), quoting, Owen v. RJS Safety Equip., 79 NY2d 970 (1992); see also, Miller, supra, quoting, Sontag, supra.*

The plaintiff has also failed in her burden with respect to whether the lift attendants were properly trained, and in fact points to the National Ski Area's Association Training completed by defendant's employees. Nor has the plaintiff raised an issue as to whether the lift was properly operating on the day of the accident. Plaintiff has not disputed the inspection reports or the defendants' compliance with the requisite regulations.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the defendant's motion for summary judgment dismissal is granted.

ENTER

Dated: November 2, 2012
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Defendants' Notice of Motion for summary judgment, dated May 14, 2012;

2. Affidavit of Matthew J. Kelly, Esq. in support of motion for summary judgment, dated May 14, 2012, and attached exhibits;

3. Affidavit of Peter Harris in support of motion for summary judgment, dated November 25, 2011;

4. Memorandum of Law in support of defendant's motion for summary judgment, dated May 11, 2012;

5. Affidavit of Michelle Rudderow, Esq. in opposition to defendant's motion, dated September 17, 2012, and attached exhibits;

6. Affidavit of Christina Tone in opposition to motion, dated September 7, 2012, and attached exhibits;

7. Reply Affidavit of Peter Harris, dated October 1, 2012; and

8. Reply Affidavit of Matthew J. Kelly, Esq., dated September 28, 2012;