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SHORT FORM ORDER

INDEX No. 08-10458
CAL No. 12-02084OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-23-13
ADJ. DATE 7-16-13
Mot. Seq. # 006 - MG
007 - MG

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KEVIN GRIGG and TARA GRIGG,

Plaintiffs,

- against -

SPLISH SPLASH AT ADVENTURELAND, INC., PALACE ENTERTAINMENT, FESTIVAL FUN PARKS, LLC, PROSLIDE TECHNOLOGY, INC. and EXPRESS CONSTRUCTION CORP.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Proslide Technology Inc, dated February 19, 2013, and supporting papers (including Memorandum of Law dated February 19, 2013); (2) Notice of Motion/Order to Show Cause by the defendants Splish Splash, Palace Entertainment and Festival Fun Parks, dated February 23, 2013, supporting papers (including Memorandum of Law dated February 22, 2013); (3) Affirmation in Opposition by the plaintiffs, dated May 13, 2013, and supporting papers; (4) Reply Affidavit by the defendant Proslide Technology Inc., dated July 12, 2013 (including Memorandum of Law dated July 12, 2013); (5) Reply Affirmation by the defendants Splish Splash, Palace Entertainment and Festival Fun Parks, dated July 15, 2013; (6) Other Sur-Reply Affirmation by the plaintiffs, dated July 24, 2013 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (# 006) by defendant ProSlide Technology, Inc. and the motion (# 007) by defendants Splish Splash at Adventureland, Inc., Palace Entertainment Holdings Inc., s/h/a Palace Entertainment, and Festival Fun Parks, LLC are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 006) by defendant ProSlide Technology, Inc. for an order dismissing the complaint against it is granted; and it is further

ORDERED that the motion (# 007) by defendants Splish Splash at Adventureland, Inc., Palace Entertainment Holdings Inc., s/h/a Palace Entertainment, and Festival Fun Parks, LLC for an order dismissing the complaint and all cross claims against them is granted.

Plaintiff Kevin Grigg commenced this action to recover damages for personal injuries arising out of an accident in August 4, 2006 on a ride known as "Splash Landing" at a water amusement park operated by defendant Splish Splash at Adventureland, Inc. ("Splish Splash"). The complaint alleges that defendant Palace Entertainment Holdings Inc., s/h/a Palace Entertainment ("Palace Entertainment"), owned and maintained the subject ride. It further alleges, among other things, that defendant Proslide Technology, Inc. ("ProSlide") designed and manufactured the subject ride. Plaintiff Kevin Grigg's wife, Tara Grigg, asserts a derivative cause of action.

Defendants Splish Splash, Palace Entertainment, and Festival Fun Parks, LLC move (# 007) for summary judgment dismissing the complaint and all cross claims against them, asserting that they owed no duty of care to the plaintiff; the Splash Landing ride was safe for those patrons who chose to ride it; they did not create the alleged dangerous condition of the ride and had no actual or constructive notice of the alleged defective condition; they were not the proximate cause of the accident; and that plaintiff Kevin Grigg was fully aware of and appreciated the risk of injury associated with riding the Splash Landing attraction, and assumed the risk of injury as a matter of law. In support, moving defendants submit, *inter alia*, the pleadings, the transcripts of the deposition testimony dated April 14, 2009 and September 14, 2011 of plaintiff Kevin Grigg, and the deposition testimony dated April 14, 2009 of Michael Bengtson, a representative of Splish Splash.

At his deposition dated April 14, 2009, plaintiff Kevin Grigg testified to the effect that on the morning of the accident, he arrived at Splish Splash at approximately 10:00 a.m. with his wife, Tara Grigg, and three children. It was his first time there. Although he had never been to a water park, he was able to swim and had been in in-ground pools before. He and his daughter, then six years old, went onto the Splash Landing ride. There was a staging area on the top of the ride where a bunch of employees were working. He and his daughter sat in a two person tube; he was sitting in a hole in the back and was holding rubber handles on the side of the tube, and his daughter was sitting in a hole in the front and was holding onto his legs which wrapped around her. When they reached the bottom of the slide, they shot out into the pool, and his daughter slipped through the tube. He was getting off the tube, trying to get the tube off his daughter. His foot made contact with the bottom of the pool, but he lost his footing, causing him to fall sideways. In an attempt to break his fall, he stuck his left hand out and caught the side of the pool, approximately three feet away, causing him to injure his left hand. He stated that the bottom of the pool seemed more slippery than any other pool that he has been in. However, he did not observe any algae,

dirt, debris or substance on the bottom of the pool. At the time of the incident, he was 5' 10" tall, and the water was two feet deep.

At his deposition dated September 14, 2011, plaintiff Kevin Grigg testified to the effect that on the morning of the accident, when he reached the top of the ride, a female attendant instructed him to sit in the back of the tube and told him to use his legs to hold on as best he could to his daughter who was sitting in the front of the tube. During the course of the ride, his daughter hung onto his legs with her fingers. As they emerged from the enclosed area to slide into the pool, his daughter "started losing her grip" and fell through the bottom of the tube into the pool.

At his deposition dated April 14, 2009, Michael Bengston testified to the effect that he has been the general manager of Splish Splash in Riverhead, New York since 2005. He stated that Festival Fun Parks, LLC is the owner of the water park which Splish Splash operates. He stated that there were about 32 slides at Splish Splash in 2006. The Splash Landing ride was a single and double tube flume that goes into a splash pool. The Splash Landing ride was already installed by Express Construction before he took the job as the general manager of Splish Splash in 2005. The height restriction for the ride provided; if a guest is under 42 inches, the guest must be accompanied by an adult. A double tube, 48 inch long, is used for two riders. The larger of the two individuals would be instructed to sit in the back, and the smaller guest would be in the front. Once the patrons had gone through the ride and came out, there is a splash pool at the bottom of the ride. The ride has three separate flumes, all of which empty out into the pool. The dimensions of the pool were 30 feet by 30 feet. There is a staircase at the end of the pool to exit, and the bottom of the pool gradually inclines up towards the stairs. He stated that in August 2006, the rides were inspected on a daily basis by the maintenance department to ascertain that they are working, and there was a document entitled "Splish Landing maintenance sign off and checklist" for the ride, including an item checking "pool clear of dirt and debris." The water is checked hourly throughout the day. According to the checklist document, the head guard of the aquatics department conducted an inspection of the ride at 8:59 a.m. on the day of the accident, and there was no dirt or debris in the pool.

In an action for negligence, a plaintiff must establish that the defendant owed him a duty to use reasonable care, and that it breached that duty (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Liability attaches to the owner or possessor of property only if the owner possessor created the condition or had actual or constructive notice thereof. To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (*see* ***Ortiz v Splish Splash***, 17 Misc3d 1104A, 851 NYS2d 59 [Sup. Ct., Nassau County 2007]; citing ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]).

A plaintiff is barred from recovery for injuries which occur during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law (*see* ***Reidy v Raman***, 85 AD3d 892, 892, 924 NYS2d 581 [2d Dept 2011]; ***Leslie v Splish Splash at Adventureland***, 1 AD3d 320, 321, 766 NYS2d 599 [2d Dept 2003]). The doctrine of primary assumption of risk provides that a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation (*see* ***Morgan v State of New York***, 90 NY2d 471, 484, 662 NYS2d 421 [1997]; ***Zachary v***

Young Israel of Woodmere, 95 AD3d 946, 944 NYS2d 203 [2d Dept 2012]). A defendant seeking to be relieved from liability based on such doctrine must establish that the injured plaintiff was aware of the risks, appreciated the nature of the risks, and voluntarily assumed the risks (*see* ***Morgan v State of New York***, *supra*; ***Turcotte v Fell***, *supra*; *see e.g.* ***Carracino v Town of Oyster Bay***, 247 AD2d 501, 669 NYS2d 328 [2d Dept 1998]). A negligence claim, however, will not be dismissed if the defendant's negligent action or inaction "created a dangerous condition over and above the usual dangers" inherent in the sport or activity (*see* ***Morgan v State of New York***, *supra*; ***Owen v R.J.S. Safety Equip.***, 79 NY2d 967, 582 NYS2d 998 [1992]; ***Rosenbaum v Bayis Ne'Emon, Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]). In assessing the risks assumed by a plaintiff when he or she elected to participate in the activity and the duty of care owed by the owner or operator of the recreational facility, a court must consider the skill and experience of the particular plaintiff (*see* ***Morgan v State of New York***, *supra*; ***Maddox v City of New York***, 66 NY2d 270, 278 [1985]), as well as the nature of the defendant's conduct (*see e.g.* ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989] [plaintiff does not assume concealed or unreasonably increased risks]; ***Turcotte v Fell***, *supra* [plaintiff does not assume risk of reckless or intentional conduct]). Thus, "[i]f the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" to make the conditions as safe as they appear to be (*id.* at 439; *see* ***Manoly v City of New York***, 29 AD3d 649, 816 NYS2d 499 [2d Dept 2006]).

Here, moving defendants established their prima facie entitlement to summary judgment as a matter of law by presenting evidence that plaintiff Kevin Grigg, who was an adult at the time of the accident, understood and voluntarily assumed the risks inherent in utilizing the Splash Landing ride (*see* ***Morgan v State of New York***, *supra*; ***Owen v R.J.S. Safety Equip.***, *supra*; ***Reidy v Raman***, *supra*; ***Leslie v Splish Splash at Adventureland***, *supra*). Moreover, defendants established that they did not have actual or constructive notice of the conditions complained of by plaintiff Kevin Grigg, and that they met their duty to maintain the premises, particularly the Splash Landing ride, in a reasonably safe condition.

In opposition, plaintiffs failed to raise triable issues as to the existence of a dangerous condition over and above the risk inherent in riding the water slide, or whether Splish Splash engaged in any conduct that unreasonably increased or concealed the alleged danger (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Reidy v Raman***, *supra*; ***Leslie v Splish Splash at Adventureland***, *supra*). Plaintiffs' expert, Mr. Arthur Mittelstaedt, Jr., indicates that "Splish Splash failed to provide a bottom surface sufficient for patrons to have traction composing themselves exiting from the splashdown and pool." He also states that ProSlide failed to provide "specifications for the splashdown pool." The Court finds that such generalized, conclusory, and speculative assertions with no independent factual basis are insufficient to defeat a motion for summary judgment (*see* ***Losciuto v City Univ. of New York***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Pirie v Krasinski***, 18 AD3d 848, 796 NYS2d 671 [2d Dept 2005]). Accordingly, the motion (# 007) by Splish Splash, Palace Entertainment, and Festival Fun Parks, LLC is granted, and plaintiffs' complaint and all cross claims against them are severed as well as dismissed.

Defendant ProSlide moves (# 006) for summary judgment dismissing the complaint against it, arguing that it did not design, manufacture, or install the splash pool of the subject water slide, and that it was not responsible for operating, maintaining, or repairing the subject ride. In support, ProSlide submits,

inter alia, the pleadings, the deposition testimony dated September 15, 2011 of Andreas Tanzer, a representative of ProSlide, and an affidavit of Andreas Tanzer.

At his deposition dated September 15, 2011, Andreas Tanzer testified to the effect that he is the director of innovations, research and standards of ProSlide and has worked for ProSlide for 25 years. ProSlide designs and installs water slides for water parks. ProSlide was contracted by Splish Splash to design and manufacture the "Giant Continuous Rivers" ride, which consists of three separate tube rides, in the area of "Splash Landing." ProSlide supplied the fiberglass slide and did the structural engineering for the support of the tower and the foundations. The scope of work was solely the fiberglass section that made up the flume, the sealant and the bolts for the flume, and the structural design of the tower and the support systems. There is a landing pool at the bottom of each ride. ProSlide did not provide any services with respect to the landing pool. Rather, the design, engineering, and installation of the pool was performed by another contractor. The only input that ProSlide had for the pool was the "safe landing zone." Mr. Tanzer described the safe landing zone as "the area such that when [riders] come out of the end of the slide, it's the area that is required for the inner tube to come down to a near stop or floating very, very slowly prior to people exiting such that they don't come in contact with stairs or side walls." He stated that ProSlide did not determine or recommend the size of the pools.

In his affidavit, Andreas Tanzer stated that on August 8, 1990, ProSlide entered into an agreement with Splish Splash for the design, engineering, manufacturing and sale of fiberglass components for the subject water slide. Mr. Tanzer stated that pursuant to the agreement, ProSlide designed, manufactured, and provided the fiberglass components of the water slide. However, ProSlide was not responsible for the construction or assembly of the water slide and for the design or construction of the splash pool at the bottom of the water slide. Moreover, he stated that ProSlide was not responsible for operating, maintaining or operating the water slide, including the splash pool since it opened to the public in 1991 at Splish Splash.

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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see* ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, if a defendant in no way controlled the instrumentality causing the accident, there can be no imposition of liability (*see* ***Ketchum v National Standard Co.***, 239 AD2d 881, 661 NYS2d 583 [4th Dept 1997]; ***Novoa v Woodson Inc.***, 229 AD2d 934, 645 NYS2d 191 [4th Dept 1996]; ***Gerdowsky v Crain's New York Bus.***, 188 AD2d 93, 593 NYS2d 514 [1st Dept 1993]).

Here, ProSlide established its prima facie entitlement to summary judgment as a matter of law by presenting evidence that it did not design, install, maintain, own or control the subject splash pool where plaintiff Kevin Grigg slipped and fell (*see* ***Novoa v Woodson Inc.***, *supra*).

In opposition, plaintiffs failed to raise triable issues as to whether ProSlide, who designed and manufactured fiberglass components of the slide, was responsible for the accident of plaintiff Kevin Grigg, who slipped on the bottom of the splash pool which was located at the bottom of the slide. Accordingly, ProSlide's motion is granted, and plaintiffs' complaint and all cross claims against it are severed as well as dismissed.

Dated: 12/5/13

PETER H. MAYER, J.S.C.