Hines v City of New York
2016 NY Slip Op 30504(U)
March 24, 2016
Supreme Court, New York County
Docket Number: 151542-2012
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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HELENE HINES and GEORGE HINES,

Plaintiffs,

-against-

CITY OF NEW YORK, KORFF ENTERPRISES, INC., and CENTRAL PARK CONSERVANCY,

Defendants.

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Index No. 151542-2012

DECISION/ORDER

Motion Sequence 003

HON. GEORGE J. SILVER, J.S.C.

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

Papers	Numbered
Notice of Motion, Affirmation In Support & Collective Exhibits Annexed---------	1, 2, 3
Answering Affirmation, Collective Exhibits Annexed & Memorandum of Law---	4, 5, 6
Reply Affirmation----------	7

In this action to recover for personal injuries allegedly sustained by plaintiff Helene Hines (Hines) in the 2011 Nautical New York City Triathlon (triathlon) defendants City of New York, Korpff Enterprises, Inc. and Central Park Conservancy (collectively defendants) move pursuant to CPLR § 3212 for an order granting them summary judgment dismissing the complaint. Hines and her husband, plaintiff George Hines (collectively plaintiffs), who asserts a derivative claim, oppose the motion.

Hines, an experienced para-athlete, claims she was injured during the running portion of the triathlon when she was operating a push-rim racer and was struck by an alleged non-participant jogger. The accident occurred in Central Park at or around West 100th Street and West Drive. The bill of particulars alleges that the defendants were negligent in the ownership, operation, management, maintenance, control and supervision of the incident location in that defendants negligently permitted and/or allowed a non-participant jogger to enter upon the race curse and violently collide with Hines. Prior to the triathlon, all participants were required to sign a liability waiver in person before receiving their race packet and race bibs. Defendants argue that Hines signed the waiver and by doing so expressly assumed the risk of a collision. The waiver, entitled "Event Registration, Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement", states:

> I HEREBY ACKNOWLEDGE AND ASSUME ALL OF THE RISKS OF PARTICIPATING IN THIS EVENT. . . . I also assume any and all other risks associated with participating in this Event, including but not limited to the following: falls, dangers of collisions with vehicles, pedestrians, other participants and fixed objects; the dangers arising from surface hazards, tides, equipment failure, inadequate safety equipment; and hazard that may be posed by spectators or volunteers; and weather conditions. I further acknowledge that these risks include risks that may be the result of ordinary negligent acts, omissions, and/or carelessness of the Released Parties, as defined herein. I understand that I will be participating in the Event at my own risk, that I am responsible for the risk of participation in the Event.

The waiver further states:

> I WAIVE, RELEASE AND FOREVER DISCHARGE Event Producer, World Triathlon Corporation, the Race Director, USA Triathlon . . . the City of New York, Event sponsors, Event Organizers, Event promoters, Event producers, race directors . . . all other persons or entities involved with the Event, and all state, city, town, county, and other governmental bodies, and/or municipal agencies whose property and/or personnel are used and/or in any way assist in locations in which the Event or segments of the Event take place . . . from any and all claims, liabilities of every kind, demands, damages . . . , losses . . . and causes of action, of any kind or any nature, which I have or may have in future . . . that may arise out of, result from, or relate to my participation in the Event . . . including my death, personal injury, partial or permanent disability, negligence, property damage and damages of any kind, . . . even if any of such claims Claims are caused by the ordinary negligent acts, omissions, or the carelessness of the Released Parties.

Hines denies signing the waiver and argues in the alternative that the waiver violates General Obligations Law § 5-326 because she paid a fee to participate in the triathlon. Hines also contends that defendants created and enhanced an unanticipated risk within the running portion of the triathlon by inappropriately situating cones and improperly stationing marshals in the area of her accident. Hines argues that she expected, based upon her past triathlon experience, that cones would be separated 20 feet apart and that marshals would be readily apparent within the areas between the cones. Instead, plaintiff claims the cones were separated 70 feet apart and there were no marshals present in the area where her accident occurred. Hines contends that defendants, through there setup of the race course, heightened the risk of non-participants interfering with the race and that she did not assume such heightened risks when she entered the triathlon. According to Hines' athletic administration and safety management expert,

the placement of cones 70 feet apart limited the sight lines of bystanders walking toward the race and increased the probability of confusion and misapprehension. Hines' expert also contends that on a race course that traverses a highly populated area marshals must be easily seen and heard on the course. According to Hines' expert, defendants' failure to properly delineate the race course with appropriately spaced cones and to properly position marshals between the cones were deviations from accepted sports safety practices which proximately caused Hines' accident.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Contractual agreements to waive liability for a party's negligence, although frowned upon, are generally enforceable where not expressly prohibited by law (*Gross v Sweet*, 49 NY2d 102, 105, 400 NE2d 306, 424 NYS2d 365 [1979]). Language relieving one from liability must be unmistakable and easily understood. (*id.* at 107). The waiver at issue here clearly and

unequivocally expresses the intention of the parties to relieve defendants of liability for their own negligence (*Schwartz v Martin*, 82 AD3d 1201 [2d Dept 2011]) and because the entry fee paid by Hines was for her participation in the triathlon, not an admission fee allowing her to use the public park and roadway where her accident allegedly occurred, the waiver does not violate General Obligations Law § 5-326 (*see Brookner v New York Roadrunners Club, Inc.*, 51 AD3d 841 [2d Dept 2008]).

With respect to the signature on the waiver, while the opinion of defendants' forensic expert is inadmissible, an expert's opinion is not required to establish that the signature on the waiver is Hines' (*see John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620 [2d Dept 2008] [defendant failed to submit an affidavit of a handwriting expert or of a lay witness familiar with defendant's handwriting to establish that the signature on the agreement was not hers]). George Hines, who as a party to the action is an interested witness, testified that he believed the signature on the waiver was Hines'. Moreover, as defendants point out, athletes could not participate in the triathlon without signing the waiver in person and presenting photographic identification at a pre-race expo and Hines was seen by non-party witness Kathleen Bateman of Achilles International, Inc. at the expo waiting in line with her handlers to pick up her race bib. In opposition to defendants' prima facie showing that Hines signed the enforceable waiver, Hines' bald, self-serving claim that she did not sign it, which is not supported by an expert's opinion, does not raise a triable issue of fact (*see Abrons v 149 Fifth Ave. Corp.*, 45 AD3d 384 [1st Dept 2007]; *Peyton v State of Newburgh, Inc.*, 14 AD3d 51 [1st Dept 2004]).

Although an enforceable release will not insulate a party from grossly negligent conduct, the alleged acts of defendants with respect to the placement of cones and the stationing of marshals in the area where Hines' accident occurred do not rise to the level of intentional wrongdoing or evince a reckless indifference to the rights of others (*Schwartz*, 82 AD3d at 1202 [alleged acts of negligence did not rise to the level of intentional wrongdoing where a marshal at a bicycle race was injured by a non-participant bicyclist]). Hines' expert expressly states that defendants' actions with respect to the placement of cones and marshals were deviations from accepted sports safety practices. Thus, Hines' expert's opinion is that defendants were merely negligent, not grossly negligent.

Hines has also failed to raise a triable issue of fact as to whether the placement of cones and marshals by defendants improperly enhanced an unanticipated risk of collision. Hines' expert's affidavit fails to establish the foundation or source of the standards underlying the expert's conclusion that the placement and positioning of cones and marshals along the running portion of the triathlon was negligent and, as such, the affidavit lacks probative value (*see David v County of Suffolk*, 1 NY3d 525, 526, 807 NE2d 278, 775 NYS2d 229 [2003]). Moreover, the primary assumption of the risk doctrine 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" (*Morgan v State of New York*, 90 NY2d 471, 484, 685 NE2d 202, 662 NYS2d 421 [1997]) and it is "not necessary to the application of [the doctrine] that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as the he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox*, 66 NY2d 270, 278, 487 NE2d 553, 496 NYS2d 726 [1985]). Awareness of risk, including risks created by less than optimal conditions

(*Latimer v City of New York*, 118 AD3d 420 [1st Dept 2014]), "is not to be determined in a vacuum" (*Morgan*, 90 NY2d at 486) but, rather, "against the background of the skill and experience of the particular plaintiff" (*id.*). Hines is a highly decorated and highly experienced para-athlete who participated in dozens races over her career, many of which took place in Central Park. Hines' testimony that other race courses in Central Park were set up differently and delineated with cones and marshals differently than the way in which defendants allegedly set up the triathlon course establishes that Hines was aware that collisions with non-participants were an inherent risk in participating in a triathlon in Central Park. Hines also testified that she was wearing a helmet at the time of the accident, further proof that she was aware that collisions of some type, whether with participants, non-participants or objects, were an inherent risk of participating in the race. "Inherency is the *sine qua non*" (*Morgan*, 90 NY2d at 484-486) and regardless of how defendants situated cones and marshals along the race course, Hines was fully aware of and fully appreciated the inherent risk of injury resulting from a collision during the triathlon. Defendants, therefore, are entitled to summary dismissal of the complaint.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that movants are to serve a copy of this order, with notice of entry, upon plaintiffs within 20 days of entry.

George J. Silver

George J. Silver, J.S.C.

Dated: 3/24/16
New York County

HON. GEORGE J. SILVER