McGuire v City of New York
2017 NY Slip Op 30230(U)
January 25, 2017
Supreme Court, Queens County
Docket Number: 10658/14
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

GRAHAM J. MCGUIRE,

Plaintiff,

-against-

THE CITY OF NEW YORK and FOREST GOLF CORP. d/b/a FLUSHING GOLF CORP.,

Defendants.

Index No. 10658/14

Motion
Date November 10, 2016

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Upon the foregoing papers it is ordered that this motion by defendants, The City of New York and Forest Golf Corp. d/b/a Flushing Golf Corp. ("Forest") for summary judgment pursuant to CPLR 3212 dismissing the complaint against them is hereby denied.

The underlying action involves one for personal injuries whereby on June 27, 2013, plaintiff, Graham J. McGuire was a passenger in a golf cart at or near the 11th fairway of Forest Park Golf Course in Woodhaven, New York when allegedly, the golf cart was going over a hill and slid down a slippery slope, thereby propelling plaintiff from the cart. Plaintiff alleges serious personal injuries due to the negligence of defendants. Defendants assert the defense of assumption of risk and move for summary judgment under such grounds.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden

of production" shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of triable issue of fact.

The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is such a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos* 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The role of the court is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman* 278 AD2d 811 [4th Dept 2000]; *see also*, *Yaziciyan v. Blancato*, 267 AD2d 152 [1st Dept 1999] ["The deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact."])

When the moving party has established entitlement to summary judgment as a matter of law, the opposing party must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action (*see, LaCapria v. Bonazza*, 153 AD2d 551 [2d Dept 1989]). The opponent of a motion for summary judgment, in order to avoid the granting of the motion, must ordinarily submit evidentiary proof in admissible form (*see*, CPLR 3212[b]).

It is fundamental that to recover in a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care and that the defendant breached that duty (*Turcotte v. Fell*, 68 NY2d 432, 437 [1986]). However, "[w]hen a person voluntarily participates in certain sporting events or athletic activities, an action to recover for injuries resulting from conduct or conditions that are inherent in the sport or activity is barred by the doctrine of primary assumption of risk" (*Cotty v. Town of Southampton*, 64 AD3d 251 [2d Dept 2009]).

"Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks which are inherent in the activity" (*see, Morgan v. State of New York*, 90 NY2d 471, 484 [1997]; *Turcotte v. Fell*, 68 NY2d 432, 439 [1986]). Risks inherent in a sporting activity are those which are known, apparent, natural,

or reasonably foreseeable consequences of the participation (*see, Morgan v. State of New York*, 90 NY2d at 484; *Turcotte v. Fell*, 68 NY2d at 439). Because determining the existence and scope of a duty of care requires "an examination of plaintiff's reasonable expectations of the care owed him by others" (*Turcotte v. Fell*, 68 NY2d at 437), the plaintiff's consent does not merely furnish the defendant with a defense; it eliminates the duty of care that would otherwise exist. Accordingly, when a plaintiff assumes the risk of participating in a sporting event, 'the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence' (68 NY2d at 438, quoting Prosser and Keeton, Torts "68, at 480-481 [5th ed])." (*Cotty v. Town of Southampton*, 64 AD3d 251 [2d Dept 2009]).

"The policy underlying the doctrine of primary assumption of risk is "to facilitate free and vigorous participation in athletic activities" (*Benitez v. New York City Bd. of Educ.*, 73 NY2d 650, 657 [1989]). Without the doctrine, athletes may be reluctant to play aggressively, for fear of being sued by an opposing player. As long as the defendant's conduct does not unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk (*see, Morgan v. State of New York*, 90 NY2d at 485; *Benitez v. New York City Bd. of Educ.*, 73 NY2d at 658; *Muniz v. Warwick School Dist.*, 293 AD2d 724 [2002])." (*Cotty v. Town of Southampton*, 64 AD3d 251 [2d Dept 2009]).

Awareness of the risk assumed is to be assessed against the background of the skill and experience of the particular plaintiff (*Morgan v. State, supra*). In *Turcotte v. Fell*, the Court of Appeals placed professional athletes[1] participating in sporting events into the category of "primary" assumption of risk, which limited defendant's duty to exercising due care to make the conditions as safe as they appear to be(68 NY2d at 438-439). Thus, relieving an owner or operator of a sports venue from liability for the inherent risks of engaging in the sport is justified when a consenting participant is (1) aware of the risks, 2) has an appreciation of the nature of the risks, and (3) voluntarily assumes the risks (*Morgan v. State*, 90 NY2d 471; *Turcotte v. Fell, supra; see, Verro v. NYRA*, 142 AD2d 396 [3d Dept 1989] [a professional athlete who is injured while participating in the dangerous sport activity of horse racing is presumed to have greater understanding of the dangers involved and is deemed to have consented, by his participation to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation]).

"It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" *(Maddox v. New York*, 66 NY2d 270, 278 [1985]). However, although "knowledge plays a role" "for purposes of determining the extent of the threshold duty of care," the inherency of the risk "is the sine qua non" (*Morgan v. State*, 90 NY2d 471 [1997]; *see*, *Rosati v. Hunt Racing, Inc.*, 13 AD3d 1129 [4th Dept 2004]).

In determining whether a defendant has violated a duty of care to a plaintiff engaged in a sporting activity, the applicable standard should include whether the conditions caused by defendant's negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport *(Morgan v. State*, 90 NY2d 471 [1997]; *Owen v. R.J.S. Safety Equipment, Inc.*, 79 NY2d 967 [1992]. Thus, there must be a showing of some negligent act or inaction, referenced to the applicable duty of care owed to the participant by the defendant, which may be said to constitute a substantial cause of the events which produced the injury (*Morgan v. State, supra)*.

Accordingly, a participant will not be deemed to have assumed the risk where the action is based on negligence which created additional risks not inherent in the sport (*Reid v. Druckman*, 309 AD2d 669 [1st Dept 2003] [ice skater did not assume risk of being bowled over by reckless rink safety personnel]; *Huneau v. Maple Ski Ridge, Inc.*, 17 AD3d 848 [3d Dept 2005] [issue of fact as to whether actions of attendants at snow tubing facility unreasonably increased the risk of injury]; *Rosati v. Hunt Racing, Inc.*, 13 AD3d 1129 [4th Dept 2004] [issue of fact whether improperly trained or negligent flagman is a risk inherent in sport of motorcross racing] (*Minuto v. State*, NYLJ, Sept 25, 2009, at 32, col 3 [Court of Claims] [granting summary judgment to 15 year old luge sled rider who was injured when her sled struck a worker standing in the track who was employed by defendant to perform track maintenance between sled runs, and finding that "a maintenance worker standing in the middle of the track is not an inherent risk of the sport of luge and constitutes a unique and dangerous condition beyond the usual dangers inherent in the sport]).

Defendants have failed to present a prima facie case that there are no triable issues of fact. In support of the motion, defendants submit, inter alia, the plaintiff's own examination before trial transcript testimony; the examination before trial transcript testimony of Robert Smith, the general manager of

Forest Golf; and the examination before trial transcript testimony of Alfred Huemmer, the superintendent of Forest Golf. The record reflects that plaintiff teed off at 10:30am, and the accident happened between 1:30pm and 2:30pm, the golf course is watered down every night from sundown to sun up, plaintiff described the weather as "Clear," "Beautiful" and "Gorgeous," and plaintiff played at that specific course 30 to 50 times a year between 2004 and 2013 when the subject accident occurred.

The Court finds that there are triable issues of fact concerning whether plaintiff did not know, and had no reason to know that that particular hill would be wet, particularly in light of the fact that the previous ten holes were dry, it was a dry day weatherwise, and he had never encountered water on that hole in prior years of playing golf. Plaintiff cannot be said to have assumed the risk, of a risk he did not know about, nor had reason to know about.

As defendants have failed to present a prima facie case, the Court need not examine plaintiff's opposition papers.

Accordingly, as there are no triable issues of fact, defendants' motion for summary judgment is denied.

This constitutes the decision and order of this court.

Dated: January 25, 2017

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Howard G. Lane, J.S.C.