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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF Justice PART 8

0114903/2002

THEODOROU, **ANDREAS**
vs
APHIS REALTY

MOTION DATE 10 22 | 3

SEQ 2

DISMISS ACTION

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

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ – Affidavits – Exhibits ... X-motion	1-6
Answering Affidavits – Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 15 2004
COUNTY CLERK'S OFFICE
NEW YORK

SCANNED JAN 14 2004

MOTION IS RESPECTFULLY REFERRED TO JUSTICE

Dated: JAN 08 2004

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY I.A.S. PART 8
----------X

ANDREAS THEODOROU.

Plaintiff,

-against-

Index No. 114903/02
Mot. Seq. No. 002

APHIS REALTY INC., THIASOS CAFÉ, THJASOS INC., A&A COORDINATION INC., and EVANGELOS FRAMPAS,

Defendants.

----------X

DIANE A. LEBEDEFF, J.:

Plaintiff was injured while dancing the Zambekio at the Thiasos Cafe, a Greek night club located on the second floor of a building at 59 West 21st Street in Manhattan. The building is owned by defendant Aphis Realty Inc. ("Aphis"), and the second floor is leased for use as a "café with musical entertainment" to defendants Thiasos Cafe, and Thiasos Inc. ("A&A/Thiasos"; motion, exhibit I). Defendants move for summary judgment dismissing plaintiffs complaint and all cross-claims in their entirety

Plaintiff slipped and fell on flowers and paper money that had been thrown on the floor throughout the evening by patrons of the Café. Both plaintiff and the Cafe owner testified that it is "customary" and traditional in Greek establishments for people to throw flowers and paper money at the musicians and dancers when musicians are playing, and that patrons bought carnations to throw from a woman who sold them at the Thiasos Cafe

American Museum of Natural History, 67 N.Y.2d 836 [1986]). These facts being essentially undisputed, Aphis is entitled to summary judgment dismissing the complaint against it.

The A&A/Thiasos defendants base their *summary* judgment motion on the "primary" assumption of risk doctrine, because the plaintiffs injury resulted from voluntary participation in a recreational activity presenting inherent and known risks. That doctrine rests on the common sense proposition that, "by engaging in a sport or recreational activity, a participant 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*, 90 N.Y.2d 471, 484 [19971). In the context of participation in sporting events, the Court of Appeals has explained that the assumption of risk doctrine has continued vitality, notwithstanding New York's adoption of comparative negligence:

> "Relieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks [citations omitted]. Thus, to be sure, a premises owner continues to owe 'a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty' (*Turcotte v. Fell, supra*, 68 N.Y.2d, at 439; see also, Prosser and Keeton, Torts § 68, at 485-486 [5th ed.]). The balance struck at the threshold duty stage of responsibility and adjudication is that the tort rules support a social policy to 'facilitatefree and vigorous participation in athletic activities'...." (*Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 657 [1989]).

The risks of slipping on flowers and coins on the floor while dancing the Zambekio were as apparent as the risk of slipping while tap dancing on a slippery dance floor (*LaFond v. Star Time Dance & Performing Arts Center*, 279 A.D.2d 509 [2d Dept. 2001]), or of

losing one's balance while dancing the Samba in slippers with three-inch heels ***(Nelson v. Cafe Wienecke, Inc.***, 18 A.D.2d 392 [1st Dept. 19631, aff'd 14 N.Y.2d 587 [1964]). In all cases, the inherent risks of the dance were known to the experienced dancers, and the resulting harm not actionable against the defendants.

This case is not one in which risks were "unreasonably increased or concealed *(Benitez v. New York City Bd. of Educ., supra,* 73 N.Y.2d at 658), or in which "the conditions caused by the defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport' (*Owen v. R.J.S. Safety Equip.*, 79 N.Y.2d 967, 970)" ***(Morgan v. State,*** 90 N.Y.2d 471 [1997]). Such increased and unique risks, not generally inherent in the situation presented, were found in ***Endres v. Mingles Restaurant, Ltd.***, 271 A.D.2d 207 (1st Dept. 2000), lv. dismissed 95 N.Y.2d 845 (2000), where the owner of the bar conceded that "patrons threw cups in which jello-based drinks had been served onto the floor." Since plaintiffs dancing was not inherently dangerous, it was not error to refuse to give an assumption of risk charge ***(zd.).*** In distinction, here, the flowers and paper money tossed by participants in the Greek dancing did not create such an unusual, unreasonably unsafe or inherently dangerous condition, but was an inherent part of the traditional music and dancing. Indeed, the cafe owner knew of no other accidents or falls on the dance floor for two years prior to plaintiff's accident (Ateshoglou dep., at 18-19)

Plaintiffs submission of a self-serving affidavit contradicting his earlier testimony cannot defeat summary judgment (see *Joe v. Orbit Industries, Ltd.*, 269 A.D.2d 121 [1st Dept. 20001; *Phillips v. Bronx Lebanon Hospital,* 268 A.D.2d 3 **18** [1st Dept. 2000]).

Moreover, the concept that the owner's incomplete efforts to sweep up the floor are analogous to negligent clearing of snow and ice, is unpersuasive. The flowers on the floor were visible to the dancers, and the owner did not increase any dangerous condition of the dance floor by having the floor swept periodically.

Accordingly, the motion for summary judgment is granted. No sooner than five days after service of a copy of this order with notice of entry and a proposed judgment upon plaintiff, the clerk shall enter judgment accordingly upon the presentation of appropriate papers.

This decision constitutes the order of the court.

Dated: **January** 8 ,2004

J.S.C.