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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11
Justice

Index Number : 114713/2009
BRIGNONI, IRMA
VS.
BIG BOWL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

OCT 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 29, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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IRMA BRIGNONI,

Index No. 114713/09

Plaintiff,

-against-

BIG BOWL LLC d/b/a LEISURE TIME BOWL,

Defendant.

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JOAN A. MADDEN, J.:

In this personal injury action, defendant Big Bowl LLC d/b/a Leisure Time Bowl, ("Leisure Time") moves for summary judgment dismissing the complaint against it. Plaintiff Irma Brignoni opposes the motion, which is denied for the reasons set forth below.

Background

Plaintiff alleges that she sustained personal injuries on September 13, 2009, at Leisure Time's bowling alley at 625 Eighth Avenue, New York, New York, while attempting to retrieve a bowling ball which had been thrown down the lane. Specifically, plaintiff alleges that, after her foot had crossed the foul line, the slippery condition of the lane caused her to slip and fall to the ground, causing injury to her shoulder.

At her deposition plaintiff testified that on the date of the accident, family members had taken her to Leisure Time's bowling alley to celebrate her birthday. Brignoni dep., at 15. Plaintiff testified that, at no time after entering the facility did any Leisure Time employee offer warnings or explanations of the rules of the bowling alley, and that no one told her that crossing the foul line was dangerous, nor did she see any

signs anywhere in the facility that warned bowlers of the slippery condition of the lanes. Id., at 21, 28.

The family bowled for approximately one hour without incident. Id., at 22. After the family had finished bowling for the evening, plaintiff observed her young grandson throw a ball down the same lane where they had just been bowling. Id., at 27. Plaintiff attempted to retrieve the ball by "speed walking" past the foul line in order to stop the ball from going any further down the lane. Id. Plaintiff does not recall how many steps she had taken past the foul line; however, before she reached the ball, both feet left the ground as she fell "up in the air," landing on her left hand and arm. Id., at 40, 42.

Plaintiff alleges that due to Leisure Time's negligence in failing to properly maintain the lanes, and in failing to properly warn patrons of the slippery condition of the lanes, she was caused to slip and fall and incurred a severe injury to her shoulder.

At his deposition, Albert Santana ("Santana"), a maintenance man/porter employed by Leisure Time, testified that he was working at the bowling alley on the night of plaintiff's accident. Santana dep., at 6-8. Santana is responsible for, *inter alia*, maintaining the approach area of the lanes, but does not do any work beyond the foul line. Id., at 18.

Santana stated that he had spoken to plaintiff and others in her party right after they had received their lane assignment. Id., at 30-32. Santana remembers explaining to them how to use the console and how to order food and drinks, and also informing them of the bowling alley's rules, including that no one should go past the foul line because the lanes were oiled and slippery. Id. Santana further testified that, on more than 20

occasions, he had observed a bowler slip and fall after someone had stepped beyond the foul line and tracked oil from the lane back to the approach. Id., at 41-43.

Leisure Time's head mechanic, Lawrence Kenny ("Kenny"), was also deposed and confirmed that he was responsible for cleaning and maintaining the lanes. Kenny dep., at 7. Kenny testified that after a cleaning machine is placed at the foul line, the appropriate program is set, and the machine proceeds down the lane towards the pins, then returns to the foul line. Id., at 26-7. The conditioning begins approximately four-and-a-half inches from the foul line which, according to Kenny, is "basically industry standard." Id. Kenny testified that a low viscosity oil is used on the lanes since this is the appropriate oil for the average Leisure Time bowler. Id., at 35. Kenny further testified that "every once in a while" people step over the foul line track oil from the lane into the approach. Id., at 47.

Leisure Time now moves for summary judgment, arguing that it has made a *prima facie* showing that it neither created the allegedly hazardous condition which caused the accident, nor had actual or constructive notice of the condition. Leisure Time also asserts that the record establishes that it provided adequate warnings of the condition, including a verbal warnings from an employee, and a conspicuous warning about not crossing the foul line that was in place at the console where the plaintiff sat throughout the evening. The sign reads, "Warning. Do not cross foul line! Condition on lane beyond foul line is slippery. Report abnormal conditions to the desk person. Do not operate bumpers! Contact desk person for assistance." See, Leisure Time's Exhibit J.

Further, Leisure Time asserts that, as a voluntary participant in bowling which is a sporting or recreational activity, plaintiff consented to those commonly-appreciated

risks which are inherent in and arise out of the nature of the activity generally, and which flow from such participation. See, Morgan v. State of New York, 90 N.Y.2d 471, 484 (1997); Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650 (1989); Leslie v. Splish Splash at Adventureland, 1 A.D.2d 320 (2003). In this connection, Leisure Time argues that the oil used to maintain the lanes is not a foreign substance and constitutes a commonly-appreciated risk that is inherent to the sport of bowling. In any event, Leisure Time maintains that no notice of any alleged defect or foreign substance was ever given or made by plaintiff or anyone on her behalf.

Thus, Leisure Time contends that as record demonstrates that there is no triable fact as to its negligence, it is entitled to summary judgment dismissing the complaint.

In opposition, plaintiff contends that since the oiling and maintaining of the lanes was under Leisure Time's exclusive control, triable issues of fact exist as to whether Leisure Time created the allegedly hazardous condition which caused plaintiff's injury. Additionally, plaintiff argues that, based on Mr. Santana's and Mr. Kenney's testimony acknowledging a persistent problem with bowlers tracking oil into the approach area, a triable issue of fact exists as to whether Leisure Time had notice of a slippery condition in the approach area.

In further support of her position, plaintiff submits the affidavit of John H. Hanst ("Hanst"), a Recreational Hazards Forensic Expert who states that he has extensive experience in recreational hazards, accident prevention and recreational safety. Hanst opines that Leisure Time did not adequately warn of the slip and fall danger in the area near the foul line since the sign on the console was too small and too inconspicuous to be sufficient warning. Hanst Affidavit, at 4. Additionally, he opines that since the scoring

is computerized, an entire game can be played without anyone sitting at the console, which means that the sign may be overlooked by a majority of bowlers. Id. Hanst further states since bowlers regularly track oil into the approach area, the danger of slipping and falling is significant and foreseeable. Id., at 5. Hanst believes additional warnings should have been placed throughout the alley and near the lanes themselves. Id.

Hanst also opines that the four-and-a-half inch area that remained un-oiled beyond the foul line was not a sufficient distance to protect against a slipping hazard, stating that the general guideline in bowling is to begin oiling at least six inches past the foul line." Id., at 4-5. He also states that use of a low viscosity oil used by Leisure Time caused the area to becomes slicker and more slippery than it would be with medium or high viscosity oil. Id. at 5. Hanst concludes that the lane in question was conditioned with too much low viscosity oil, so that bowlers who inadvertently stepped over the foul line would fall "as if they were slipping on a pond." Id.

Discussion

On a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the face..." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist and require a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

In the instant case, even assuming *arguendo* that Leisure Time has made a *prima facie* showing entitling it to summary judgment, plaintiff has controverted this showing by providing evidence sufficient to raise triable issues of fact.

An owner or occupier of a premises who makes it available to the public is obligated to use reasonable care to make the premise safe for its intended use. Shields v. Van Kelton Amusement Corp., 228 N.Y. 396, 397 (1920); 85 N.Y.Jur.2d Premises Liability § 36. This rule applies to a proprietor of a bowling alley who has been held to a owes a duty to his or her patrons to exercise ordinary and reasonable care to keep the premises in a reasonably safe condition for its contemplated use. See, Stelter v. Cordes, 146 A.D. 300, 300 (2nd Dept 1911). Such proprietor is not, however, an insurer of their patron's safety. See, Preston v. Newburgh Y.M.C.A., 271 A.D. 797 (2d Dept 1946). Thus, if an injury is caused by a defect in the approach or sliding area of a bowling alley, liability must be predicated on the negligence of the proprietor in causing or creating the defect, having actual or constructive notice of a defect, and/or negligently failing to discover the defect. Kappes v. Cohoes Bowling Arena, Inc., 2 A.D.3d 1034 (3rd Dep't 2003); Overton v. Leisure Time Recreation, 280 A.D.2d 655 (2d Dept 2001); Stelter v. Cordes, 146 A.D. at 300.

Here, Leisure Time argues that although it oiled the lanes, and thereby created the condition which caused plaintiff to fall, oil on the lane does not constitute a foreign substance. Rather, Leisure Time argues that it is entitled to summary judgment as the oil that caused plaintiff's accident is an example of a commonly-appreciated risk that is inherent to the sport of bowling, in which plaintiff voluntarily participated, and an open and obvious condition.

Leisure Time's position is without merit. The assumption of risk to be implied from participation in a sport with awareness of the risk "is generally a question of fact for a jury [and] dismissal of a complaint as a matter of law is warranted [only] when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact." Maddox v. City of New York, 66 N.Y.2d 270, 279 (1985).

Although Leisure Time argues that plaintiff assumed the risks associated with bowling, it is well settled that a participant in a recreational activity will not be deemed to have assumed the risk if, due to another's negligence, the risks "were unique and resulted in a dangerous condition over and above the usual dangers inherent in the activity" See Rios v. Town of Colonie, 256 A.D.2d 900 (3rd Dep't 1998). Here, the expert affidavit submitted by plaintiff raises triable issue of fact as to whether Leisure Time enhanced the risk of injury through its negligence in oiling the lane four-and-a-half inches past the foul line as opposed to six inches, and by using low viscosity oil.[1] See Garafolo v. A.M.F. White Plains Bowl, 277 A.D.2d 283 (2d Dept 2000)(bowling alley is not entitled to summary dismissal in cases where the bowling patron alleges a slip and fall accident due to misapplied oil or conditioning wax on the bowling lane);Conary v. Clover Lanes, 199 A.D.2d 1067 (4th Dept 1993)(triable issue of fact existed as to whether bowler assumed the risk of injury when she stepped over foul line and slipped and fell on oil applied to bowling lane).

Next, in light of Mr. Santana's and Mr. Kenny's testimony that they regularly saw bowlers slip and fall as a result of oil applied to the alley, a jury must decide whether Leisure Time had notice of a dangerous condition and whether the warnings provided

[1]In contrast to the cases relied upon by Leisure Time (Mauro v. Rosedale Enters., 60 A.D.3d 401 (1st Dept 2009) and the expert affidavit submitted in this action is sufficiently probative to be considered.

were sufficient to satisfied its duty to plaintiff. Rothgen v. AMF Babylon Lanes, 30 A.D.3d 398 (2d Dept 2006); Travlos v. Coram Country Lanes, LLC, 56 A.D.3d 661 (2d Dept 2008).

Furthermore, while it may be argued that plaintiff was negligent in seeking to recover the ball past the foul line, any such negligence would not serve to eliminate Leisure Time's liability. Gonzalez v. Arc Interior Const., 83 A.D.3d 418, 419 (1st Dept 2011); Smith v. Zink, 274 A.D.2d 885 (3d Dept 2000).

Finally, it cannot be said as a matter of law that the oil used to condition the lanes was an open and obvious condition. In any event, "that a defect may be open and obvious does not negate a landowner's duty to maintain its premises in a reasonably safe condition, but may raise an issue of fact as to the plaintiff's comparative negligence." Ruiz v. Hart Elm Corp., 44 A.D.3d 842, 843 (2d Dept 2007).

Accordingly, as there are triable issues of fact as to whether plaintiff's injuries were caused by Leisure Time's negligence, Leisure Time's motion for summary judgment must be denied.

In view of the above, it is

ORDERED that the motion for summary judgment by defendant Leisure Time Bowl is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11 room 351, 60 Centre Street, New York, NY, on October 27, 2011, at 2:15 pm.

DATED: September 29, 2011

J.S.C.