SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JAMES FATATO,

Plaintiff,

-against-

BILL REAGAN,

Defendant.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 19024/09
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

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Defendant Bill Regan moves for an order pursuant to CPLR §3212 granting him summary judgment dismissing the plaintiff's complaint against him.

The plaintiff in this action seeks to recover damages for personal injuries he sustained on November 15, 2009 while playing basketball at the home of the defendant who was his brother-in-law at the time. He alleges that he fell and got hurt when he stepped on a loose paving stone that was inlaid in the driveway in the area of the basketball hoop. The plaintiff alleges that the defendant failed to keep his driveway in a safe condition, failed to warn of the dangerous condition and actually created the dangerous condition through a third party which created the condition when it renovated the driveway.

The defendant seeks dismissal of the complaint on four grounds: (1) that the improperly laid brick in the driveway constituted an open and obvious condition; (2) that the plaintiff assumed the risk; (3) that he cannot be held liable for a condition created by a third-party contractor; and (4) that he did not have actual or constructive notice of the defect.

At his examination-before-trial, the plaintiff testified that he had played basketball on outdoor

courts for many years. He described the defendant's driveway as having a two-stone wide row of decorative stones around the perimeter. He had never experienced any problems with the driveway before his accident nor was he aware of anyone else having done so. He testified that just before he fell, he proceeded towards the hoop with the ball along the decorative stone path. He then stepped on that line of stones underneath the hoop, jumped up attempting a lay-up and landed on one of the decorative stones inlaid in the driveway underneath the hoop. He attests in support of his motion that: "[a]s I landed, I landed on my foot almost seesawed, like pivoted off the decorative paying stone. As I came down, my leg pivoted, a seesaw action . . . I landed and then it was loose and it was almost like a seesaw and that's when I went down." He testified that after his accident, his sister told him that she has been aware of a loose stone in the area where he fell before his accident.

The defendant testified at his examination-before-trial that he believed that the driveway was installed in 2008. He described it as lined with raised Belgium blocks around the perimeter with paving stones inlaid in the blacktop. He testified that no repairs were done after the driveway was installed and that he was not aware of any loose bricks or pavers in the area where the plaintiff fell.

Tiffany Reagan, the plaintiff's sister and the defendant's ex-wife, testified at her examination-before-trial that she was aware of a "defect" with the pavers underneath the basketball hoop. She testified that she observed a "little bump" in the area when she put away her children's sleighs and that one of the paving stones was a little raised and wobbly. She testified however that she never told the defendant about this nor could she recall when she herself became aware of the defect so as to establish how long it existed before the plaintiff's accident.

"On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King, supra*, at p. 74; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept 1990).

Despite the lack of executions, the defendant has established that the transcripts of the various examinations-before-trial are in admissible form. *Franzese v Tanger Factory Outlet Centers Inc.*, 88 AD3d 763 (2d Dept 2011).

"[A]thletic and recreative activities possess enormous social value, even while they involve significantly heightened risks . . . these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise." *Trupia ex rel. v Lake George Cent. School Dist.*, 14 NY3d 392, 395 (2010). "The doctrine of assumption of the risk is a form of measurement of a defendant's duty to a voluntary participant in a sporting activity." *Manoly v City of New York*, 29 AD3d 649 (2d Dept 2006, citing *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 659 (1989). "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 (citations omitted)." *Leslie v Splish Splash at Adventureland*, 1 AD3d 320, 321 (2d Dept 2003); *see also, Morgan*

v State, 90 NY2d 471 (1997), *rearg den.*, 90 NY2d 936 (1997). "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 such activity generally, and which flow from the participation." *Reidy v Raman*, 85 AD3d 892 (2d Dept 2011), citing *Morgan v State, supra* at p. 484; *Leslie v Splish Splash at Adventureland, supra* at p. 321; *see also Miskanic v Roller Jam USA, Inc.*, 71 AD3d 1101 (2d Dept 2010). "The doctrine of primary assumption of the risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased." *Miskanic v Roller Jam USA, Inc. supra*, at p. 1103, citing *Morgan v State, supra* at p. 484; *Ribuado v La Salle Inst.*, 45 AD3d 556, 557 (2d Dept 2007), *lv den.*, 10 NY3d 717 (2008); *see also, Benitez v New York City Bd. of Educ., supra*, at p. 659, quoting *McGee v Board of Educ.*, 16 AD2d 99 (1st Dept 1962), *lv den.*, 13 NY2d (1963); *Morgan v State, supra; Morales v Beacon City School Dist.*, 44 AD3d 724 (2d Dept 2007); *Muniz v Warwick School Dist.*, 293 AD2d 724 (2d Dept 2002); *Stryker v Jericho Union Free School Dist.*, 244 AD2d 330 (2d Dept 1997).

To prevail on the doctrine of assumption of the risk, the defendants must establish that the infant-plaintiff was aware of, appreciated the nature of and voluntarily assumed all of the risks. *Morgan v State, supra*, at p. 484. "The plaintiff's awareness of the risk must be assessed against the background of his skill and experience." *Hyde v North Collins Cent. School Dist.*, 83 AD3d 1557, (4th Dept 2011), citing *Morgan v State, supra*, at p. 486. Furthermore, " '[i]n assessing whether a defendant has violated a duty of care in the context of an injury sustained during a sport or game, [it] must [be] determine[d] whether the defendant created a unique condition "over and above the usual dangers inherent in the sport." ' " *Gerry v Commack Union Free School Dist.*, 52 AD3d 467, 469 (2d Dept 2008), quoting *Convey v City of Rye School Dist.*, 271 AD2d 154, 158 (2d Dept 2000), quoting *Morgan*

v State, supra at p. 485.

While falling on the court is a known risk inherent in the sport of basketball, a player will not be deemed to have assumed unreasonably increased risks. *Ruiz v Young Men's Christian Ass'n of Greater New York*, 26 Misc 3d 1222(A) (Supreme Court New York County 2010), citing *Morgan v State*, 90 NY2d 471 (1997).

The defendant has not established his entitlement to summary judgment based on the doctrine of primary assumption of the risk. There are issues of fact as to whether the defective condition of the driveway was apparent, whether plaintiff's fall was a reasonably foreseeable consequence of participating in the sport and whether the plaintiff was in fact exposed to unassumed, concealed and increased risk. *See, Ruiz v Young Men's Christian Ass'n of Greater New York, supra*, (defendant failed to prove plaintiff assumed risk of playing basketball on an indoor surface, which may have been littered with round beads or that condition is apparent or a reasonably foreseeable consequence of participating in sport); *Greenburg v Peeksville City School Dist.*, 255 AD2d 487 (2d Dept 1998) (out of bounds area at basketball court end line less than recommended distance from end line); *Clark v State of New York*, 245 AD2d 413 (2d Dept 2997) (steep drop-off several inches from asphalt basketball court area); *Warren v Town of Hempstead*, 246 AD2d 536 (2d Dept 1998) (issue of fact as to whether defendant's use of sealant rendered the depth and extent of cracks in basketball court not open and obvious).

Nevertheless, " 'to establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff.' " *Nappi v Incorporated Village of Lynbrook*, 19 AD3d 565 (2d Dept 2005), quoting *Alvino v Lin*, 300 AD2d 421 (2d Dept 2002), citing *Gordon v Muchnick*, 180 AD2d 715 (2d Dept 1992). "Imposition of liability for a dangerous condition on property must be

predicated upon occupancy, ownership, control or special use of the premises." *Valez v Captain Luna's Marina*, 74 AD3d 1191, 1192 (2d Dept 2010), citing *Canaan v Costco Wholesale Membership, Inc.*, 49 AD3d 583, 584-585 (2d Dept 2008); *Logatto v City of New York*, 51 AD3d 984 (2d Dept 2008); *Schwalb v Kulaski*, 29 AD3d 563, 564 (2d Dept 2006). This duty however only lies when a property owner either created the condition or had actual or constructive notice of the dangerous condition that precipitated the injury. *Gordon v Museum of Natural History*, 67 NY2d 836 (1986). Accordingly, a defendant moving for summary judgment in a case like this " 'has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it.' " *Reimold v Walden Terrace, Inc.* 85 AD3d 1144, 1146 (2d Dept 2011), quoting *Melnikov v 249 Brighten Corp.*, 72 AD3d 760 (2d Dept 2010).

There is no evidence that the defendant created the defective condition or that he had actual or constructive notice of it. Tiffany Reagan's knowledge of a loose paver in the area does not suffice as that certainly does not establish the defendant's knowledge. Furthermore, there is no evidence that the condition existed long enough to impart constructive notice to the defendant.

Assuming, *arguendo*, that the contractor who installed the driveway created the defective condition , standing alone, that is not a sufficient basis to attribute liability to the defendant and there is no evidence that the work was inherently dangerous or that the defendant interfered with and assumed control over the work. *Kleeman v Rheingold*, 81 NY2d 270 (1993); *Posa v Copiague Publ. School Dist.*, 84 AD3d 770 (2d Dept 2011).

The defendant has accordingly established his entitlement to summary judgment thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

The plaintiff has not met his burden. The plaintiff's sister and the defendant's ex-wife, Tiffany Reagan's present attestation to having noticed the loose brick during the winter before the plaintiff's accident is suspiciously at odds with her examination-before-trial testimony rendering the issue arguably feigned. In any event, the plaintiff's accident happened in March, also during the winter. Accordingly, Ms. Reagan's recent statement hardly suffices to raise an issue of fact with respect to the defendant's constructive notice of the defect as the length of time the defect existed prior to the plaintiff's accident has not been adequately established.

The defendant's motion for summary judgment is ***granted***. The complaint is ***dismissed***. This action is concluded.

This constitutes the Decision and Order of the Court.

DATED: December 8, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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