SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

Index Number : 100656/2009

GRIX, MAUREEN

vs

RCPI LANDMARK PROPERTIES

Sequence Number : 004

SUMMARY JUDGMENT

PART 15

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

FOR THE FOLLOWING REASON(S): _____

Dated: 12/20/11

_____, J.S.C.

HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

MAUREEN GRIX,

Plaintiff,

- against -

RCPI LANDMARK PROPERTIES, LLC, PATINA RESTAURANT GROUP LLC, TISHMAN SPEYER PROPERTIES, LP, and TISHMAN SPEYER PROPERTIES, INC.,

Defendants.

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Index No. 100656/09

Mot. Seq. 004 Decision and Order

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she fell while she was ice skating at Rockefeller Center located on Fifth Avenue between East 49th Street and East 50th Street in the County and State of New York on December 5, 2008. Plaintiff alleges that her accident occurred as the result of dull blades on her skates and a "choppy ice surface." Defendants, owners and operators of the subject ice rink, now move for summary judgment pursuant to CPLR 3212. Plaintiff opposes.

According to plaintiff's testimony, she has been ice skating since she was a child, and has skated at Rockefeller Center for most of her life. Plaintiff considers herself an intermediate skater. On the date of the accident, plaintiff looked at the ice and did not notice any holes but that, after "three or four minutes" of skating in the outer portion of the rink, she noticed the ice "wasn't as smooth as I would have liked it to be." Plaintiff continued around the rink for "a minimum of four" times before her

accident occurred. Plaintiff claims that she was "gliding" straight ahead when she "just fell" and found herself on the ice.

Defendants, in support of their motion, submit: the pleadings; the deposition transcript of plaintiff; the continued deposition transcript of plaintiff; the deposition transcript of Carol Olsen, Director of the subject ice skating rink; the videotaped deposition transcript of Kathleen Guarneri, a non-party witness; a "Local Climatological Data" report for December 2008; and an accident report. Defendants assert that plaintiff, an experienced skater, assumed the risk of ice skating, an inherently risky activity.

Plaintiff, in opposition, submits the report of Steve Bernheim, President of Sports and Recreation Consultants, Inc. Plaintiff claims that defendants unreasonably increased the risk of skating by negligently maintaining the skates, thereby allowing the blade to become dull, and by negligently maintaining the ice. Plaintiff points to her expert's report, wherein he opines that "the dull blade edges on the rental skates . . . materially increased the risk of danger associated with skating, by not allowing 'grip' of the ice," and that defendants were negligent in failing to keep a smooth skating surface.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

"Pursuant to the doctrine of primary assumption of risk, one is deemed to have assumed, as a voluntary participant . . . certain risks occasioned by athletic or recreational activity, and to the extent of such an assumption, any legally enforceable duty to reduce the risks of such activity is limited." Defendant's duty may vary depending on the plaintiff's level of skill and the capacity to appreciate the risks of a particular activity. (*Roberts v. Boys and Girls Republic, Inc.*, 51 AD3d 246[1st

Dept. 2008]).

With respect to the condition of the ice, the assumption of risk doctrine may "encompass risks engendered by less than optimal conditions, provided that those conditions are open and obvious . . ." In such circumstances, defendant's duty is limited to exercising care to make the conditions "as safe as they appear to be." (*Roberts* at 247). Here, plaintiff, who was a self proclaimed "intermediate" skater, who had been skating at Rockefeller Center for years, concedes that she noticed that the ice did not feel as smooth as usual, and that she observed "wedges from the skates with some . . . sections of very fluffy ice." Ms. Guarneri, plaintiff's friend, who was with her on the date of the accident, testifies that the she commented to plaintiff that there was "buildup on the ice . . . slushy ice, wet ice," and that plaintiff agreed with her.

Plaintiff initially received a pair of skates, which she returned. She claims only that the second pair "were fine as far as putting them on." She admits looking at them but not "inspecting" them. Ms. Olsen, the rink director, testifies that the skates are sharpened every day and that she personally inspected plaintiff's skates right after they were taken off as part of the procedure of recording an accident report. Ms. Olsen testifies that she did not find anything wrong with the skates. However, the skates were immediately placed back into service after the accident. It is important to note that at the time Ms. Olsen, in effect, discarded the skates, she was not on notice that there was a problem with the skates. Thus, while they were placed back in service, such "discarding" was not in bad faith. (*See*; *Greater New York Mut. Ins. Co. v. Curbeon*, 300 AD2d 182 [1st Dept. 2002])Neither plaintiff's expert, nor plaintiff inspected the skates after the accident.

Despite plaintiff's feeling that the ice did not feel as smooth as usual, and her visual observations, she continued to skate around the outer edge of the rink. The facts here are similar to those in *Rossman v. RCPI Landmark Properties*, LLC, 41 AD3d 318, where the court dismissed plaintiff's complaint because she testified that she "observed that the skating surface was deteriorating, and there were ice chips, bumps, and wet spots," yet she continued to skate for fifteen minutes before her fall. (*Id.*)

Plaintiff urges that there was a hidden risk in the skates being dull. However, plaintiff's own testimony establishes that she had the opportunity to inspect the skates before skating. Additionally, she admits the skates did not cause her to have trouble making turns, despite her expert's opinion that it was dull blades which made plaintiff unable to "grip" the ice properly. The accident report does not reflect trouble with the blades, and merely quotes plaintiff as stating that "I was skating and I lost my balance." Plaintiff, who concedes that she never examined the blades either before or after her accident, testifies that it was not until two or three weeks later, when she was "speculating" as to what caused her accident, that she thought it may have been the blades.

Wherefore, it is hereby

ORDERED that the motion for summary judgment is granted; and it is further

ORDERED that and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: December 20, 2011

EILEEN A. RAKOWER, J.S.C.