DECISION AND ORDER

FILED & ENTERED
12/9/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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JULIA RICCIO,

Plaintiff,

MOTION DATE: 11/22/13
INDEX NO.: 50146/12

-against-

KID FIT, INC. and THE LITTLE GYM OF SCARSDALE,

Defendants.
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The following papers numbered 1 to 9 were read on this motion by defendants for summary judgment dismissing the complaint.

Papers Numbered

Notice of Motion - Affirmation (Bhupathi) - Affidavits (Quintano, Nyugen) - Exhs. (A-I) - Memorandum of Law 1-6
Answering Affirmation (Graci) - Exhs. (A-H) 7-8
Replying Affirmation (Bhupathi) - Memorandum of Law 9-10

Upon the foregoing papers, it is Ordered and adjudged that this unopposed motion by plaintiff for summary judgment is disposed of as follows:

Plaintiff commenced this personal injury action seeking to recover for personal injuries she allegedly had sustained, on July 24, 2010, when, after attending her grandchild's birthday party hosted at defendants' premises and while helping in the "rushed" cleanup at the party's conclusion, she had been burned by a lit sterno which she knowingly had carried and accidently dropped onto herself. Plaintiff alleges that defendants had been negligent inter alia in their ownership, operation, maintenance and management of the premises, in permitting a dangerous and unsafe condition to exist on their premises, in failing to provide for adequate, proper and timely cleaning of the premises, in failing to warn, in creating a nuisance and in failing to provide proper equipment and safeguards.

The deposition testimony and supporting moving affidavits in the record establish that plaintiff's daughter, the mother of plaintiff's grandson, had brought to the party, with defendants' permission, outside hot food, trays and sternos, that defendants had three employees, Robin Smith, the lead party instructor, and two assistant instructors, Tammy Quintano and Tommy Nyugen, working at the party, that 30 minutes had been allocated for cleaning up following the party, that it had been said employees jobs to set up, including the table settings and food, and to supervise and manage the party, as well as to fully clean up following the party

but, according to defendants, "parents were responsible for the parents' food that they brought in," although the employees would help with the food and cleanup of same.

According to plaintiff, defendants' employee, Mr. Nyugen, had taken care of lighting the sternos at the beginning of the party and mistakenly had thrown out the sterno caps. Plaintiff's daughter had testified that she did not know how or when the sternos had been lighted but that she believed "the staff" had done so. Ms. Smith had testified that she personally had not lighted the sternos and that she did not know but did not think that either of the other employees had lighted the sternos. According to Ms. Smith, the employees had not been trained to use hot chafing dishes and sternos and there had been no policies or procedures in place with respect to same.

During the cleanup at plaintiff's grandson's party, it had been discovered that the sterno caps were missing from the sternos which plaintiff's daughter had planned to take home. The sterno caps never had been located and Ms. Smith had testified that she had assumed that they mistakenly had gotten thrown out. Plaintiff's daughter had testified that she had felt very anxious at that time because she was being told they have to immediately clear the table because of an incoming party. Further, she had testified that, after the sterno caps could not be located, a

discussion ensued about how to extinguish the sternos without their caps, and that she had suggested using a metal spatula but defendants' employees did not have one available. According to plaintiff's daughter, the employees had no suggestions on what to do.

Plaintiff too had testified that defendants' employees were "rushing" to set up for the next party and that they had told plaintiff and her daughter that they needed to "hurry up" and to "clear up the whole table." However, when specifically asked whether anyone had asked her before the accident to help, she had answered, "No one asked for my help. I was just there with my daughter. You know, I usually always, you know, help her pack and all that for the party." Plaintiff's daughter also had testified that no employee had requested or directed plaintiff to remove the food tray and sterno.

Plaintiff then had lifted the empty food tray, along with the lit sterno, intending to carry them to the sink; as she had walked halfway, holding the tray about one inch from her body, plaintiff's blouse ignited. Plaintiff had testified that she knew that the sterno had been lit and she explained that she had held the tray and lit sterno close to her body because she did not want it to burn anyone or spill.

Both Ms. Quintano and Mr. Nyugen in their supporting

affidavits deny that they had asked plaintiff or anyone else to touch, carry or handle the hot food tray and sterno, and they both further aver that they specifically had told plaintiff not to touch the hot plate with lit sterno. Plaintiff's daughter denies having heard any of defendants' employees tell plaintiff not to lift the food tray and sterno. Ms. Quintano and Mr. Nyugen each states that she/he knows how to extinguish a sterno, even without a sterno cap, and Ms. Quintano states in her affidavit that it had been her intention to have discarded the food tray and lit sterno but that plaintiff had lifted and carried them before she had been able to.

Presently, defendants are moving for summary judgment dismissing the negligence complaint, arguing that the evidence at bar establishes that defendants never had asked plaintiff to lift and/or carry the tray with the lit sterno to the sink, that they had done nothing which had caused plaintiff to carry the tray and lit sterno one inch from her body, that plaintiff herself knowingly had assumed the foreseeable risks of lifting and carrying a lit sterno and that the sole proximate cause of her injuries had been her own negligent and reckless actions.

Defendants' motion for summary judgment is granted. The Court finds that the evidence at bar irrefutably establishes that defendants' employees had not specifically instructed or directed plaintiff to remove the food tray and lit sterno, that the doctrine

of primary assumption of risk applies and that plaintiff voluntarily and knowingly had assumed the open, obvious and foreseeable risks of her sustaining injury in the manner in which she had chosen to carry the tray and lit sterno in close proximity to her body. See Giugliano v. County of Nassau, 24 A.D.3d 504, 505 (2nd Dept. 2005); Sy v. Kopet, 18 A.D.3d 463 (2nd Dept. 2005); Belloro v. Chicoma, 8 A.D.3d 598 (2nd Dept. 2004). Defendants had no duty to warn plaintiff, a mature adult, of the presenting open and obvious risk of carrying a lit sterno, which the Court finds was not inherently dangerous unless done in the unreasonable manner chosen by plaintiff, to wit, carrying the lit sterno one inch from her body. See Boyd v. New York City Housing Authority, 105 A.D.3d 542, 543 (1st dept. 2013); Tyz v. First Street Holding Co., Inc., 78 A.D.3d 818, 819 (2nd Dept. 2010).

In the circumstances presenting, this Court finds that any alleged negligence by defendants in either discarding the sterno caps and/or permitting outside food heated by sterno to be brought onto the premises without defendants' properly having trained their employees in the handling of same and/or defendants' failure to train their employees by defining their responsibilities during the party cleanup had not been the proximate cause of plaintiff's injuries but merely had furnished the occasion for plaintiff's injury, see Derdiarian v. Felix Constr. Corp., 51 N.Y.2d 308,

314-316 (1980); Singh v. McCrossen, _ A.D.3d _, 2013 WL 6063975 1st Dept. 2013); Palmer v. City of New York, 109 A.D.3d 526 (2nd Dept. 2013); Garcia v. All Metro Health Care, 108 A.D.3d 742 (2nd Dept. 2013), which injury, as herein above found, had been caused by plaintiff's imprudent and voluntary action of carrying the food tray with lit sterno in very close proximity to her body. The Court further rejects plaintiff's argument that defendants are liable herein because the staff otherwise did not have the means to extinguish the lit sterno; the sterno could have been left to naturally burn out or any non-flammable object, including a metal cake cutter or a folded up empty metal food tray, could have been used to extinguish the flame.

This action is hereby dismissed.

Dated: December 9, 2013
White Plains, New York

MARY H. SMITH
J.S.C.