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SHORT FORM ORDER

INDEX No. 10-6130
CAL. No. 12-01915OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

***PRESENT*:**

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-11-13
ADJ. DATE 1-15-13
Mot. Seq.# 003-MD

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ERICA SHEA, an infant by her father and Natural Guardian, PATRICK SHEA, and PATRICK SHEA, Individually,

Plaintiffs,

- against -

BROOKHAVEN COUNTRY DAY CAMP, and SUNSHINE CAMP CORP.,

Defendants.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 12-18; Replying Affidavits and supporting papers 19-22; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This is an action to recover damages, personally and derivatively, from the defendants Sunshine Camp Corp. d/b/a Brookhaven Country Day Camp ("Brookhaven"), for injuries allegedly sustained by infant plaintiff as a result of an accident that occurred on July 3, 2007, while attending a day camp

operated by defendants. It is alleged that, due to defendants negligence, the infant plaintiff, Erica Shea, while attending the camp, fell from a "balance beam" which was in a dangerous condition. It is further alleged that defendants failed to properly supervise the infant plaintiff.

Defendants now move for summary judgment dismissing plaintiffs' complaint, alleging, that they were not negligent and that there was an assumption of risk by the infant plaintiff. In support of the motion defendants submit, *inter alia*, their attorney's affirmation, the depositions of the infant plaintiff and of Neil Pollack, on behalf of the defendants, the pleadings, the bill of particulars and a certified meteorological report. In opposition, plaintiffs submit, *inter alia*, their attorney's affirmation; the depositions of the plaintiffs; the deposition of Neil Pollack, on behalf of the defendants; and the defendants' response to plaintiffs' notice of discovery and inspection.

Erica Shea testified that she was born on October 2, 1998. At the time of the accident she was eight years old and about to enter fourth grade. She attended the Brookhaven camp in 2006 but never went on the balance beam. Prior to the July 3, 2007, accident she had not gone on the balance beam. She had never observed any camp counselors acting as spotters for campers on the balance beam. On July 3, 2007, she arrived at camp and went to her group's designated area. After an initial activity her group went to the fitness course. The fitness course had different activities, including the balance beams. She went through a yellow tunnel and then she went to the balance beams. There were three balance beams in a zig-zag shape. Each successive beam was higher than the previous one. She walked the first two beams without incident. The balance beams were wet from rain the night before, as was the ground. The weather on the day of the incident was cloudy. She was on the highest beam, when she slipped due to the water on the balance beam. After she slipped, she fell back, her left arm struck the balance beam and then she hit the ground. After 20 to 30 seconds a camp counselor, Lauren, appeared. Soon after another counselor, Janet, and the Camp Director, Neil Pollack, appeared. The counselors were in different places around the fitness course. Mr. Pollack took her to the camp office on a golf cart. Her father picked her up and took her to the hospital, where she was told her arm was broken. She was put in a soft cast and a few days later, into a hard cast, which was later replaced by a mobile cast.

Plaintiff, Patrick Shea, testified that after receiving a call from the camp telling him that Erica had hurt her arm, he picked her up and took her to the hospital. During that time Erica told him that she had been walking on the balance beam and that she slipped and fell backward and hit her arm on the balance beam. He further testified that the day of the accident was overcast; that the windshield on his car was wet, not from dew; and that he saw water roll down his window.

Neil Pollack testified that he is the director/president of Sunshine Camp Corp. d/b/a Brookhaven Country Camp. The camp is located in Yaphank and consists of about 24 acres. Campers from three to fifteen years old could attend the camp, in sessions from a minimum of two weeks to a maximum of eight weeks, beginning approximately July 1 to about August 20th. There were approximately one hundred employees for the camp season, consisting of specialty counselors-athletics, music, arts, etc.- as well as maintenance personnel and cooks. He testified that the infant plaintiff's accident occurred at the

Healthtrek System area. This system had 15-16 stations for children 5-12 years old and included stretching stations, a sit-up station, a tunnel to crawl through, a push-up station and the balance beams. The balance beams are in three sections, shaped like a "Z". The beams are enamel blue and made of metal and have a "non-slip" surface. The beams go from about five inches to just over a foot off the ground. The beams are about ten feet long and four inches wide. He testified that they do not use wet equipment. He testified that the children are instructed with regard to the balance beam that "you're on the balance beam, you try to keep your balance." He testified that there are no standards that require spotters on the balance beam and there were no spotters for this activity. During the counselor's orientation, they are instructed to tell the campers how to use the beam and there is a Counselor Handbook that has the counselor's instructions. There were at least five counselors in the Healthtrek area while Erica was there. He testified that on the day of the accident it was sunny, the grass was dry and he could not recall the last time it rained. He was fifteen feet from the infant plaintiff when she tripped and fell while running on the grass toward some other campers. He testified that she had jumped cleanly off the beam before she began running. She fell forward and tried to break her fall with her arm or hand. He walked over to her. She was holding her arm and it looked pretty serious.

The proponent of a summary judgment motion 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 case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form.

Camps, like schools, are not an insurer of safety, and are not required to continuously supervise and control all movements and activities of the children entrusted in their care (*see* ***Fintzi v New Jersey YMHA-YWHA Camps***, 97 NY2d 669, 739 NYS2d 85 [2001]; ***Douglas v John Hus Moravian Church of Brooklyn, Inc.***, 8 AD3d 327, 778 NYS2d 77 [2d Dept 2004]). Rather, the duty of care owed by persons supervising campers is that of a reasonably prudent parent under comparable circumstances (*see* ***Gonzales v Munchkinland Child Care, LLC***, 89 AD3d 987, 933 NYS2d 710 [2d Dept 2011]; ***Ragusa v Town of Huntington***, 54 AD3d 743, 864 NYS2d 441 [2d Dept 2008]). Moreover, liability for negligent supervision of children entrusted in the care of persons or entities such as schools and camps will only lie if there is a showing that such negligent supervision constituted a proximate cause of the sustained injury (*see* ***Lopez v Freeport Union Free School Dist.***, 288 AD2d 355, 734 NYS2d 97 [2d Dept 2001]; ***Schlecker v Connetquot Cent. School Dist. of Islip***, 150 AD2d 548, 541 NYS2d 127 [2d Dept 1989]).

Defendants have failed to meet their burden of demonstrating a prima facie entitlement to judgment as a matter of law. The conflicting deposition testimony of infant plaintiff and defendants' witness Pollack, with regard to how the accident occurred, raises credibility issues which preclude the grant of summary judgment. Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact (***Gille v Long Beach City School District***, 84 AD3d 1022, 923 NYS2d 649 [2s Dept 2011]). Here, the conflicting depositions create questions of fact with regard to the details of the accident. The court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (*see* ***Ruiz v Griffin***, 71 AD3 d 1112, 898 NYS2d 590 [2d Dept 2012]; ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]).

It is well settled that by engaging in a sport, 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 of New York***, 90 NY2d 471, 484-486, 662 NYS2d 421 [1997]; *see* ***Anand v Kapoor***, 61 AD3d 787, 877 NYS2d 425 [2d Dept 2009]; ***Fithian v Sag Harbor Union Free School Dist.***, 54 AD3d 719, 864 NYS2d 456 [2d Dept 2008]; ***Mendoza v Village of Greenport***, 52 AD3d 788, 861 NYS2d 738 [2d Dept 2008]; ***Joseph v New York Racing Assn.***, 28 AD3d 105, 809 NYS2d 526 [2d Dept 2006]). The assumption of risk doctrine is not an absolute defense to liability, but a measure of the duty of care owed by the defendant (***Turcotte v Fell***, 68 NY2d 432, 439, 510 NYS2d 49 [1986]; ***Taylor v Massapequa Intl. Little League***, 261 AD2d 396, 397, 689 NYS2d 523 [2d Dept 1999]). Under the doctrine, a plaintiff will be barred from recovering damages for injuries sustained during a voluntary sporting activity if it is established that the injury-causing conduct, event or condition was known, apparent or reasonably foreseeable (*see* ***Morgan v State of New York***, *supra*; ***Turcotte v Fell***, *supra*; ***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]). Thus, a defendant seeking to be relieved from liability based on the assumption of risk doctrine must establish that the injured plaintiff was aware of the risks, appreciated the nature of the risks, and voluntarily assumed the risks (***Morgan v State of New York***, *supra*, at 484, 662 NYS2d 421; *see* ***Turcotte v Fell***, *supra*; ***Carracino v Town of Oyster Bay***, 247 AD2d 501, 669 NYS2d 328 [2d Dept], *lv denied* 92 NY2d 809, 680 NYS2d 54 [1998]).

In light of the foregoing case law, there is also a question of fact with regard to the alleged assumption of risk by the infant plaintiff. A negligence claim will not be dismissed if the defendant's negligent action or inaction "created a dangerous condition over and above the usual dangers" inherent in the sport (***Owen v R.J.S. Safety Equip.***, 79 NY2d 967, 970, 582 NYS2d 998 [1992]; *see* ***Morgan v State of New York***, *supra*; ***Rosenbaum v Bayis Ne'Emon, Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]). In assessing the risks assumed by a plaintiff when he or she elected to participate in the sport and the duty of care owed by the owner or operator of the property used for such activity, a court must consider the skill and experience of the particular plaintiff (***Morgan v State of New York***, *supra*, at 486, 662 NYS2d 421; ***Maddox v City of New York***, *supra*, at 278, 496 NYS2d 726). Here, no evidence has been set forth to establish that the infant plaintiff, who was less than nine years old, had any

experience at all on the balance beam prior to her accident. Defendants have failed to establish that the injured infant plaintiff was aware of the risks, appreciated the nature of the risks, and voluntarily assumed the risks involved in traversing the balance beam.

There is also yet another question of fact created by the testimony of defendants' witness Pollack, who testified that there are no standards that require spotters on the balance beam and there were no spotters for this activity. This contradicts the camp's handbook, which states that no campers are allowed to use the obstacle course without counselor supervision and that counselors will "spot" all campers on the course. This issue of fact, as to whether defendants properly supervised the infant plaintiff, is also a matter to be resolved by the finder of fact (see ***Gille v Long Beach City School District***, *supra).*

Accordingly, the motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

Dated: March 28, 2013

W. Gerard Asher
J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**