Blumenthal v Bronx Equestrian Ctr., Inc.
2014 NY Slip Op 31654(U)
May 7, 2014
Supeme Court, Bronx County
Docket Number: 308815/08
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 7

Index No. **308815/08**
Motion Calendar No. 3
Motion Date:3/24/14

LYNETTE BLUMENTHAL and EDWARD BLUMENTHAL,

Plaintiffs,

-against-

THE BRONX EQUESTRIAN CENTER, INC., d/b/a PELHAM BIT STABLES and THE CITY OF NEW YORK ,

Defendant.

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibits thereto	**1**
Affirmation in Opposition and exhibits thereto	**2**
Reply Affirmation	**3**

After due deliberation upon the foregoing papers, the Decision/Order on this motion is as follows:

Defendants move this Court for an Order summary judgment pursuant to C.P.L.R. §3212 dismissing plaintiffs complaint on the grounds that there are no triable issues of fact as to defendant's liability. Defendants also move to dismiss this complaint pursuant to C.P.L.R. §3211(a)(7). Plaintiffs submitted written opposition.

Plaintiff by his mother brought this cause of action for injuries allegedly sustained on September 17, 2007 when she was thrown from a horse on the premises of the Bronx Equestrian Center.

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 demonstrate the absence of any material issues of fact. Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Summary judgment is a drastic remedy, and it should not be granted when there is any doubt as to the existence of a triable issue of fact. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223 (1978). The court's function on this motion for summary judgment is issue finding, not issue determination. Krupp v. Etna Life & Cas. Co., 103 A.D.2d 252, 479 N.Y.S.2d 992 (2nd Dept. 1984). Summary judgment will only be granted if there are no material, triable issues of fact. Stillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Under the doctrine of primary "assumption of risk" a person who is a voluntary participant, spectator or even bystander is deemed to have assumed and consented to the risks inherent in, arising out of, and generally flowing from a certain athletic or recreational activities. Tadmor v. New York Jiu Jitsu Inc., 109 A.D23d 440 (1st Dept. 2013); Roberts v. Boys and Girls Republic, Inc., 850 N.Y.S.2d 38 (1st Dept. 2008).

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211 motion should be granted only where "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., supra, citing Kliebert v. McKoan, 228 A.D.2d 232, lv denied, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977)

A plaintiff's capacity to appreciate the assumption of the risk of a particular activity may

limit the defendant's duty. Morgan v. State of New York, 90 N.Y.2d 471 (1997); Roberts supra at 40. An plaintiff who is an infant limited horseback riding experience may not appreciate the risks associated with such an activity. Maher v. Woodhollow Equestrian Center, LLC., (85 A.D.3d 876, 1st Dept. 2011); "An Assessment of whether a participant assumed a risk depends on the openness and obviousness of the risks, the participant's skill and experience, as well as his or her conduct under the circumstances and the nature of the defendants conduct. Corica v. Rocking Horse Ranch, Inc., 84 A.D3d 1566 (3rd Dept. 2011) (Internal citations omitted). A participant who voluntarily engages in the activity of horseback riding assumes the risks inherent to that activity, such as the "sudden and unintended actions of the animals. Dalton v. Adirondack Saddle Tours, Inc., (40 A.D.3d 1169 (3rd Dept. 2007).

In the instant case the plaintiff testified that she has been riding horses since nine years old, although her riding was intermittent, with many years off. As an adult, her riding was under ten times. Prior to the incident, she does not recall whether while at the Pelham Bit Stables, she was given instruction or anything to sign. On the day of the incident, she was not given any instruction nor was she asked her level of riding experience. Plaintiff testified that as she neared the end of the trail her horse stopped to eat some grass, which she allowed because he had been a very nice horse. She was not told that she should not permit the horse to stop and eat grass. However, she did recall being told that during prior riding experiences as a young girl, although she was not told the reason for this prohibition. Approximately two minutes after the horse grazed, the horse started to bolt and she fell off. She did not remember being thrown from the horse. Plaintiff testified that at the time the horse stopped to eat grass the guide was in front of her, already around the curve. No guide was behind her.

Marcy Brennen testified on behalf of defendant. She has worked at the Bronx Equestrian Center for approximately 20 to 30 years. Bronx Equestrian Center rents the Pelham Bit Stables from the Department of Parks. Although he was at the stable on September 14, 2007, he had no involvement with plaintiff. She became aware of the accident when he observed plaintiff's horse return to the stable. She then went to the bridle path to see what happened. The waivers detail the risks of riding. All riders must sign the waiver prior to going out on the trail. After signing the waiver, the riders pay the $30 fee and go out with a guide. Mrs. Brennen would also inquire as to

the rider's level of ability to match them with a horse. This would also be customary for the other workers. Greeters assign trail guides are assigned depending on group size, group composition and riding ability. She did not know how many people were in plaintiff's party. Nor did she know which guide was assigned to the plaintiff's party. There are no written riding guidelines given to the participants, however she has heard guides instruct on maintaining distance. There is no instruction on preventing the horses from grazing.

Defendant has failed to meet the prima facie burden for summary judgment. Mrs. Brennan who testified on behalf of plaintiff did not have any knowledge as to the guide who went out on the trail, whether this guide inquired as to the riding ability of the plaintiff, or whether plaintiff was instructed as to the rules of horse riding. Furthermore, plaintiff created a question of fact, by testifying that the waiver, which purportedly informed of the risks of horseback riding, was not signed directly by her but another person in the group.

Accordingly, it is

ORDERED that defendants motion to dismiss pursuant to C.P.L.R §§3211(a)(7) and 3212(b) is hereby denied. It is further

ORDERED that defendant shall serve a copy of this order with Notice of Entry upon all parties within thirty (30) days of entry of this order.

This constitutes the decision and order of this court.

5/7/14

DATE

HON. WILMA GUZMAN

Justice Supreme Court.