SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29
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JIN CHUNG,

Plaintiff,

Index No. 151744/13

-against-

JONATHAN P. LEHMANN and DINAH LEHMANN,

Defendants.

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**KALISH, J.:**

Upon the forgoing papers, the Defendants' Jonathan P. Lehmann ("Jonathan") and Dinah Lehmann ("Dinah") motion to dismiss the underlying action pursuant to CPLR §3211 and for summary judgment dismissing the underlying action pursuant to CPLR §3212 is hereby granted as follows:

Procedural History

Relevant Background and Underlying Dispute

Without restating the entirety of the pleadings, the Plaintiff Jin Chung alleges in sum and substance that he was injured in a tubing/wakeboarding accident that occurred on August 6, 2012, on Lake Hopatcong, New Jersey, at approximately 5:30 p.m (Plaintiff's June 13, 2014 Deposition 16: 21-25, 17: 1-3, 20: 4-14; Jonathan's July 15, 2014 Deposition 20: 6-8). The weather was sunny and the lake conditions were calm (Plaintiff's June 13, 2014 Deposition 20: 8-13).

While there are some discrepancies among the parties' testimony regarding details of the day's activities, they are not particularly relevant to the issues before the court. The following recitation of the factual background is based upon a reading of the parties' deposition testimonies as attached with the Defendants' motion papers.

On the date of the accident, the Plaintiff went out on the Defendants' boat, with the Defendants and two other people, Michael and Anthony Guido ("Michael" and "Anthony", respectively) (Jonathan's July 15, 2014 Deposition 18: 5-8). The activities that afternoon involved one person wakeboarding while another was tubing. A third person was driving the boat, while the two remaining participants were spotters for those wakeboarding and tubing. The person tubing was also videotaping the person wakeboarding using a GoPro camera.[1] The rope for the wakeboard was about 65 feet long, while the one for the tube was about 60 feet long (Plaintiff's June 13, 2014 Deposition 35-38; Jonathan's July 15, 2014 Deposition 35-36). This enabled the tuber to be slightly in front of the wakeboard, purportedly to get a better angle for recording. The parties do not dispute that the Plaintiff was aware that the tube had a shorter rope than the wakeboard.

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[1] Plaintiff indicates in the Affirmation in Opposition to the motion that on the day of accident prior to the accident the Defendant Jonathan had expressed interest in the Plaintiff's "second GoPro camera" and that Jonathan had suggested that the Plaintiff take some action video with the GoPro camera.

[* 3]

On what was approximately the fourth run of the afternoon, after being on the water for one or two hours, the Plaintiff took a turn tubing, while Michael was wakeboarding (Plaintiff's June 13, 2014 Deposition 39: 19-25; Jonathan's July 15, 2014 Deposition 32: 22-25, 33; Dinah's July 15, 2014 Deposition 11-12). While tubing, the Plaintiff was holding the GoPro camera in one hand and videotaping Michael, and holding onto a handle of the tube with his other hand (Plaintiff's June 13, 2014 Deposition 41: 15-25, 42). Jonathan was driving the boat (Jonathan's July 15, 2014 Deposition 25: 13-15). Several minutes into the run, Jonathan turned the boat to the right, which allegedly caused the tube and wakeboard to have to traverse a double wake (Plaintiff's June 13, 2014 Deposition 43: 22-25, 44: 1-2). Plaintiff fell off the tube, and, while resurfacing, was hit in the face by the wakeboard. It is unclear whether he was knocked unconscious, but when the boat turned to pick both him and Michael up from the water, it was obvious that the Plaintiff was badly hurt (Jonathan's July 15, 2014 Deposition 42: 11-45, 43). Anthony called 911, and an ambulance and police officer were waiting at the Guido's dock when the boat arrived there a few minutes later (Jonathan's July 15, 2014 Deposition 45-46; Dinah's July 15, 2014 Deposition 17).

The Plaintiff was, and is currently, employed by Lakeview Marina in Hopatcong, New Jersey (Plaintiff's June 13, 2014 Deposition 9: 21-25, 10: 2). He operates boats and gives water skiing and wakeboard lessons at the marina (Plaintiff's June 13, 2014 Deposition 21; Jonathan's July 15, 2014 Deposition 19). The Plaintiff worked at the marina for a couple of years before the accident, was familiar with

the lake, and knew Jonathan from the marina (Plaintiff's June 13, 2014 Deposition 18-19). At the time of the accident, the Plaintiff had been engaged in water sports for more than 10 years, and estimated that he wakeboarded three or four times per week during the summer (Plaintiff's June 13, 2014 Deposition 22).

Parties' contentions

In the instant case, the Defendants contend in sum and substance that the Plaintiff assumed the risk of tubing with another person simultaneously wakeboarding, and argue that the Plaintiff's experience as an instructor for the marina and his own personal experience with water sports demonstrate that he knowingly assumed the risks involved in the activity. Therefore, the Defendants argue that the Plaintiff cannot recover damages from the Defendants for his injuries. It is undisputed that the Plaintiff knew that the rope attaching the tube to the boat was approximately five feet shorter than the rope to the wakeboard.

In opposition, the Plaintiff contends that, where the assumption of the risk doctrine applies, the Defendants are shielded from liability only if they did not increase the risk of injury by intentional or reckless action. Here, the Plaintiff argues that Jonathan acted recklessly when he made a sharp right turn without warning, which caused the Plaintiff to be thrown from the tube. The Plaintiff further argues that the assumption of the risk doctrine should not apply. Rather, the Plaintiff argues that the subject activity should be viewed as horseplay rather than a sponsored sporting activity since the participants were attempting to capture

video footage for their own enjoyment.

Analysis

Summary Judgment Standard

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 NY2d 557, 562 (NY1980)).

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" (Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (NY 2012) citing Alvarez v. Prospect Hosp., 68 NY2d 320 (NY 1986). "Since summary judgment is the equivalent of a trial, it has been a

cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." (Ostrov v. Rozbruch, 91 AD3d 147, 152 (NY App Div 1st Dept 2012) citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (NY 1985); Alvarez v Prospect Hosp., 68 NY2d 320 (NY 1986)). The proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v. AJI Indus., Inc., 10 NY3d 733, 735 (NY 2008)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY1980)).

In deciding a motion for summary judgment, the Court's function is to identify material triable issues of fact, not to make credibility determinations or findings of fact. Issue-finding, rather than issue-determination is the key to the procedure (See Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (NY 2012); Farias v. Simon, 122 AD3d 466 (NY App Div 1st Dept 2014)). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (See Negri v. Stop & Shop, Inc., 65 NY2d 625 (NY 1985). If there is any doubt as to the existence of a triable issue, then the motion for summary judgment should be denied (See Grossman v. Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002) citing Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223 (NY 1978); Stone v. Goodson, 8 NY2d 8 (NY1960)).

"On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'. Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate. We [The Court of Appeals of New York] have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the

requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY 1980) citing CPLR §3212(b); Phillips v. Joseph Kantor & Co., 31 NY2d 307 (NY 1972); Indig v. Finkelstein, 23 NY2d 728 (NY 1968); Alvord v Swift & Muller Constr. Co., 46 NY2d 276 (NY 1978); Fried v Bower & Gardner, 46 NY2d 765 (NY 1978); Platzman v American Totalisator Co., 45 NY2d 910 (NY 1978); Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285 (NY 1973)).

The Defendants have met their prima facie burden for summary judgment by establishing that the Plaintiff assumed the risk of tubing while another person was wakeboarding.

CPLR §1411 reads as follows:

> Damages recoverable when contributory negligence or assumption of risk is established
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> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Despite the text of this provision, the Court of Appeals has held that "a limited vestige of the assumption of the risk doctrine--referred to as 'primary' assumption of the risk--survived the enactment of CPLR 1411 as a defense to tort recovery in cases involving certain types of athletic or recreational activities. Rather than operating as a complete defense, the doctrine in the post-CPLR 1411 era has been described in terms of the scope of duty owed to a participant. Under

this theory, a plaintiff who freely accepts a known risk 'commensurately negates any duty on the part of the defendant to safeguard him or her from the risk'" (Custodi v Town of Amherst, 20 N.Y.3d 83, 87 (NY 2012) citing Turcotte v Fell, 68 NY2d 432, 439 [NY 1986]; Morgan v State of New York, 90 NY2d 471, 485 [NY 1997]; Trupia v Lake George Cent. School Dist., 14 NY3d 392, 395 [NY 2010].

Since the adoption of CPLR 1411, the Court of Appeals has "generally restricted the concept of assumption of the risk to particular athletic and recreative activities in recognition that such pursuits have 'enormous social value' even while they may 'involve significantly heightened risks'" (Custodi v Town of Amherst, 20 N.Y.3d 83, 88 (NY 2012) citing Trupia v Lake George Cent. School Dist., 14 NY3d 392, 395 [NY 2010]). "As a general rule, application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues"(Custodi v Town of Amherst, 20 NY3d 83, 89 (NY 2012)).

"The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks'... 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty'. Relatedly, risks which are commonly encountered or 'inherent' in a sport, such as being struck by a ball or bat in baseball, are 'risks [for] which various participants are legally deemed to have accepted personal responsibility'. The primary assumption of risk doctrine also encompasses risks involving less than optimal conditions" (Bukowski v Clarkson Univ., 19 N.Y.3d 353, 356 (NY 2012)citing Morgan v. State, 90 NY2d 471 (NY 1997); Turcotte v. Fell, 68 NY2d 432 (NY 1986); Sykes v. County of Erie, 94 N.Y.2d 912 (NY 2000); Maddox v. City of New York, 66 NY2d 270 (NY 1985); Martin v. State, 64 AD3d 62 (NY App Div. 3d Dept 2009) lv denied 13 NY3d 706 [NY 2009]).

In order to make a prima facie showing that a plaintiff assumed the risk of an activity in which that plaintiff was injured, the defendant must demonstrate that the plaintiff voluntarily participated in an athletic or recreational activity, thereby consenting to "those injury-causing events, conditions, and risks which are inherent in the activity. Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation" (Cruz v Longwood Cent. Sch. Dist., 110 AD3d 757 (NY App Div 2d Dept 2013) citing Morgan v. State, 90 NY2d 471 (NY 1997)and Turcotte v. Fell, 68 NY2d 432 (NY 1986); see also Quigley v Frost Val.

YMCA, 85 AD3d 752 (NY App Div 2d Dept 2011)).

Upon a review of the submitted papers, this Court finds that the Defendant has established prima facie that the Plaintiff voluntarily participated in the activity of tubing and assumed the risks inherent therein. Specifically, the Defendants referred to Plaintiff's deposition testimony, which was sufficient to establish that the Plaintiff had experience with wakeboarding and tubing, that the Plaintiff was aware of the conditions of the lake, and that it was inherent to the activity that the boat would have to turn at times either because of the limitations of the lake or because of other boats or other activity on the lake.

The Plaintiff has failed to establish that there is an issue of fact as to whether or not he assumed the risk inherent to the activity of tubing while another person was wakeboarding

In opposition to the motion, the Plaintiff relies upon the case of Custodi v Town of Amherst (20 NY3d 83 [NY 2012]) in support of his argument that his activities do not fall within the scope of the "assumption of risk" doctrine. Specifically, the Plaintiff argues that the subject activities do not fall within the scope of "assumption of risk" since they "cannot be deemed a sponsored sporting or activity" (Plaintiff's Affirmation in Opposition p. 10, para 36).

However, the instant action is signficantly distinguishable from Custodi. In Custodi, the question before the Court of Appeals was whether or not a plaintiff who was rollerblading on a sidewalk should be held to have assumed the risk of injury resulting from a two-inch height differential between the end of a driveway and the street, when she had to go around a vehicle blocking the sidewalk. The Court of Appeals concluded that the property owners owed the plaintiff the same duty of care to maintain their sidewalk in a reasonably safe condition as they would owe a pedestrian on the sidewalk.

In the instant action, neither of the parties is suggesting that the owner of the lake is responsible for the lake having limits, or having other boat traffic. Thus, the question is whether the activity is "appropriate for absolution of duty," keeping in mind that the language of the Court of Appeals is not exclusive; the Court expressly states "such as" in enumerating the types of activities to which assumption of the risk should be limited (See Custodi v Town of Amherst, 20 NY3d 83, 89 (NY 2012)).

In the instant action, the subject activity took place on a lake. The lake may not be a "designated venue" for wakeboarding and tubing, in that it is not used exclusively for those purposes, but it is clearly a venue used for those purposes, along with boating and other recreational activities. In point of fact, Plaintiff testified that he uses the lake regularly for both his own recreational purposes, and for teaching others how to wakeboard and water ski.

Further, the fact that the participants were videotaping the activity does not mean that the activity was no longer athletic or recreational. Such an artificial distinction makes no sense in this day and age, when photographing and videotaping are ubiquitous. Tubing, wakeboarding and boating are recreational sporting activities. The fact that the Plaintiff was using a camera at the same time does not in any way take away from his recreational activity, any more than it would preclude use of the doctrine of assumption of the risk if a spectator were using a camera when injured at a sporting event (See Newcomb v Guptill Holding Corp., 31 AD3d 875 (NY App Div 3d Dept 2006); Pira v Sterling Equities, Inc., 16 AD3d 396 (NY App Div 2d Dept 2005); Koenig v Town of Huntington, 10 AD3d 632 (NY App Div 2d Dept 2004)).

As such, this Court rejects the Plaintiff's argument that he was involved in horseplay rather than a recreational activity.

Plaintiff further argues that the underlying accident did not result from any inherent risk of tubing, but resulted from Jonathan's allegedly reckless act of making a sharp turn without warning.

Initially, the Court notes that while the Plaintiff contends that Jonathan made a sharp turn, and that he was going too fast while he turned (Chung EBT at 52-54), plaintiff has offered no expert testimony and/or reports as to what an appropriate speed would have been or whether the turn was, in fact, sharper than was appropriate under the circumstances. As such, the Plaintiff has failed to present any evidence in support of said claim. The Plaintiff relys only upon his own conclusory assertions as to the speed of the boat and the

"sharpness" of the turn, which are insufficient to defeat a motion for summary judgment. The Court further notes that the Plaintiff has not disputed Jonathan's assertion that he had to turn because he was nearing the shoreline and that there was another boat nearby that he had to avoid.

Further, while the Plaintiff's attorney discusses the ramifications of the "double up wake," "sling shot effect," and the effect of "centripetal" force[2] on the tube, he has not offered any expert testimony to support his conclusions. Similarly, Plaintiff's counsel offers his view on the differences between wakeboarding and tubing in terms of dependence upon the driver of the boat, again without offering any testimony or other evidence to support this conclusion regarding said differences and their ramifications. An attorney cannot offer his opinions as evidence to counter a summary judgment motion (See Zuckerman v City of New York, 49 NY2d 557, 563 (NY 1980); Contacare, Inc. v CIBA-Geigy Corp., 49 AD3d 1215, 1216 (NY App Div 4th Dept 2008); Marinelli v Shifrin, 260 AD2d 227, 228-229 (NY App Div 1st Dept 1999). As such, the Plaintiff's attorney's discussion of these matters cannot be considered by the Court, and the Plaintiff has failed to raise a material issue of fact regarding Jonathan's alleged reckless operation of the boat in opposition to summary judgment.

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[2] Counsel used the term centripetal force, but probably meant centrifugal force.

Based upon the parties' deposition testimony, it is apparent that at some point, due to the configuration of the lake, the boat was going to turn while pulling the Plaintiff. Further it is reasonably foreseeable that the boat would cause wakes to form and equally reasonably foreseeable that both the Plaintiff and the wakeboarder would go over said wakes. This Court finds that losing one's balance, falling and landing in the water is a known, apparent, natural, and reasonably foreseeable consequences for a person engaged in tubing while another person was wakeboarding.

The Plaintiff further argues that Dinah could not testify as to what caused the Plaintiff to fall into the water, nor did she recall whether she heard the Plaintiff screaming before the accident occurred (Dinah's July 15, 2014 Deposition 13-14). Plaintiff argues that this lack of recall demonstrates that Dinah was not fulfilling her role as a spotter adequately, since she should have advised Jonathan that there was a problem. The Court finds that the Plaintiff has also failed to raise an issue of fact with regard to this point.

In order to overcome the assumption of risk, plaintiff would have to provide evidence that Dinah acted intentionally or recklessly (See Turcotte v Fell, 68 NY2d 432, 437 (1986)). At most, the evidence offered might support a finding of negligence. However, even that is tenuous, given that there were two spotters, and there is no evidence as to whether Dinah's main focus was on the Plaintiff or on Michael. Further, the uncontroverted evidence was that the motor of the boat was so loud that people could not hear each other from any distance. So even if Dinah was spotting the plaintiff, there is no evidence that

she would have been able to hear him above the noise of the engine, considering that he was approximately 60 feet from the back of the boat. In fact, Jonathan testified, without contradiction, that you could not hear anything from plaintiff or Michael due to the volume of the motor (Jonathan's July 15 Deposition at 64). Finally, there is no evidence that, even if Dinah had seen that the Plaintiff was in trouble, she would have been able to transmit that knowledge to Jonathan quickly enough for Jonathan to have altered the boat's course (even plaintiff acknowledges that there was no more than a 15-second time lapse). Moreover, the Plaintiff testified that the accident happened so fast that he did not even have time to put down the camera and grab the handle of the tube with his other hand. If the accident was too fast for the Plaintiff to react, it was undoubtedly too fast for Dinah to react, transmit information to Jonathan, and then for Jonathan to react. It also bears noting that there is no evidence that the Plaintiff used any hand signals to indicate to the spotters that the boat should either slow down or stop, which Dinah failed to transmit.

The Plaintiff also attached with his opposition papers the video taken from the GoPro camera that the Plaintiff was holding during the accident. Having examined said video, the Court finds that it is insufficient to create an issue of fact as to whether or not Jonathan was operating the boat recklessly by going too fast or making too sharp a turn. Specifically, the video is pointed away from the boat towards Michael (who is wakeboarding). As such, the video does not show the boat turning nor give a clear indication of how fast the boat

was going when it turned. Further, the video tends to support Jonathan's testimony that he would not have been able to hear the Plaintiff or Michael due to the volume of the motor. Specifically, the boat's motor can be heard loudly in the background of the video, and it is very difficult to hear the Plaintiff's shouting over the sound of the engine as recorded by the GoPro camera even though the Plaintiff was holding the camera in his hand at the time.

Further, the video does not support the Plaintiff's argument that the parties were engaged in horseplay. Specifically, the wakeboarder appeared to be experienced and the camera work was steady.

As such, the Court finds that the Plaintiff has failed to raise any issues of fact as to any alleged reckless behavior on the part of Dinah sufficient to defeat the Defendants' motion for summary judgment.

Conclusion

For the reasons so stated in the instant decision, this Court finds that the Defendants are entitled to summary judgment dismissing the underlying action on the basis that the Plaintiff assumed the risk of tubing while another person was wakeboarding, and that the Plaintiff's accident fell within the scope of said assumed risk. Based upon the submitted evidence including the Plaintiff's background and employment, it was clear that the Plaintiff was aware of the inherent risk of injury associated with the water activity that he voluntarily participated in.

Accordingly, it is hereby ORDERED that Defendants' motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: Aug 21, 2015

ENTER:

HON. ROBERT D. KALISH
J.S.C.