Horowitz v Chen
2015 NY Slip Op 32238(U)
November 20, 2015
Supreme Court, New York County
Docket Number: 152242/2014
Judge: Robert D. Kalish

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

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Keri Horowitz

Plaintiff,

Index No. 152242/2014

-against-

Ethen Chen

Defendants.

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KALISH, J.:

Upon the forgoing papers, the Defendant Ethen Chen's motion for summary judgment dismissing the underlying action pursuant to CPLR §3212 is hereby denied as follows:

Relevant Background, Underlying Dispute and Deposition Testimonies

In the underlying personal injury action, the Plaintiff, Keri Horowitz, alleges that she sustained physical injuries as a direct result of Defendant Ethan Chen's negligence and recklessness. Without restating the entirety of the pleadings, the Plaintiff alleges in sum and substance that on March 1, 2014 that she was injured when the Defendant collided into her while the Defendant was skiing downhill. Plaintiff testified that she was born deaf and that on the date of the accident she was wearing a cochlear implant (Horowitz EBT p. 34, lines 12-13). The Plaintiff testified that the accident occurred at the bottom of a slope at the Mountain Creek ski resort (Horowitz EBT p. 41, lines 24 - 25; p. 42, lines 5-6). The Plaintiff testified in sum and substance that she was standing and talking with a friend in the safety area at the bottom of a beginners' slope (called the "Sugar slope") with her back to the slope, when she was struck by the Defendant who was coming down the slope (Horowitz EBT p. 62, lines 16 - 18; 67, lines 19-20; 69, lines 10-11; p. 70, 13-15; p. 75, lines 20-21).

Plaintiff further testified that prior to the accident she had completed one "run" on the Sugar slope and after completing her run, she stopped at the bottom in a "safety zone" near orange netting (Horowitz EBT p. 62, lines 17 - 25). Plaintiff testified that she was equipt with a snow-board and had dismounted from her snow-board by unstrapping one of her boots (Horowitz EBT p. 73, lines 13 - 17) She further testified that at the time of the accident she was standing in a "safety area" at the bottom of the slope, approximately 15 feet from a line of orange netting that marked where the slope ended (Horowitz EBT p. 71, lines 5-6, 13- 15; p. 73, lines 13-17). Plaintiff further testified that she had made her way to the safety zone in order to get out of the way of other skiers coming down the slope (Horowitz EBT p. 73, lines 14 - 17).

The Defendant testified that he is 24 years old and had limited skiing experience. Specifically, the Defendant testified that he had skied approximately 7 or 8 times and had approximately 3 hours of ski lessons prior to the accident of March 1, 2014 (Chen EBT p. 48, lines 17-19). The Defendant further testified that on the date of the accident, he was skiing down the Sugar slope when he collided with the Plaintiff (Chen EBT p. 56, lines 18-21). He further testified that although he did not have a "clear sense of speed", that he was going at approximately 20 to 30 kilometers per hour when he collided with the Plaintiff (Chen EBT p. 57, lines 2-6). The Defendant further testified that when he collided with the Plaintiff, she was standing at the end of the Sugar slope inside of a fenced safety area (Chen EBT p. 57, lines 16-19). He further testified that while he was skiing down the Sugar slope, he slowed down by wedging his skies and making short "turns" to slow his speed (Chen EBT p. 58, lines 23-25). The Defendant testified that the middle of the slope was icy and bumpy, but that he was in control of his skis almost the entire time he was going down the slope (Chen EBT p. 66, lines 6-10). He further testified that he first saw the Plaintiff when he was six or seven feet from her, approximately four or five seconds before colliding with the Plaintiff (Chen EBT p. 67, lines 9-11, 22-25; p. 68, lines 2-3). The Defendant

testified that he was trying to stop by putting his skies into a "wedge", but was unable to come to a complete stop due to the icy and bumpy condition of the slope (Chen EBT p. 68, lines 7-21). He further testified that as he approached the bottom of the slope, he was shouting for people to watch out since there were a lot of people and he did not want to hit them (Chen EBT p. 73, lines 15-21). The Defendant further testified that there were moguls and ice at the bottom of the slope and that he was unable to slow down (Chen EBT p. 74, lines 2-6). He further testified that "at the very last" he was trying to "fall down to stop completely" (Chen EBT p. 77, lines 6-8; p. 79, lines 18-22). The Defendant stated that had he been going at 10 kilometers per hour it would have been easier to stop (Chen EBT p. 77, lines 19-21).

A non-party witness, Ms. Katie Huray testified that she witnessed the subject accident. Ms. Huray testified that on the date of the accident she was standing with the Plaintiff at the bottom of the Sugar slope next to the "orange mesh fence" (Huray EBT p. 19, lines 7-9, 22-25). She further testified that she saw the Defendant skiing down the slope towards the Plaintiff at a very fast speed without stopping or slowing down (Huray EBT p. 24, lines 12-17). Ms. Huray further testified that she did not see the Defendant with any poles in his hands and that she did not see the Defendant try to turn or avoid the collision (Huray EBT p. 25, lines 17-19, 23-25; p. 26, line 2). Ms. Huray testified that she was born deaf and is "profoundly deaf" (Huray EBT p.53, lines 2-7). However, she testified that she does not have trouble hearing a person if they are yelling or screaming (Huray EBT p.53, lines 13-16). Ms. Huray further testified that she did not hear the Defendant scream, yell or warn anyone as he was skiing down the slope towards the Plaintiff, and that she did not see anyone snow-boarding or skiing in front of the Defendant (Huray EBT p.54, lines 10-18). She further testified that prior to the accident, she did not see the Defendant attempting to stop (Huray EBT p.58, lines 14-16). She further testified that the Defendant's chest was the contact point between the Defendant and the Plaintiff during the accident (Huray EBT p.58, line 25; p. 59, lines 1 -2).

Parties' contentions in the instant motion

In support of his motion for summary judgment, the Defendant argues that the Court should apply the law of the State of New Jersey in deciding the instant motion for summary judgment. The Parties in the underlying accident are not domiciliaries of the same state, the Plaintiff being domiciled in New York and the Defendant being domiciled in China. Further, the underlying accident occurred in the State of New Jersey, which as stated is not the domicile of either of the parties. As such, the Defendant argues that the Court should apply the doctrine of "lex loci delicti" and decide the instant motion according to the laws of the State of New Jersey, the location where the accident occurred.

The Defendant further argues in sum and substance that New Jersey Law requires a finding of recklessness in order for liability to attach to the Defendant, and that in the underlying action the Plaintiff has failed to submit sufficient evidence to indicate that the Defendant was skiing in a reckless manner. The Defendant cites to the New Jersey Ski Act and the Supreme Court of New Jersey's decision in Angland v. Mountain Creek Resort, Inc., (213 NJ 573 (NJ 2013)).

The Defendant further argues that even assuming arguendo that the Court were to apply the laws of the State of New York to the underlying action, the Defendant has still established prima facie that he is entitled to summary judgment dismissing the Plaintiff's action based upon the assumption of risk doctrine. The Defendant argues in sum and substance that the Plaintiff assumed the inherent risks of downhill snow-boarding and that the injuries the Plaintiff sustained were inherent to downhill snow-boarding. The Defendant argues that he did not enhance such risks, as he slowed down upon approaching the bottom of the slope and shouted several times to warn skiers and snow-boarders that he was having difficulty stopping. The Defendant further argues that the Plaintiff enhanced the inherent risk associated with snow-boarding by standing with her back facing the slope and failed to provide any indica of her deafness to her fellow skiers or snow-boarders in the area. The Defendant further argues

that the Plaintiff's testimony that she was in a "safety zone" at the time of the accident is speculative and conclusory, and that it is evident from the Plaintiff's testimony that at the time of the accident she was standing in a place for individuals to slow down and/or remove equipment. Therefore, the Defendant argues that the Plaintiff cannot recover damages from the Defendant for her injuries, and the Defendant is entitled to summary judgment dismissing the underlying action.

In opposition, the Plaintiff argues that both New Jersey and New York require a finding of recklessness in order for liability to attach to a tortfeaser when involved in recreation activities such as skiing. The Plaintiff argues that although each state relies upon its own case law and statutes to determine the standard of care between skiers on a ski mountain, both NY and NJ case law reach the same cognate decisions.

The Plaintiff further argues that regardless of whether the Court applies New Jersey or New York law, the Defendant is not entitled summary judgment as there are issues of fact as to whether or not the Defendant acted recklessly in the underlying action. Specifically, the Plaintiff refers to the Defendant's testimony as to his rate of speed going down the slope prior to the accident, his testimony that he failed to take evasive action before colliding with the Plaintiff and his testimony that he did not fall down to avoid the collision. The Plaintiff further attaches an expert affidavit by Rick Frongillo, who identifies himself as a "Winter Sports Safety Expert". Mr. Frongillo indicated that based upon his personal observations of the area where the accident occurred and his examination of the Parties' deposition testimonies, it is his opinion that the Defendant acted recklessly and said recklessness caused the collision.

In reply to the Plaintiff's opposition, the Defendant argues that the Plaintiff has failed to create an issue of fact as to whether or not the Defendant acted recklessly. Specifically, the Defense refers to the Defendant's testimony that he attempted to stop prior to the collision, but was unable to do so. Further, the Defense argues that the Plaintiff's expert's opinion that the Defendant acted recklessly is conclusory and fails to create an issue of fact.

Analysis

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (id.). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)).

Both the State of NJ and the State of NY apply the same "recklessness" standard in determining liability for injuries resulting from activities such as skiing under the "assumption of risk" doctrine.

As a threshold legal matter and in order to properly apply the summary judgment standard, this Court must first determine the proper law against which to assess the facts. "When a case presents a potential choice of law issue, a court should first analyze whether there is an actual conflict between the laws in the different jurisdictions" (Bodea v. Trans Nat Express, Inc., 286 AD2d 5, 8 (NY App Div 4th Dept 2001) citing Allstate Ins. Co. v. Stolarz, 81 NY2d 219 (NY 1993)).

Upon examination of both NJ and NY case law, the Court finds that there is no conflict as both New Jersey and New York apply the same "recklessness" standard in determining a party's responsibility for injuries resulting from recreational activities such as skiing. In Angland v. Mountain Creek Resort, Inc. (213 NJ 573, 589 (NJ 2013)) the Supreme Court for the State of New Jersey stated that "[t]he common law standard of care that ordinarily applies as between individuals involved in recreational sporting activities, as we have explained, is not breached by mere negligence. As we have held, 'the duty of care applicable to participants in informal recreational sports is to avoid the infliction of injury caused by reckless or intentional conduct.'" (Angland v. Mountain Creek Resort, Inc., 213 NJ 573, 589 (NJ 2013) citing Crawn v. Campo, 136 NJ 494, 497 (NJ 1994)). This is the same standard applied in New York State when determining questions of liability in actions involving recreational activities such as skiing (see Farone v. Hunter Mtn. Ski Bowl, Inc., 51 A.D.3d 601 (NY App. Div. 1st Dept 2008) lv denied 11 NY3d 715 (NY 2008); Kaufman v. Hunter Mt. Ski Bowl, 240 AD2d 371 (NY App Div 2nd Dept 1997) lv denied 91 NY2d 805 (NY 1998)); Sontag v. Holiday Val., Inc., 38 AD3d 1350 (NY App Div 4th Dept 2007). "Where no conflict exists between the laws of the jurisdictions involved, there is no reason to engage in a choice of law analysis." (Elson v. Defren, 283 AD2d 109, 114 (NY App Div 1st Dept 2001) citing Portanova v. Trump Taj Mahal Assocs., 270 AD2d 757, 759 (NY App Div 3d Dept 2000) lv denied 95 NY2d 765 (NY 2000)). In the instant action, there is no

conflict of laws as NY and NJ both apply the same recklessness and inherent risk analysis to liability actions stemming from skiing accidents. As such, there is no need to engage in a choice of law analysis (Elson v. Defren, 283 AD2d 109, 114 (NY App Div 1st Dept 2001)).

Although the Plaintiff assumed certain inherent risks by voluntarily snow-boarding/skiing, the Defendant has not established prima facie that he did not engage in reckless, or other risk-enhancing conduct not inherent in the activity' of downhill snow-boarding/skiing that caused or contributed to the accident.

CPLR §1411 reads as follows:

> Damages recoverable when contributory negligence or assumption of risk is established
>
> 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 the 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)).

"'[D]ownhill skiing [and snow-boarding] . . . contain[ ] inherent risks including, but not limited to, the risks of personal injury . . . which may be caused by . . . other persons using the facilities', and thus there generally is an inherent risk in downhill skiing and snow-boarding that the participants in those sports might collide" (Martin v. Fiutko, 27 AD3d 1130, 1131 (NY App. Div. 4th Dept 2006) citing General Obligations Law § 18-101; Gern v. Basta, 26 AD3d 807 (NY App Div 4th Dept 2006) lv denied 6 NY3d 715 (NY 2006); Lamprecht v. Rhinehardt, 8 AD3d 448 (NY App Div 2d Dept 2004); Zielinski v. Farace, 291 AD2d 910 (NY App Div 4th Dept 2002) lv denied 98 NY2d 612 (NY 2002)). Nevertheless, "a sporting participant will not be deemed to have assumed the risks of reckless or intentional conduct" (Moore v. Hoffman, 114 AD3d 1265, 1265-1266 (NY App Div 4th Dept 2014) citing Thornton v Rickner, 94 AD3d 1504 (NY App Div 4th Dept 2012)). "Generally, the issue of assumption of [the] risk is a question of fact for the jury" (Moore v Hoffman, 114 AD3d 1265, 1266 (NY App Div 4th Dept 2014) (internal citations omitted)).

There is no dispute in the underlying action that the Plaintiff voluntarily participated in the activity of snow-boarding and that said action carries with it the assumption of those risks inherent to snow-boarding, which includes being injured in collisions with other skiers and/or snow-boarders (See Farone v. Hunter Mtn. Ski Bowl, Inc., 51 A.D.3d 601 (NY App. Div. 1st Dept 2008) lv denied 11 NY3d 715 (NY 2008); Zielinski v. Farace, 291 A.D.2d 910 (NY App Div 4th Dept 2002) lv denied 98 NY2d 612 (NY 2002); Kaufman v. Hunter Mt. Ski Bowl, 240 AD2d 371 (NY App Div 2nd Dept 1997) lv denied 91 NY2d 805 (NY 1998)). However, upon review of the evidence including the Parties' and nonparty witness's deposition testimonies, the Court finds that the Defendant has failed to establish prima facie that he did not engage in reckless, or other risk-enhancing conduct not inherent in the activity' of downhill skiing that caused or contributed to the accident. Further, even if the Defendant had met his prima facie burden, the Plaintiff has established based upon the submitted papers that there are issues of fact warranting the denial of summary judgment.

Specifically, there are issues of fact as to whether or not the Defendant acted recklessly while skiing down the slope immediately prior to colliding with the Plaintiff. The Defendant specifically testified that he was traveling at a speed that was too fast for the conditions of the slope and his level of skiing experience. He further testified that he was unable to fully stop having tried to do so. The Defendant further stated that at some point he was going 20-30 kilometers per hour, realized that his speed was too fast when he was about half way down the slope, used a wedge technique to stop, but was unable to do so. The Defendant further testified that from the halfway point, he continued going at about 20 kilometers per hour to the bottom of the slope, slowing down and picking up speed as he was unable to stop. The Defendant testified in sum and substance that at some point he realized that the only way to fully stop was to fall down, however, he failed to do so in a timely fashion to prevent the accident. The Defendant also conceded in his testimony that if he had been going at a slower rate, he would have

been able to stop. Finally the non-party witness's testimony directly contradicts the Defendant's testimony as to whether or not he shouted warnings prior to colliding with the Plaintiff.

Given the Defendant's testimony as to his limited skiing ability, the level of his skiing experience prior to the accident, the speed at which he was traveling down the hill, his observations as to the people on the slope and the conditions of the slope, the Defendant's testimony that he did not fall down in order to stop completely prior to the accident and the testimony by both the Plaintiff and the non-party witness that the collision occurred while the Plaintiff was standing in the safety zone at the bottom of the beginner's slope, the Court finds that there is a triable issue of fact as to whether the Defendant's conduct rose to the level of recklessness that was over and above the appropriate level of risk assumed by the Plaintiff, a novice snow-boarder who was injured while standing and talking in a safety zone at the bottom of a beginner slope (See generally Moore v. Hoffman, 114 AD3d 1265 (NY App Div 4th Dept 2014); Martin v. Fiutko, 27 AD3d 1130 (NY App Div 4th Dept 2006)).

Finally, as the Court determined based upon Parties' and non-party witness's deposition transcripts that the Defendant failed to meet his prima facie burden and that there are issues of fact as to whether or not the Defendant acted recklessly, the Court did not consider the Plaintiff's expert affidavit in deciding the instant motion.

Conclusion

Accordingly and for the reasons so stated, it is hereby

ORDERED that the Defendant's motion for summary judgment dismissing the Plaintiff's action is denied.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: November 20, 2015

ENTER:

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