Gramling v Chelsea Piers, L.P.
2017 NY Slip Op 31900(U)
September 8, 2017
Supreme Court, New York County
Docket Number: 158119 /14
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

JILLIAN GRAMLING,
Plaintiff

- Against-

CHELSEA PIERS, L.P., a Limited Partnership, Individually and d/b/a FIELD HOUSE AT CHELSEA PIERS, CHELSEA PIERS MANAGEMENT, INC., Individually and d/b/a FIELD HOUSE AT CHELSEA PIERS, and "JOHN DOE" the true name and identity of a Gymnastic Coach being unkown,

Defendant.

INDEX NO. 158119 /14
MOTION DATE 07-19-2017
MOTION SEQ. NO 002
MOTION CAL. NO

The following papers, numbered 1 to 5 were read on this motion for Summary Judgment by defendants.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment by defendants CHELSEA PIERS L.P., a Limited Partnership and d/b/a FIELD HOUSE at CHELSEA PIERS, CHELSEA PIERS MANAGEMENT, INC., Individually and d/b/a FIELD HOUSE at CHELSEA PIERS (hereinafter CHELSEA PIERS) is granted solely to the extent of dismissing the Second, Third, Fourth and Fifth causes of action in the complaint, the remainder of the motion is denied.

This is an action to recover for personal injuries sustained by plaintiff on April 24, 2013 while attending a beginner's level adult gymnastics class at defendants Chelsea Piers' facility and performing a front handspring. Plaintiff was 24 years old at the time, was an experienced dancer whose dancing included gymnastic moves such as forward rolls, backward rolls, cartwheels and roundoffs, and had taken five beginner's gymnastics classes at Chelsea Piers prior to her accident, during which she had practiced front and back handsprings.

Plaintiff stated at her deposition that on April 24, 2013 there were three coaches working with approximately 15 to 20 students, that she participated in warm-up activities which included cartwheels, forward rolls, backward rolls and handstands. That she practiced front handsprings using a six to eight inch mat and practiced front handsprings without using an octagonal mat. At the suggestion of her coach she used

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

a rigid cloth strap around her wrists and performed approximately three or four front handsprings without any problem, landing on her feet. She then performed two more front hadsprings without the cloth strap on her wrist and landed on her feet. After this the group broke into two sections, some stayed on the mat and some went to the trampoline. Plaintiff chose to stay on the mat along with about nine more people, approximately ten in total.

Two coaches were assigned to the students that stayed on the mat, allowing the students to work on whatever skill they needed to work on. Plaintiff worked with a coach one to one. The coach placed a thin mat for plaintiff to place her hands on, and a thick mat a few inches away for plaintiff to land on. The coach stood by the thin mat, plaintiff ran towards the spot where the thin mat was, placed her hands on the mat, went vertical and then immediately fell directly from that position injuring herself. Plaintiff described it as crumpling on to the thick mat. Plaintiff stated that she landed on her back and injured her elbow. She stated that she expected the coach to be there to help her but because it was a thin mat and because the coach didn't actually spot her she ended up in a vertical position and didn't land on her butt which is a very safe way to land. (See EBT P. 79 Line 12 to P. 85 Line 9).

Plaintiff stated that she felt pain to her right elbow when she was in the vertical position on her hands in the middle of the mat. Within a split second of putting her hands down on the mat, by the time she hit the vertical she felt pain in her right elbow. She started feeling pain as soon as her body was not able to support the vertical position. As her body lost momentum of the swinging and started the momentum of gravity pulling her down and because she was still on her hands, and her momentum was not moving forward, it was just going down, she felt [the pain] in her elbow because the whole weight of her body was crushing down on that. (see Plaintiff's EBT P. 86 Line 6 to P. 89 Line 16).

Plaintiff stated that before her accident she was aware of the risk of sustaining injuries performing gymnastic maneuvers, and even though she knew there was a risk of injury performing gymnastics she still made the decision to perform the gymnastics (EBT P. 138 Line 25 to P. 139 line 20). Furthermore, when she attended the sixth class she signed a signing sheet that contained a waiver wherein she acknowledged and assumed the risk of injury from the use of the facility (see moving papers exhibit G).

Chelsea Piers moves for summary judgment alleging that Plaintiff assumed the risk of injury while performing gymnastics. Defendants argue that by engaging in the gymnastics activity plaintiff consented and appreciated the risks which are commonly inherent in and arise out of the nature of the activity generally and that flow from such participation. It further argues that at the time of the accident she was a consenting adult who was fully aware of the risks of injury when performing gymnastics, as evidenced by the waiver and assumption of the risk document she signed before the accident. Finally, defendants argue that the accident did not occur due to defective equipment, or to anything that was hidden or unexpected. Plaintiff voluntarily assumed the risk of injury to her arm by voluntarily attempting to perform a gymnastics maneuver.

Plaintiff opposes the motion and submits her affidavit and that of Mr. Phil Frank, an expert in the field of Gymnastics.

Plaintiff stated in her affidavit that whenever she had attempted handsprings she was always spotted by an instructor and would not attempt to perform a handspring without an instructor spotting her. Spotting consisted of an instructor watching her perform the lead-up to the handspring and the handspring itself. If the instructor saw that she needed help while performing the handspring, the instructor would either grab her midsection, or push her in a way that would help her complete the maneuver. On the date of the accident, on the assumption that the instructor was spotting her, she attempted to perform a handspring maneuver within arms length of the instructor and was injured.

On this occasion the instructor watched her run-up leading to the handspring, just as in every other occasion. However he did not spot her, did not grab her or push her or do anything to assist or protect her. To her astonishment, soon after the occurrence, she heard the instructor that was supposed to be spotting her say to Kim Rich of Chelsea Piers that he did not even see her perform the handspring at all.

Plaintiff stated that had the instructor been actually spotting her he could have prevented her injuries because he was within arms length of her when she went vertical. She has had problems on previous performances of handsprings and the instructor spotting her on all prior occasions was always able to catch her, or assist her in such a way that prevented any possible injury. Finally she stated that she knew that a handspring was a dangerous maneuver, that she was not ready to perform this maneuver without being spotted, would not have done the handspring without being spotted, and never did a handspring without being spotted.

Mr. Frank, an expert in the field of gymnastics, states in his affidavit that the instructor's failure to spot plaintiff is a departure from the good and accepted standards utilized in an adult beginner's gymnastics class and a serious breach of conduct. Had the instructor been actively spotting her he would have seen her hesitating as she was halfway into her run, and would have been able to prevent any injury from occurring.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20th Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not

"issue determination"(Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

"Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and the plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention"(Weinberger v. Guttman Breast and Diagnostic Institute, 254 A.D.2d 213, 679 N.Y.S.2d 217 [1st. Dept. 1998];Neiger v. City of New York, 72 A.D.3d 663, 897 N.Y.S.2d 733 [2nd. Dept. 2010]). The instructor was acting within the scope of his employment and defendant would be liable for his negligence, if any, under a theory of respondeat superior, therefore plaintiff may not proceed with a cause of action for negligent hiring and retention. Accordingly, the second and third causes of action for negligent supervision and negligent hiring and retention are severed and dismissed.

Defendant also moves to dismiss the fourth and fifth causes of action for Breach of Contract and representation and Breach of Standard of care. Defendant has made out, and plaintiff has not refuted, that there was no contract or agreement between plaintiff and defendant, and that at the time plaintiff attended adult gymnastic classes at Chelsea Piers USA Gymnastics did not require any coaching licenses or certifications for the adult gymnastic classes that plaintiff attended. Furthermore, the fifth cause of action is duplicative of the first cause of action for negligence and should be dismissed. Where the cause of action is based on the same facts and seeks essentially the same relief it is duplicative (see Village of Kiryas Joel v. County of Orange, 144 A.D.3d 895, 43 N.Y.S.3d 51). Accordingly the Fourth cause of action for Breach of contract and the Fifth causes of action for Breach of Standard of Care are severed and dismissed.

The assumption of the risk doctrine applies as a bar to liability where a consenting participant in sporting or recreational activities is aware of the risks, has an appreciation of the nature of the risks, and voluntarily assumes the risks. If the risks of a sports or recreational activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty; However, the doctrine of primary assumption of the risk will not serve as a bar to liability if the risk is unassumed, concealed or unreasonably increased. (Rosenblatt v. St. George Health and Racquetball Associates, LLC, 119 A.D.3d 45, 984 N.Y.S.2d 401 [2nd. Dept. 2014]). In determining applicability of the doctrine of primary assumption of the risk, awareness of the risk is to be assessed against the background of the skill and experience of the particular plaintiff (Latimer v. City of New York, 118 A.D.3d 420, 987 N.Y.S.2d 58 [1st. Dept. 2014]).

Courts have applied this doctrine as a bar to liability and dismissed the case where the plaintiff- injured while attempting to perform a front aerial somersault in a gymnastic floor exercise routine- was an experienced gymnast who had spent approximately two hours warming up on the mats where he ultimately injured himself (Hopkins v. City of New York, 248 A.D.2d 441, 669 N.Y.S.2d 667 [2nd. Dept. 1998]); where the plaintiff - injured while performing

assisted straddle jump during a varsity cheerleading practice- was an experienced cheerleader who had spent one hour warming up on the field and had successfully performed one or two assisted straddle jumps before the accident (Weber v. William Floyd School District, UFSD, 272 A.D.2d 396, 707 N.Y.S.2d 231 [2nd. Dept. 2000]); where the plaintiff - a highschool sophomore with extensive cheerleading experience- was injured when the cheerleader she was spotting fell without warning and knocked her to the floor (DiGiose v. Bellmore-Merrick Central High School District, 50 AD.3d 623, 855 N.Y.S.2d 199 [2nd. Dept. 2008]); when the infant plaintiff engages in an act of performing unassisted front flip on a trampoline in a gymnastic class (Yedid v. Gymnastic Center, 33 A.D.3d 911, 824 N.Y.S.2d 299 [1st. Dept. 2006]); and when the plaintiff, although not experienced, is able to appreciate and fully comprehend the perfectly obvious risks of participating in the sports or recreational activity (See Koubek v. Denis, 21 A.D.3d 453, 799 N.Y.S.2d 746 [2nd. Dept. 2005]; Vecchione v. Middle County Central School District, 300 A.D.2d 471, 752 N.Y.S.2d 82 [2nd. Dept. 2002]; Sajkowski v. Young Men's Christian Ass'n of Greater New York, 269 A.D.2d 105, 702 N.Y.S.2d 66 [1st. Dept. 2000]).

The plaintiff is not an experienced gymnast. She was on her sixth class of an adult beginner's gymnastics course, and had not performed the handspring maneuver without being spotted. She stated in her deposition testimony, and in her affidavit opposing the motion for summary judgment, that she expected and assumed that her instructor would be spotting her when she performed the handspring maneuver. She further stated, and this is unrefuted, that the instructor failed to spot her and that "to her astonishment, soon after the occurrence, she heard the instructor that was supposed to be spotting her say to Kim Rich of Chelsea Piers that he did not even see her perform the handspring at all." Under these circumstances a triable issue of fact exists as to whether the instructor employed by defendants unreasonably increased the risks to plaintiff beyond those usually inherent in gymnastics, by having her perform the handspring maneuver and failing to spot her (see Levy v. Town Sports International, 101 A.D.3d 519, 955 N.Y.S.2d 599 [1st. Dept. 2012]; Layden v. Plante, 101 A.D.3d 1540, 957 N.Y.S.2d 458 [3rd. Dept. 2012]).

According to Plaintiff in this case (unlike in Butt v. Equinox 63rd Street, Inc., 139 A.D.3d 614, 32 N.Y.S.3d 160 [1st. Dept. 2016] and Lee v. Maloney, 270 A.D.2d 689, 704 N.Y.S.2d 729 [3rd. Dept. 2000] where the court dismissed the complaint when plaintiffs were experienced weight-lifters, the spotters were attentive and the injury was spontaneous) the instructor was inattentive, failed to spot her and had sufficient time to have prevented her injury-had he been attentive-by catching her by her midsection and propelling her forward, as he had done on other occasions. There is a material issue of fact as to whether plaintiff's instructor failed to spot her (Cody v. Massapequa Union Free School District No. 23, 227 A.D.2d 368, 642 N.Y.S.2d 329 [2nd. Dept. 1996]), or whether his actions unreasonably heightened the risks to which plaintiff was exposed. Finally the application of the doctrine of assumption of risk is generally a question of fact to be resolved by a jury (Layden v. Plante, Supra quoting McGrath v. Shenendehowa Central School District, 76 A.D.3d 755, 906 N.Y.S.2d 399 [3rd. Dept. 2010] and Pantalone v. Talcott, 52 A.D.3d 1148, 861 N.Y.S.2d 166 [3rd. Dept. 2008]).

Defendant has made out a prima facie case entitling it to judgment as a matter of law, and plaintiff has failed to raise an issue of fact to defeat summary judgment, dismissing the Second, Third, Fourth and Fifth causes of action. Plaintiff has raised a triable issue of fact precluding dismissal on summary judgment of the first cause of action for negligence.

Accordingly, it is ORDERED, that defendant's motion for summary judgment is granted solely to the extent of dismissing the Second, Third, Fourth and Fifth causes of action, and it is further

ORDERED that the Second cause of action for Negligent Supervision, the Third cause of action for Negligent Hiring and Retention, the Fourth cause of action for Breach of Contract and Representation and the Fifth Cause of action for Breach of Standard of Care asserted in the complaint are hereby severed and dismissed, and it is further

ORDERED that the clerk of court enter judgment accordingly, and it is further

ORDERED that the motion for summary judgment dismissing the First cause of action for Negligence is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: September 8, 2017

Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE