Jenkins v CEC Entertainment, Inc.
2018 NY Slip Op 31483(U)
July 6, 2018
Supreme Court, Kings County
Docket Number: 512662/2015
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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JENICE JENKINS, individually, and as mother and natural guardian of the infant, GIOVANNI FRATER,

Plaintiffs,

-against-

CEC ENTERTAINMENT, INC. d/b/a CHUCK E. CHEESE'S,

Defendant.

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DECISION / ORDER

Index No. 512662/2015
Motion Seq. No. 2
Date Submitted: 6/14/18
Cal No. 30

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	24-32
Answering Affirmation and Exhibits Annexed.....	34-43
Reply Affirmation.....	42

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of an accident on June 22, 2015, when the infant plaintiff Giovanni Frater, who was six years old at the time, fell from a childrens' helicopter ride at a Chuck E. Cheese's restaurant owned by defendant.

Defendant CEC Entertainment contends that the undisputed facts demonstrate that defendant cannot be held liable for any negligence, as a matter of law, as the infant plaintiff's improper use of the ride was the sole proximate cause of the accident. The defendant maintains that the surveillance video of the incident shows the infant plaintiff

standing on the back of the helicopter ride, while another child was in the seat, and plaintiff then jumped or fell off while the ride was still "in the air" (exhibit E, clip 150622-171121 at 5:30 P.M.). Defendant avers that in the child's deposition testimony, the infant plaintiff was clear that he understood how to use the ride properly, that is, while sitting in the seat with the seatbelt on. Further, defendant maintains that the ride was tested and deemed "operational" the day before the accident.

Plaintiff counters that there are issues of fact as to whether defendant breached its duty to provide plaintiff with safe equipment and a safe place to play, and whether it failed to provide adequate supervision and instruction to the infant plaintiff regarding the proper use of the equipment. Plaintiff maintains that misuse of the ride in this manner by children was foreseeable and that defendant has not established that the ride was not inherently dangerous or that the defendant had adequate adult supervision of its infant patrons and of the ride in question, and that these questions remain issues of fact. Plaintiff relies on an expert who concludes, based upon his viewing of the surveillance video, that children frequently used the ride improperly and defendant's staff failed to make sure that children would not climb onto the ride either before it started or while it was in motion. The expert concludes that the manner in which the ride was placed in the space, the lack of safety precautions built into the design, and the lack of supervision and instruction provided by the defendant's staff combined to create a dangerous condition.

While it is true that defendant has shown that the plaintiff child misused the ride by climbing on the back of the ride while it was moving, and when the seat was occupied by another child, issues of fact exist as to whether misuse of this ride by

children was foreseeable and that therefore the defendant either failed to take necessary precautions to prevent misuse of the ride or that the design and set-up of the ride was not inherently dangerous.

As the Second Department explained in *Cruz v New York City Transit Auth.* (136 AD2d 196, 201 [2d Dept1988]):

> It has been historically recognized that liability could be found by the jury even in those instances where there has been a misuse of an instrumentality. New York State courts have recognized "the special propensities of children and the prevailing social policy of protecting them from harm" (*Barker v Parnossa, Inc.*, 39 NY2d 926, 929 [Breitel, Ch. J., concurring]) and have not deprived them of a right to compensation for injuries caused by the negligence of third parties . . . solely on account of their misuse of an instrument found on the defendant's premises.

Moreover, that court noted that "[t]he sufficiency of the precautions taken by a landowner to prevent injuries is almost always a question of fact for the jury (*Cruz v New York City Transit Auth.*, 136 AD2d at 202). "[A]t least once it is known that children commonly play around . . . an artificial structure, their 'well-known propensities . . . to climb about and play' . . . create a duty of care on the part of a landowner to prevent foreseeable risks of harm that might arise out of those activities" (*Holtslander v Whalen & Sons*, 126 AD2d 917, 919 [3d Dept 1987]).

Moreover, the assignment of fault to a six-year-old child has not generally been upheld in New York, as young children are not held to the same standard as adults with regard to their ability to appreciate the risk of injury (*See Clark v Interlaken Owners Inc.*, 2 AD3d 338 (1st Dept 2003) [assumption of risk doctrine did not apply to a six-year-old, citing *Roberts v NYC Hous. Auth.*, 257 AD2d 550, *lv denied* 93 NY2d 811 (1999)]).

The surveillance video here shows numerous instances of children climbing on

and misusing the subject ride. Indeed, "defendant's own submissions raise triable issues of fact whether it was foreseeable that children such as plaintiff would misuse the [ride] in the manner giving rise to the accident" (*see Charles ex rel. Charles v Vill. of Mohawk*, 128 AD3d 1477, 1478 [4th Dept 2015]).

At oral argument, counsel for defendant conceded that the ride was started by placing tokens in a slot which was located in a box that is low to the ground and accessible by a six-year-old child. Thus, there was no need for a parent to start the ride or to check that no children were in a place of danger when it was started.

As defendant has not made a prima face case for summary judgment, the court need not consider the papers in opposition. (*cf. Orelli v Showbiz Pizza Time* 302 AD2d 440, 440-441 [2nd Dept 2003] [defendant established prima facie entitlement to summary judgment and plaintiffs failed to submit evidence in admissible form sufficient to raise a triable issue of fact in fall from a coin-operated ride]).

Accordingly, it is

ORDERED that the motion is denied.

This shall constitute the decision and order of the court.

Dated: July 6, 2018

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court