SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

LAURA VOORHEIS et al.

INDEX NO. 158102/2013

MOT. DATE

- v -

MOT. SEQ. NO. 004

CATAMOUNT DEVELOPMENT CORPORATION et al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 38-60

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 67-73

Replying Affidavits NYSCEF DOC No(s). 74-84

This personal injury action arises from the infant plaintiff's fall from a chairlift at Catamount Ski Area in Hillsdale, New York on March 2, 2013. Defendants now move for summary judgment in their favor. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is denied.

Many of the relevant facts are not in dispute. The infant plaintiff was four years old at the time of her accident. Beginning in January 2013, plaintiff began taking weekly lessons with the Catamount Mountain Cats program in January 2013. On the morning of March 2, 2013, the infant plaintiff was being instructed by Sean Suydam. At that point, Suydam had been working as an instructor at Catamount for approximately four years.

Suydam explained at his deposition that he was "approved" to work as a ski instructor by Catamount but otherwise did not possess any formal certification. Suydam described the infant plaintiff as an above-average skier. Before the accident, the infant plaintiff had made two or three runs down the bunny hill before proceeding to a quad chairlift (the "lift") which she ultimately fell from. There were two operators working at the lift, Lucas Wiggins and David Johnson, who worked the inside and outside paths of the chairs, respectively.

When she got on the lift, the infant plaintiff was accompanied by Suydam and two other young students. The group made one trip up and down the mountain and then came back to the lift for another run. Suydam described all three students as "beginner to interrnediate" students. The infant plaintiff sat to the left of Suydam and the other two children sat to his right.

After Suydam got the children onto the lift, he testified that he made sure the children's back and bottoms were against the back of the chair.

Dated: 1/23/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Q. When you got [the children] back, you noticed and you made sure that their bottoms were all the way to the back of the seat?

A. Yes, yes. That is a very important part of the job. If they are not, they could slide right out.

...

Q. ... at what point did you make sure that their bottoms were all the way behind, all the way to the back of the chair?

A. Immediately as we boarded... Immediately upon the chair meeting you, you bring them back onto the chair. And that is a downward, you know, sitting onto the chair. And then, the chair is still moving. And then, the secondary motion is to bring them back against the back of the chair.

The lift had a safety bar which Suydam explained could not be lowered before the lift moved out of the boarding area. Suydam testified that "[t]here is a sign indicating... when to bring down the bar..." and admitted that the bar should come down "[a]s soon as you safely can."

Q. Assuming that the pole is first, at what point did you start bringing down the bar, before the pole or after the pole?

A. I cannot recall based on landmarks. While this is occurring, I am not assessing the terrain to the side. I am watching the students for their safety. So, after they had been firmly brought to the back and the chair had risen enough from the ground, I then brought the bar down. I was not checking the landscape to the side while this is going on.

Q. Do you have to wait until the chair is off the ground to make sure their bottoms are all the way back?

A. No. That happens as soon as we get on the chair.

Q. It starts getting off the ground?

A. Yeah. If you see how low it is here and you could see where they are already in this Plaintiff's Exhibit 4, you know, you quickly ascend. So, as soon as, you know, you are moving forward and up, you bring down the bar.

Suydam described the moments before the infant plaintiff's accident as follows:

Q. ... somewhere after the box but before pole one is where you ensure their bottoms are on –

A. Firmly against the back of the chair.

Q. That is the second step; you said, right?

A. It is one motion. So there is the onto the chair and then the back. So, within the one motion, it is the secondary, yes.

Q. You are doing it with all three students simultaneously, you said?

A. Yes.

Q. Is the lift operator that is stationed at that box control, you said, is that person making sure that those kids are fully back?

A. Yeah. If he sees that someone is slipping forward or falling off the chair, they will stop the lift and either put them back on or help them get all the way off and then put them on the next chair if he sees there is a problem.

...

Q. At what point did you start bringing down the pole, the bar?

A. I would say in line with the pine tree as seen here in the pole (indicating). Basically as soon as I had brought them back and made sure they are firmly seated, you say "I am going to bring the bar down. (sic) And you have to watch, you know, their heads and their bodies to make sure that the bar and the foot rest will not hit them or, you know, move them, et cetera. And you are holding them while this is happening. "I am going to bring the bar down, get ready." And then, you go and bring the bar down.

...

Q. You made sure that all the kids had their bottoms to the back?

A. And backs, yes, both.

Q. You went up to grab the bar –

A. With my left hand. He is there, they are there (indicating). Arms against both of them. My arms (sic) stays on the other two. That is it.

Q. When you went to grab the bar, you kept your right hand on the other two kids?

A. Yeah. Across the other two kids.

...

Q. Then, what happened?

A. And then, in the space between the bar coming down and my hand being on it, so reaching up, she proceeded to hop forward. And the bar was, if I recall, about at my head level, so on the way down. And as soon as that happened, I obviously let go of the bar and I caught her on my left leg by turning my ski rapidly and catching her along my boot and my ski.

...

Suydam tried to grab the infant plaintiff who was hanging from his leg with his gloved hands, but was unable to get a good grip. Suydam approximated that he traveled approximately yards after he first yelled "stop the lift!" Other skiers also yelled for the lift to stop before it came to a stop. When the lift eventually stopped, Suydam was still holding the infant plaintiff by his ski for another thirty seconds before she fell 25 feet into the snow below. As a result of her fall, plaintiff sustained a broken leg.

Both Johnson and Wiggins prepared witness statements on the date of the accident. According to Johnson, "[o]nce the chair... was pasted (sic) the 3rd tower up the hill the lift attendant and I heard a scream to stop the lift. From the terminal we could not see the girl hanging from the chair, but we stopped the lift anyways."

The infant plaintiff appeared for a deposition on October 18, 2016 and testified about her accident as follows:

> Q. ... do you remember how you happened to – how you road (sic) the ski lift on the time that you fell?
>
> A. I think someone like scooted by accident and then pushed me off, but not like pushed on purpose. They just scooted a bit and I just slid off under the bar.

Parties' arguments

Defendants argue that they are entitled to summary judgment because plaintiff's fall was "an unfortunate accident", defendants "satisfied [their] duty to make the ocnditions as safe as they appeared to be" and "[p]laintiff assumed the obvious risk of falling from the lift." Further, defendants maintain that "[p]laintiff's accident occurred only because she hopped forward in the seat just as Suydam had his arm raised to lower the safety bar." Defendants also contend that there is no evidence the Suydam's instruction was improper.

Meanwhile, plaintiffs argue that there are numerous issues of fact which preclude summary judgment. Plaintiffs dispute Suydam's claim as to when he allegedly lowered the bar, based upon the affidavit of Kevin Fizpatrick, their expert. Fitzpatrick is a "career expert professional ski instructor, certified in 1995 as Level 2 by the Professional Ski Instructors of America ("PSIA"). Plaintiffs claim that based upon the speed at which the lift traveled and the distance between the loading zone and where plaintiff fell, "Suydam failed to lower the bar for at least 23 seconds." Fitzpatrick explains:

> In this case, Suydam could not have lowered the bar where he claims because it is inconsistent with the physical evidence. Suydam claims he lowered the bar just after Tower #1, yet he also states that when [the infant plaintiff] began to fall he started yelling and then the lift travelled around 60 feet before stopping. According to Defendants' Exhibit Q, Catamount's ski patrol measured the distance from the loading zone to the point at which Laura fella as 212 feet, about 75 feet past Tower #3. That means Suydam couldn't have lowered the bar just after Tower #1. In fact, he must not have lowered the bar until roughly 150 feet into the journey, or just past Tower #3. According to Catamount's owner, Thomas Gilbert, the chairlift had a speed of 400-425 feet per minute. Therefore, Suydam failed to lower the bar for at least 23 seconds.

Fitzpatrick further claims that the safety bar could be lowered in the loading zone, based upon photos of the lift.

Plaintiffs also claim that the lift operators delayed in stopping the lift, which also contributed to the accident. Fitzpatrick states that the combined movements of the lift made it "extremely difficult even for an adult to climb back on the lift, let alone a four-year-old fatigued at the end of a three-hour lesson... [and] also made it very difficult for Suydam to successfully regain control of Laura, precipitating her fall." Finally, based upon the infant plaintiff's testimony, plaintiffs argue that there is a disputed issue of fact as to why she fell.

Plaintiffs also contend that whether the infant plaintiff could assume the risk of riding the lift is a question of fact at best, and argues that it is inapplicable to a four-year-old child based upon relevant caselaw.

On reply, defendants dispute Fitzpatrick's credentials and have provided the affidavit of its own expert, Benjamin Craig, Catamount's Snow Sports School Director, who is a "Level 3+ Certified Alpine instructor, a Level 2 Children's Specialist, and a Level 1 Certified Snowboard instructor." Defense counsel characterizes plaintiffs' arguments as "allegations [that] have been concocted in an attempt to create a compelling narrative where none exists." Craig maintains that Fitzpatrick's opinions regarding deviations from reasonable standards are not based upon industry standards set by the PSIA. Defendants maintain that plaintiff's accident only occurred because the infant plaintiff made a sudden unexpected movement.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Defendants' motion must be denied for the reasons that follow. First, there are questions of fact regarding the happening of the accident. The infant plaintiff disputes Suydam's version of the facts. While Suydam claims that the infant plaintiff suddenly thrusted forward without reason, the infant plaintiff testified that she was accidentally pushed. Plaintiff has also proffered its expert affidavit, which disputes Suydam's claims about when he went to lower the safety bar and how long the chairlift continued to move while the infant plaintiff was hanging from Suydam's ski. Indeed, while defendants argue that plaintiff's experts' opinion that the safety bar cannot reasonably be lowered as soon as the passengers' feet leave the ground, there is a dispute about when Suydam attempted to lower the safety bar.

For example, a reasonable fact-finder could conclude that: [1] Suydam did not lower the safety bar when he said he did; [2] had Suydam lowered the safety bar when he claims he did, plaintiff would not have fallen; and/or [3] if plaintiff had indeed thrusted forward, she would not have fallen twenty-five feet to the ground. These questions of fact preclude summary judgment on this record.

The court rejects defendants' argument that "[t]here is no evidence to contradict [Suydam's] testimony" as to when he lowered the bar. As plaintiff's expert explained, the distance between the loading zone and the infant plaintiff's fall, coupled with Suydam's testimony about how long the infant plaintiff hung from his ski, suggest that there was a significant delay in bringing down the safety bar. Defendants' expert

Further, the court does not find that defendants have established that the primary assumption of the risk doctrine bars plaintiffs' recovery. Ski area operators such as the defendants here are not liable for the risks inherent in skiing, "including risks associated with the use of a chairlift, when the participant is aware of, appreciates and voluntarily assumes those risks" (*De Lacy v. Catamount Development Corp.*, 302 AD2d 735 [3d Dept 2003]). The principal behind this rule is that when a participant makes an

informed estimate of the risks involved in the activity and willingly undertakes them, there can be no liability if he or she is injured as a result of those risks (*Turcotte v. Fell*, 68 NY2d 432 [1986]).

Here, the record is similar to that in *De Lacy*, where a seven-year-old child was injured when she fell from a chairlift. The Third Department affirmed a trial court's denial of summary judgment to the defendant on the grounds that issues of fact existed as to whether the child "fully appreciated the risks associated with the use of the chairlift as required for a finding that she had assumed the risk of her injuries." Here, it is unclear whether the infant plaintiff, a four-year-old child who had just begun skiing approximately three months prior to the accident, understood the risks inherent in riding the chairlift which she ultimately fell from (see also *Smith v. City of New York*, 84 AD3d 631 [1st Dept 2011] [nine-year-old boy who fell from monkey bars at a park and broke his arm did not assume risk did not "fully appreciate[] the risks involved in the activity in which he was engaged" as a matter of law]).

Defendants argue that *De Lacy* is wrongly decided. Defendants contend that the Third Department failed to consider the Safety in Skiing Code, embodied in GOL § 18-101 *et seq*. GOL § 18-101 provides in pertinent part as follows:

> (1) that downhill skiing, like many other sports, contains inherent risks including, but not limited to, the risks of personal injury or death or property damage, which may be caused by variations in terrain or weather conditions; surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps; other persons using the facilities; and rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski facility in New York State.

Defendants cite two more provisions of the General Obligations Law. GOL § 18-104, entitled "Duties of Passengers," requires passengers to "familiarize themselves with the safe use of any tramway prior to its use." GOL § 18-106 requires that "[s]kiers shall... obtain such education in the sport of skiing as the individual skier shall deem appropriate to his or her level of ability, including the familiarization with skills and duties necessary to reduce the risk of injury in such sport." Defendants maintain that skiers are bound by the requirements set forth in the Safety in Skiing Code (see *Duncan v. Kelly*, 249 A.D.2d 802, 803 ([3d Dept 1998]), and that the *De Lacy* Court failed to apply the Safety in Skiing Code.

Assuming *arguendo* that this court is not bound to follow *De Lacy*, defendants' arguments remain unavailing. On the facts here, plaintiffs claim that the infant plaintiff fell because Suydam didn't timely lower the safety bar, and there are no facts here which would suggest that the infant plaintiff assumed the particular risk which caused her injury. Indeed, defendants do not argue that the infant plaintiff herself should have lowered the safety bar.

Accordingly, the motion is denied.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion for summary judgment is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/23/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.