Ciorciari v New York City Dept. of Parks & Recreation
2018 NY Slip Op 31877(U)
August 6, 2018
Supreme Court, New York County
Docket Number: 160213/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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NICOLE CIORCIARI, DECISION/ORDER

Plaintiff, Index no. 160213/2015

-against- Mot Seq. 001

NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, THE CITY OF NEW YORK, WORLD ICE ARENA LLC and RD MANAGEMENT,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendants, New York City Department of Parks & Recreation, The City of New York, World Ice Arena LLC and RD Management LLC (collectively "Defendants"), now move pursuant to CPLR 3212 for summary dismissal of the Complaint of plaintiff, Nicole Ciorciari ("Plaintiff").

Factual Background

Plaintiff alleges that on January 11, 2015, she was injured while ice skating at the World Ice Arena located in Queens, New York. Plaintiff claims she was gliding toward the exit of the ice rink, with the plexiglass partition separating the rink and the non-refrigerated floor surface on her left side, when her left foot began to slip (Mackin Aff., Ex. E, 29:19-22; 31:13-19). Plaintiff claims that as her left foot slipped, her right foot was unable to extend naturally because the front of her right ice skate became caught on a "crack in the ice" (*id.*, 35:22-36:2). Plaintiff further claims that as a result of her foot becoming caught, she fell backwards, causing her ankle to fracture. Defendants the City of New York by and through the Department of Parks and Recreation entered into a licensing agreement with World Ice Arena, LLC (World Ice) wherein

World Ice accepted the license to outfit, operate and manage, *inter alia*, an ice-skating rink located at World Ice Arena.

Discussion

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once *prima facie* entitlement has been established, in order to defeat the motion, the opposing party must " 'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions' " (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Defendants meet their *prima facie* burden demonstrating their entitlement to dismissal of the Complaint, as Plaintiff is unable to identify the cause of her accident. In a slip-and-fall case, "[i]t is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury" (*Siegel v. City of New York*, 86 A.D.3d 452, 454 [1st Dept 2011]; *see Reed v. Piran Realty Corp.*, 30 A.D.3d 319, 320 [1st Dept 2006]; *see Morrissey v. New York City Tr. Auth.*, 100 A.D.3d 464, 464 [1st Dept 2012]; *Washington v. New York City Bd. of Educ.*, 95 A..D.3d 739, 739-40 [1st Dept 2012]). Defendants submitted Plaintiff's deposition testimony,

wherein Plaintiff testified that she did not see what the front of her skate became caught on (Mackin Aff., Ex. E, 40:13-15), and in fact, that she did not know exactly what caught her skate (*id.*, 41:6-10).

Initially, Plaintiff's testimony by itself fails to raise an issue of fact, as Plaintiff failed to demonstrate that she was able to identify the specific condition that caused her injury. The caselaw cited by Plaintiff to support its argument that it may be reasonably inferred from the evidence that there was a defective condition in the ice which caused her accident is inapposite, since in those cases the plaintiffs identified what caused their falls (*see e.g. Taveras v. 1149 Webster Realty Corp.*, 134 A.D.3d 495, 496 [1st Dept 2015], *aff'd*, 28 N.Y.3d 958 [2016]; *Figueroa v. City of New York*, 126 A.D.3d 438, 440 [1st Dept 2015]; *Brumm v. St. Paul's Evangelical Lutheran Church*, 143 A.D.3d 1224, 1227 [3rd Dept 2016]). Instead, Plaintiff's testimony only establishes that that an employee of the ice-skating rink, Marc Lupenowicz ("Lupenowicz"), allegedly told Plaintiff's mother that a crack existed in the ice before Plaintiff's fall. Plaintiff testified as follows:

> Q. Did anything other than the ice play any role in your accident?
>
> A. Yes.
>
> Q. What?
>
> A. When i fell -- as I was falling, I know my leg could not extend because the skate was stuck on something, which caused me to fall in a weird position, and causing me to fracture my ankle.
>
> Q. As you sit here today, am, do you know what it is that your skate caught on?
>
> A. Yes.
>
> Q. What is it?
>
> A. A crack in the ice.

> Q. As you sit here today, mam, how do you know there was a crack in the ice that your skate caught on?
>
> A. After I had fallen on the ice and I was taken to a separate area, an employee [Lupenowicz] had told my mother that he knew there was a crack in the ice, that it was discussed that morning, and that's probably why that happened.

(Mackin Aff., Ex. E, 35:13-36:3-11).

There is no indication that Lupenowicz witnessed the cause of Plaintiff's accident or that he observed the alleged crack at the location of Plaintiff's accident. Lupenowicz testified that he did not see Plaintiff fall "firsthand" and that he was fifty to one-hundred feet away when he observed "somebody fall out of the corner of [his] eye" (Mackin Aff., Ex. I, 16:16-17-:6). When Lupenowicz was asked whether he observed any cracks in the ice where Plaintiff fell, he testified that "[a]ll I remember is the ice being in a slight decrease towards the saddle" (*id.*, 19:23-20:4), which is not the alleged defective condition that Plaintiff claims caused her injury. Accordingly, Plaintiff is unable to identify the cause of her fall without resorting to speculation.

However, Plaintiff's identification of the location of her fall coupled with her expert's affidavit identifying a defective condition in the area where she claims her accident occurred raises an issue of fact as to whether the accident was caused by the allegedly defective condition (*see Berr v. Grant*, 149 A.D.3d 536, 537 [1st Dept 2017] [holding that plaintiff's testimony identifying where he fell, with his expert's testimony identifying the "defects, dangerous conditions, and code violations at that site" were sufficient to establish a triable issue of fact]; *Rodriguez v. Leggett Holdings, LLC,* 96 A.D.3d 555, 556 [1st Dept 2012] [holding that plaintiff's testimony identifying the site of his fall, together with his expert's report finding building code violations at the location of his fall "provided sufficient circumstantial evidence to raise an issue of fact as to whether her fall was caused by the allegedly defective condition."], quoting *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439, 440 [1st Dept 2010]).

Plaintiff testified that she fell on the ice located on the left side of the exit of the ice rink and circled the location of her fall on a photograph depicting the exit of the ice rink where she claims her accident occurred (Mackin Aff., Ex. E, 84:11-19; Ex., L). Moreover, Plaintiff submits the affidavit of her expert, Eric Heiberg, P.E. ("Heiberg"). Heiberg indicates that his inspection of the area where Plaintiff fell revealed, *inter alia*, two gaps located in between the ice and the mat covering the flooring, off the surface of the ice (Weg Aff., Ex. 1, ¶¶12;14-15). Heiberg identifies the first gap as the "parallel gap," located between the saddle/threshold and flooring, which extends parallel to the saddle/threshold. Heiberg states that the second gap, the "perpendicular gap," is located within the white flooring material that extends perpendicular to the threshold and the black mat. Heiberg opines that both gaps are of sufficient size to catch Plaintiff's ice-skate (*id.*, ¶¶13-15). Heiberg further opines that Plaintiff's testimony that her right leg was unable to extend and go up during her fall is consistent with her skate being trapped by one of the gaps (*id.*, ¶¶18; 20-21). Heiberg additionally opines that the long and narrow gaps created a dangerous condition and were a cause of Plaintiff's accident (*id.*, ¶24). The Court notes that Plaintiff only circled the parallel gap as being within the area where her fall occurred, and thus the perpendicular gap, as identified by Heiberg, may not be a basis for Defendants' liability.

Defendants' argument that Heiberg's analysis is flawed because he did not visit the subject ice skating rink until April 10, 2018, over three years post accident, is without merit, as Heiberg indicates that his opinion is based upon the photos taken of the subject area in January 2015, his inspection of the area, and the depositions of Plaintiff and Lupenowicz. The Court notes that Defendants do not argue that the parallel gap Heiberg identified in the photos taken in January 2015 changed in some way at the time of Heiberg's inspection.

Defendants' argument that Plaintiff's injuries were a result of the risks inherent and ordinary to ice-skating also fails. It is well established that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *Saravia v. Makkos of Brooklyn*, 264 A.D.2d 576, 577 [1st Dept 1999] ["A participant in a recreational event such as ice skating is presumed to have assumed the risk of potentially injury-causing conditions which are known, apparent or reasonably foreseeable"]). Since it is undetermined whether a defective condition caused Plaintiff's accident, an issue of fact exists as to whether Plaintiff's injuries were caused by a risk inherent in ice-skating. In any event, Heiberg affirmed that the gaps he identified in the flooring "constitute[] a dangerous and defective condition that is over and above the usual dangers inherent in [ice-skating]" and that Plaintiff "could not have been expected to anticipate the dangerous, long and narrow gaps prior to [her fall]" (Weg Aff., Ex. 1, ¶24).

Finally, Defendants fail to demonstrate that it is entitled to summary dismissal of the complaint based on the release entered into by Plaintiff. A contract agreement agreeing to waive a party's negligence "is enforceable '[w]here the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence" (*Blog v. Battery Park City Auth.*, 234 A.D.2d 99, 100 [1st Dept 1996], quoting *Lago v. Krollage*, 78 N.Y.2d 95, 99-100 [1991]). However, General Obligations Law ("GOL") § 5-326 prohibits the enforcement of such agreements by owners and operators of pools, gymnasiums, places of amusement or recreation, and similar establishments where the owner or operator receives a fee or other compensation for use of such facilities.

Here, Defendants submit the "World Ice Arena Birthday Party Reservation Contract," entered into between Plaintiff and World Ice, wherein Plaintiff agreed to discharge Defendants from liability stemming from an injury incurred by Plaintiff while ice-skating. In opposition, Plaintiff raises an issue of fact as to the applicability of GOL § 5-326 by submitting the Licence Agreement between defendant New York City and World Ice, wherein the ice skating rink is identified as being part of the "recreation complex," and evidence that Defendants received payment for use of the ice rink.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of the motion of Defendants, New York City Department of Parks & Recreation, The City of New York, World Ice Arena LLC and RD Management LLC, is denied. It is further

ORDERED that Defendants shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: August 6, 2018

Hon. Carol Robinson Edmead, J.S.C

HON. CAROL R. EDMEAD
J.S.C.