51 Misc.3d 1230(A)
Unreported Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Supreme Court, Kings County, New York.

Komronbek TILLAYEV, an infant under the age of eighteen by is mother and natural guardian, Nirgiza DEERKOP and Nargiza Deerkop, individually, Plaintiff(s),
v.
Fight Factory LLC, WMG Group, Inc., and Shell Holding Corp., Defendant(s).
WMG Group, Inc. Third–Party Plaintiff,
v.
Eugene Ryvkin, Third–Party Defendant.
Fight Factory LLC., Second Third–Party Plaintiff(s),
v.
Raisa Mikhlina Second Third–Party Defendant,
Raisa Mikhlina and Dimver & Associates, Inc., Fourth–Party Plaintiff,
v.
Northland Insurance Company a/k/a Northfield Insurance Company, Fourth–Party Defendant.

No. 22182/11.
|
June 10, 2016.

Attorneys and Law Firms

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Opinion

FRANCOIS A. RIVERA, J.

***1** Recitation in accordance with CPLR 2219(a) of the papers considered on the motion of the defendant Fight Factory LLC (hereinafter Fight Factory), filed on October 20, 2015, under motion sequence number thirteen for an order granting summary judgment in its favor on the issue of liability and dismissing the complaint pursuant to CPLR 3212.

Notice of Motion

Affirmation in support

Exhibits A–O

Affirmation in Opposition

Exhibits 1–3

Reply Affirmation

BACKGROUND

On September 30, 2011, plaintiffs commenced the instant action for damages for personal injuries and derivative claims by filing a summons and complaint with the Kings County Clerk's office. On December 2, 2011, Fight Factory joined issue by verified answer with cross claims.

On or about December 2, 2011, defendant WMG Group impleaded Eugene Ryvkin (hereinafter Ryvkin), the owner of defendant Fight Factory as a third-party defendant. By answer dated March 21, 2012, Ryvkin interposed an answer. On or about December 13, 2013, Fight Factory commenced a third-party action against Raisa Mikhlina (hereinafter Mikhlina), a broker who provided it with liability insurance. Mikhlina interposed an answer to the second third-party complaint dated January 31, 2014.

On April 23, 2015, Mikhlina commenced a fourth third-party action against Northland Insurance Company (hereinafter Northland). Northland did not interpose an answer and filed a motion to dismiss. By order dated February 26, 2016, this Court granted Northland's motion to dismiss. A note of issue has not been filed.

The complaint, bill of particulars and deposition transcript of Komronbek Tillayev (hereinafter Tillayev) alleges that on July 26, 2011, he was injured while participating in a sparring session at the Fight Factory, located at 24 Cobek Court in Brooklyn New York (hereinafter the premises). Fight Factory owns and operates a boxing gym located on the premises where Tillayev was being trained. On the date of the incident Tillayev was sparring in the boxing ring when an area of the mat on which he stepped sunk in causing him to fall and break his femur. Tillayev had been in the ring over thirty times prior to the accident but had never stepped into this particular spot which he described as a "soft spot". He alleges that he was not told about the alleged dangerous condition of the soft spot.

LAW AND APPLICATION

A motion for summary judgment may be granted only when there is no doubt as to the absence of any triable issue of material fact (*Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the court's function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v. Bell,* 222 A.D.2d 547 [2nd Dept 1995]).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320 [1986]; *Napolitano v. Suffolk County Dept. of Public Works,* 65 AD3d 676 [2nd Dept 2009]). The prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings (*Miller v. Village of E. Hampton,* 98 AD3d 1007 [2nd Dept 2012] *citing Foster v. Herbert Slepoy Corp.,* 76 AD3d 210, 214 [2nd Dept 2010]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez,* 68 N.Y.2d at 324).

Assumption of the Risk

***2** In the instant matter, the analysis of the defendant's obligations may differ as the plaintiff was involved in a sports activity. Defendants assert that Tillayev assumed the risk of injury by participating in a sport. Defendants further assert that Tillayev expressly waived any liability of the defendants by a waiver agreement.

Express Assumption of the Risk

Recovery may be barred if the doctrine of express assumption of risk or the doctrine of primary assumption of risk is deemed applicable. Express assumption of risk involves an agreement between the parties in advance that defendant need not use reasonable care for benefit of plaintiff and will not be liable to the plaintiff for the consequences of negligent conduct (*Arbegast v. Board of Education,* 65 N.Y.2d 161 [1985]). Where an individual has expressly agreed to assume the risk of harm, a defendant is relieved of the duty to exercise reasonable care for the benefit of that individual and will, therefore, not be liable for the individual's injuries (*Id.*).

An exculpatory clause cause contained in an agreement to waive a parties liability must explicitly and precisely limit the liability of defendant for his own negligent acts (*Gross v. Sweet,* 49 N.Y.2d 102, 107 [1979]). Broad and sweeping language is ineffective to bar an action against defendant for his negligence (*Id.* at 108). Furthermore, a minor is not bound by a release executed by his parent (*Alexander v. Kendall Cent. Sch. Dist.,* 221 A.D.2d 898, 899 (4th Dept 1995) *citing Santangelo v. City of New York,* 66 A.D.2d 880, 881(2nd Dept 1978); *see also, Shields v. Gross,* 58 N.Y.2d 338, 344 [1983]; *Kotary v. Spencer Speedway,* 47 A.D.2d 127, 130 [4th Dept 1975]).

In support of this portion of the motion, Fight Factory includes what is purported to be the membership agreement and waiver of liability. Ryvkin testified that Nargiza Deerkop, Tillayev's mother signed the release on behalf of Tillayev. As a child is not bound by a parent's execution of a waiver of liability the Court will not discuss whether the language contained in the release would have been sufficient to shield Fight Factory from liability.

Primary Assumption of the Risk

The defendant also asserts that the concept of primary assumption of risk, which serves to relieve a defendant of its duty of reasonable care and is a complete bar to recovery, applies to those situations where the activity in which the plaintiff is voluntarily participating is itself inherently risky, such as sporting and entertainment events, and the injury-causing event is a known, apparent or reasonably foreseeable consequence of such participation (*Turcotte v. Fell,* 68 N.Y.2d 432 [1986]).

Relieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks (*Morgen v. State of New York,* 90 N.Y.2d 471 [1997] *citing Turcotte v. Fell,* 68 N.Y.2d 432 [1986]; Prosser and Keeton, Torts § 68, at 486–487 [5th ed]; *McEvoy v. City of New York,* 292 N.Y. 654, aff 266 App.Div. 445; Restatement [Second] of Torts § 50, comment b). "Thus, to be sure, a premises owner continues to owe a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty' " (*Morgen* 90 N.Y.2d 471 [1997] *citing Turcotte v. Fell,* 68 N.Y.2d 432 at 439; Prosser and Keeton, Torts § 68, at 485–486 [5th ed]). Assumption of

the risk is to be analyzed in light of a social policy to facilitate free and vigorous participation in athletic activities (*Morgen,* 90 N.Y.2d 471 *citing Benitez v. New York City Bd. of Educ.,* 73 N.Y.2d 650, 657 [1989]).

***3** It is well settled 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. Accordingly, the analysis of care owed to plaintiff must be evaluated by considering the risks plaintiff assumed when he elected to participate and how those assumed risks qualified defendants' duty" (*Morgan,* 90 N.Y.2d 471[*internal citations omitted*]. However, it is important to note that participants will not be deemed to have assumed the risks of concealed or unreasonably increased risks (*Id. citing Benitez,* 73 N.Y.2d 650, 658). Therefore, to determine whether a defendant has violated a duty of care within the genre of tort-sports activities applicable standard includes "whether the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport" (*Morgan,* 90 N.Y.2d 471[*internal citations omitted*]).

Furthermore, "the application of the assumption of risk doctrine in assessing the duty of care owed by an owner or operator of a sporting facility requires that the participant have not only knowledge of the injury-causing defect but also appreciation of the resultant risk, but awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" (*Morgan,* 90 N.Y.2d 471 [*internal citations omitted*])

In support of the instant motion, Fight Factory submits the deposition testimony of Tillayev and Ryvkin. The pertinent parts of Tillayev's testimony are as follows: he had been in the ring approximately thirty times prior to the accident. He describes the ring as square with a mat floor with foam underneath. There is a "dead spot" in the ring that when stepped on sinks in several inches. He was moving around the ring when he stepped into the dead spot, his leg sunk in and the femur bone snapped. No one warned him about the dead spot and he was otherwise unaware of the spot. The injury was not caused in any way by being hit by his sparring partner.

The pertinent part of Ryvkin's deposition testimony are as follows: he is the owner and general manager of the gym where the accident occurred. He purchased and put together the rings. The rings were inspected yearly by the New York State Athletic Commission and the Amateur Boxing Association and before any official boxing matches. Further, a cleaner cleans the rings daily. The last official inspection was in 2010, the year prior to the accident. No one had told him of a dead spot or any other problem with the ring. The parties' contrasting accounts of the condition of the ring implicate issues of credibility, which may not be resolved by a court on a motion for summary judgment (*Schwartz v. Gold Coast Rest. Corp.,* —— NYS3d ——, 2016 WL 2337925, 2016 N.Y. Slip Op. 03487 [2nd Dept 2016]; *citing Ferrante v. American Lung Assn.,* 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 687 N.E.2d 1308).

***4** It is well established that boxing is an inherently dangerous activity that the doctrine of assumption of the risk would limit liability for many different types of injuries arising from engaging in the sport (*see Baccari v. Kcor, Inc.,* 109 AD3d 856 [2nd Dept 2013]. Assumption of the risk is not limited to injuries sustained from the actual boxing but may apply to certain defects found in the rings (*Id.*). However, in the instant action Tillayev testified that he was unaware of the defect and it was not readily apparent. As discussed above, participants will not be deemed to have assumed the risks of concealed or unreasonably increased risks. The doctrine of assumption of the risk is not meant to apply to defective equipment.

The movant has failed to establish their entitlement to summary judgment. Accordingly, that part of the motion is denied regardless of the sufficiency of plaintiffs' opposition papers (*Winegrad v. NYU Medical Center,* 64 N.Y.2d 851 [1985]).

Premise Liability

Generally, the elements of a negligence claim are the existence of a duty, a breach of that duty, and damages proximately caused by the breach of duty (*see Lapides v. State,* 37 A.D.2d 755 [2nd Dept 2008]). Furthermore, under New York common law a landowner has a duty to maintain his or her premises in a reasonably safe condition, taking into account all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*Alnashmi v. Certified Analytical Group, Inc.,* 89 AD3d 10 [2nd Dept 2011], *Walsh v. Super Value, Inc.,* 76 AD3d 371 [2nd Dept 2010]). Thus, liability for a dangerous or defective condition on real property is generally predicated on ownership, occupancy, control or special use of the property (*Alnashmi,* 89 AD3d 10).

It is well settled that an owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that it either

created or had actual or constructive notice of the condition (*see Gordon v. American Museum of Natural History,* 67 N.Y.2d 836). To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it (*Id.; Bean v. Ruppert Towers Hous. Co.,* 274 A.D.2d 305, 308 [1st Dept 2000]).

A party may not be held to have constructive notice, where the defect is latent, i.e., where the defect is of such a nature that it would not be discoverable even upon a reasonable inspection" (*Ferris v. County of Suffolk,* 174 A.D.2d 70, 76 (2nd Dept 1992); *see also Bean,* 274 A.D.2d 305). The "failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect" (*Monroe v. City of New York,* 67 A.D.2d 89, 96 (2nd Dept 1979); *see Pittel v. Town of Hempstead,* 154 A.D.2d 581(2nd Dept 1989); *Lee v. Bethel First Pentecostal Church of America, Inc.,* 304 A.D.2d 798 [2nd Dept 2003]).

***5** As discussed above, Ryvkin testified that the last time the ring was inspected was the year prior to the accident. He further testified that he was not present on the date of the accident and only heard what occurred second hand when he arrived at the gym later in the day. While Ryyvkin did testify that the cleaner cleans the mats daily, the procedure for cleaning does not encompass checking the mats or the ropes which hold the mats taut to the ring.

In the instant action the defect complained of could not been seen by the naked eye. However, the defect cannot be defined as latent, as the yearly routine inspections and inspections prior to boxing events were performed to specifically check for defects in the floor and ropes of the ring. In this particular fact pattern it is not unreasonable to expect that Ryvkin, as the owner, would be responsible for inspecting the rings regularly specifically for types of defects that Tillayev alleges caused his fall. As Ryvkin was unable to say when the last inspection was he has not met his prima facie burden on a summary judgment motion. Accordingly, that part of the motion is denied regardless of the sufficiency of plaintiffs' opposition papers (*Winegrad v. NYU Medical Center,* 64 N.Y.2d 851 [1985]).

CONCLUSION

Fight Factory LLC motion for an order for granting summary judgment in its favor on the issue of liability and dismissing the complaint pursuant to CPLR 3212 is denied. The foregoing constitutes the decision and order of this Court.

All Citations

Slip Copy, 51 Misc.3d 1230(A), 2016 WL 3221837 (Table), 2016 N.Y. Slip Op. 50889(U)

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