2019 WL 576624
Supreme Court, Appellate Division,
Second Department, New York.

Lyudmila JAMJYAN, Respondent,
v.
WEST MOUNTAIN SKI CLUB, INC., et al., Appellants.

2017–01701
|
(Index No. 21602/11)
|
February 13, 2019
|
Argued—October 11, 2018

Synopsis
Background: Patron, who was injured at snow tubing park, brought personal injury action against owners and operators of the tubing park, alleging that tubing park attendant caused accident by prematurely unhooking tow rope from snow tube the patron was sitting in while being towed to top of the hill. Owners and operators filed motion for summary judgment. The Supreme Court, Kings County, Edgar G. Walker, J., denied motion for summary judgment, and owners and operators appealed.

[Holding:] The Supreme Court, Appellate Division, Second Department, held that whether allegedly unexpected action of tubing park attendant, in prematurely unhooking patron's snow tube from tow line, created dangerous condition precluded grant of summary judgment to owners and operators.

Affirmed.

West Headnotes (4)

[1] **Negligence**

Doctrine of **assumption of risk** dictates 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.

Cases that cite this headnote

[2] **Negligence**

Assumption of risk doctrine applies to any facet of the activity inherent in it and to any open and obvious condition of the place where it is carried on.

Cases that cite this headnote

[3] **Negligence**

Assumption of risk is not an absolute defense, but, rather, a measure of a defendant's duty of care.

Cases that cite this headnote

[4] **Negligence**

Material issues of fact as to whether allegedly unexpected action of tubing park attendant, in prematurely unhooking patron's snow tube from tow line, created dangerous condition over and above the usual dangers that were inherent in sport of snow tubing, whether actions of tubing park attendant violated tubing park's own safety procedures, and whether design of tubing park contributed to the dangerous condition allegedly created by attendant's actions precluded grant of summary judgment to tubing park's owners and operators on negligence claim brought by patron, who alleged that she was injured when tubing park attendant prematurely unhooked tow rope from snow tube patron was sitting in while being towed to top of hill.

Cases that cite this headnote

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Attorneys and Law Firms

Roemer Wallens Gold & Mineaux LLP, Albany, N.Y. (Matthew J. Kelly of counsel), for appellants.

Simon, Eisenberg & Baum, LLP, New York, N.Y. (Sagar Shah of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., SYLVIA O. HINDS–RADIX, COLLEEN D. DUFFY, VALERIE BRATHWAITE NELSON, JJ.

DECISION & ORDER

***1** In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Edgar G. Walker, J.), dated December 16, 2016. The order denied the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff was injured at a snow tubing park. She commenced this personal injury action against the defendants, the owners and operators of the tubing park, alleging that a tubing park attendant caused the accident by prematurely unhooking the tow rope from the snow tube the plaintiff was sitting in while being towed to the top of the hill. The defendants moved for summary judgment dismissing the complaint on the ground that the action was barred by the doctrine of **assumption of risk**. The Supreme Court denied the motion, and the defendants appeal.

[1] **[2]** The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff was aware of a risk of injury while snow tubing. The doctrine of **assumption of risk** dictates 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 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202). The **assumption of risk** doctrine applies to any facet of the activity inherent in it and to any open and obvious condition of the place where it is carried on (*see Maddox v. City of New York,* 66 N.Y.2d 270, 277, 496 N.Y.S.2d 726, 487 N.E.2d 553).

[3] **[4]** However, **assumption of risk** is not an absolute defense, but a measure of a defendant's duty of care (*see* CPLR 1411; *Morgan v. State of New York,* 90 N.Y.2d at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202). Here, in opposition to the defendants' prima facie showing, the plaintiff raised a triable issue of fact as to whether the allegedly unexpected action of the tubing park attendant, in prematurely unhooking the plaintiff's snow tube from the tow line, created a dangerous condition over and above the usual dangers that are inherent in the sport of snow tubing (*see Morgan v. State of New York,* 90 N.Y.2d at 485, 662 N.Y.S.2d 421, 685 N.E.2d 202). Triable issues of fact existed as to whether the actions of the tubing park attendant violated the defendants' own safety procedures (*see de Lacy v. Catamount Dev. Corp.,* 302 A.D.2d 735, 736, 755 N.Y.S.2d 484; *Roberts v. Ski Roundtop,* 212 A.D.2d 768, 768–769, 623 N.Y.S.2d 264). Moreover, the opinion of the plaintiff's expert raised a triable issue of fact as to whether the design of the tubing park contributed to the dangerous condition allegedly created by the actions of the tubing park attendant (*see Owen v. R.J.S. Safety Equip.,* 79 N.Y.2d 967, 969–970, 582 N.Y.S.2d 998, 591 N.E.2d 1184).

Accordingly, we agree with the Supreme Court's determination to deny the defendants' motion for summary judgment dismissing the complaint.

LEVENTHAL, J.P., HINDS–RADIX, DUFFY and BRATHWAITE NELSON, JJ., concur.

All Citations

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