2019 WL 189819
Supreme Court, Appellate Division,
First Department, New York.

LAURA V., etc., et al., Plaintiffs–Respondents,
v.
CATAMOUNT DEVELOPMENT
CORPORATION, et al., Defendants–Appellants.

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ENTERED: JANUARY 15, 2019

Synopsis

Background: Plaintiffs brought action against defendants stemming from incident in which infant plaintiff fell out of chairlift. The Supreme Court, New York County, Lynn R. Kotler, J., denied defendants' motion for summary judgment. Defendants appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] genuine issue of material fact existed as to how infant plaintiff fell out of chairlift, precluding summary judgment, and

[2] dismissal of complaint against individual defendants was warranted.

Affirmed as modified.

West Headnotes (2)

[1] Judgment

Genuine issue of material fact existed as to how infant plaintiff fell out of chairlift, precluding summary judgment in plaintiffs' action against defendants.

Cases that cite this headnote

[2] Judgment

Dismissal of complaint against individual defendants was warranted, in plaintiffs' action against defendants stemming from incident in which infant plaintiff fell out of chairlift; portion of defendants' motion for summary judgment regarding individual defendants was unopposed by plaintiffs, and there was no evidence that individual defendants personally participated in any malfeasance or misfeasance constituting an affirmative tortious act that proximately caused infant plaintiff's injuries.

Cases that cite this headnote

Attorneys and Law Firms

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

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for respondents.

Sweeny, J.P., Richter, Kapnick, Gesmer, Kern, JJ.

Opinion

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered February 9, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion to the extent of dismissing the complaint as against the individual defendants, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

[1] Defendants Catamount Development Corporation and Catamount Ski Area (collectively Catamount) failed to establish entitlement to judgment as a matter of law on the basis that the doctrine of assumption of the risk bars plaintiffs' claims (*see Maddox v. City of New York,* 66 N.Y.2d 270, 279, 496 N.Y.S.2d 726, 487 N.E.2d 553 [1985]; *Rigano v. Coram Bus Serv.,* 226 A.D.2d 274, 275, 641 N.Y.S.2d 285 [1st Dept. 1996]). Although

infant plaintiff's ski instructor at the time of the accident testified that infant plaintiff fell out of the chairlift after she suddenly propelled herself out of the chair, infant plaintiff testified that the incident happened after she was accidently pushed off the lift (*see Hope v. Holiday Mtn. Corp.,* 123 A.D.3d 1274, 1275–1276, 999 N.Y.S.2d 211 [3d Dept. 2014]; *de Lacy v. Catamount Dev. Corp.,* 302 A.D.2d 735, 755 N.Y.S.2d 484 [3d Dept. 2003]). The conflicting testimony as to how the accident occurred precludes granting Catamount's motion for summary judgment (*see Nyala C. v. Miniventures Child Care Dev. Ctr., Inc.,* 133 A.D.3d 467, 18 N.Y.S.3d 863 [1st Dept. 2015]).

[2] However, dismissal of the complaint as against the individual defendants is warranted. That portion of defendants' motion was unopposed by plaintiffs, and there is no evidence that the individual defendants personally participated in any malfeasance or misfeasance constituting an affirmative tortious act that proximately caused infant plaintiff's injuries (*see Palomo v. 175th St. Realty Corp.,* 101 A.D.3d 579, 957 N.Y.S.2d 49 [1st Dept. 2012]).

We have considered Catamount's remaining contentions and find them unavailing.

All Citations

--- N.Y.S.3d ----, 2019 WL 189819, 2019 N.Y. Slip Op. 00225

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