Charles v Lake Park 7600 Jericho Turnpike LLC
2017 NY Slip Op 31255(U)
May 4, 2017
Supreme Court, Suffolk County
Docket Number: 13-29699
Judge: Peter H. Mayer
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[* 1]

SHORT FORM ORDER

INDEX No. 13-29699
CAL. No. 16-01170OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-9-16 (001)
MOTION DATE 12-2-16 (002)
ADJ. DATE 2-17-17
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MG;CASEDISP

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PETER CHARLES,

Plaintiff,

- against -

LAKE PARK 7600 JERICHO TURNPIKE LLC, CLK-HP 7600 JERICHO TURNPIKE LLC, RXR REALTY LLC, AND EQUINOX HOLDINGS, INC, d/b/a EQUINOX FITNESS CLUB,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants Lake Park 7600 Jericho Turnpike, LLC, CLK-HP7600 Jericho Turnpike, LLC, and RXR Realty LLC, dated October 10, 2016, and supporting papers; (2); Notice of Motion by defendant Equinox Holdings, Inc., dated November 1, 2016 (including Memorandum of Law dated November 1, 2016); (3) Affirmation in Opposition by the plaintiff, dated January 9, 2017, and supporting papers; (4) Reply Affirmation by the defendant Equinox Holding, Inc., dated February 15, 2017 (including Memorandum of Law dated February 15, 2017 and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. 001) of defendants Lake Park 7600 Jericho Turnpike, LLC, CLK-HP 7600 Jericho Turnpike, LLC, and RXR Realty LLC and the motion (seq. 002) of Equinox Holdings, Inc., are consolidated for the purposes of this determination, and it is further;

ORDERED that the motion of defendants Lake Park 7600 Jericho Turnpike, LLC, CLK-HP 7600 Jericho Turnpike, LLC, and RXR Realty LLC for summary judgment dismissing the complaint and cross claims against them is granted; and it is further

ORDERED that the motion of defendant Equinox Holdings, Inc. for summary judgment dismissing the complaint and cross claims against it is granted.

This action was commenced to recover damages for injuries allegedly sustained by plaintiff on May 6, 2013, when he tripped and fell during an exercise class at a health club known as Equinox Gym located in Syosset, New York. Plaintiff alleges that defendants were negligent, among other things, in permitting a "boot camp class" to be conducted outside on a parking lot which was inherently dangerous and in failing to supervise and train its instructors.

Defendants Lake Park 7600 Jericho Turnpike, LLC, CLK-HP 7600 Jericho Turnpike, LLC, and RXR Realty LLC now move for summary judgment dismissing the complaint and cross claims against them on the ground that they were not a proximate cause of plaintiff's injury. Specifically, defendants argue that plaintiff cannot identify what caused him to trip and fall. In support of the motion, defendants submit copies of the pleadings and the bill of particulars, the transcripts of the parties' deposition testimony.

Plaintiff testified that on the date of the incident, he was participating in a "boot camp" fitness class at Equinox Gym. He testified that he had been a member of Equinox for the two years preceding the subject incident and went five times per week. He testified that he enrolled in the subject class four weeks prior to the incident and that it was conducted three times per week. Plaintiff testified that several of the classes were conducted outside of the building in the parking lot area for approximately 20 minutes of the one-hour class. He testified that at the time of the incident, the class was performing drills with a medicine ball. Plaintiff testified that the drill entailed throwing, catching and running with the medicine ball. He testified that he ran through the lot to retrieve the ball, caught it, turned around and started running back, when his right foot "gave out," causing him to lose his balance and fall. Plaintiff testified that he remained at the spot where he fell for 20 minutes and was attended to by his instructor, Dana Mancini, and two class members, Domenico Parisi and Nicole Parisi. He testified that he did not observe anything on the ground and did not know what caused him to trip and fall. Plaintiff testified that, after returning to the Equinox gym after his accident and retracing his steps, he believes he tripped on a crack in the asphalt.

Raquel Ribacoff testified that she is a certified group fitness instructor and was teaching the subject class, Equinox Training Camp (ETC). She testified that ETC is a six-week program taught three days a week for one hour and that it was for registered participants. Ribacoff testified that she and Dana Mancini were the instructors and that there were 40 students enrolled in the class. Ribacoff testified that part of the

class is taught outside in the parking lot area, and that the members enjoyed going outside, but they were not required to. She testified that she offered members the option to stay inside and do the treadmill, among other things, if they did not want to go outside. Ribacoff testified that it is her practice to inspect the parking lot, and that she inspected it two days prior to the incident and did not see any defects on the surface of the parking lot, and it was level. She testified that she taught various exercise classes in the parking lot since she started working at the gym in 2004, and that she is unaware of any similar incidents and never received any complaints about the parking lot area. Ribacoff testified that on the day of the incident, she observed plaintiff fall to the ground and immediately assisted him. She testified that she asked him what happened, and he told her he tripped over his feet. Ribacoff testified that she did not observe any cracks or anything irregular in the area where plaintiff fell.

Dana Mancini testified that she and Raquel Ribacoff were instructing the ETC class on the morning of the subject incident, and that she was running in front of plaintiff when she heard him fall. She testified that she stopped and assisted him, and that he told her he tripped on his own two feet. Mancini testified that she observed the subject area and did not see any cracks or other unusual conditions in the parking lot.

Domenico Parisi testified that he was taking the ETC class with plaintiff on the date of the incident, and that the class went outside to conduct drills towards the end of the hour. He testified that he did not see plaintiff fall but heard a noise and then observed plaintiff sitting on the ground holding his arm. Parisi testified that he is an EMT and that he assisted plaintiff until the ambulance arrived, accompanied him to the hospital, and stayed with plaintiff for one hour. Parisi testified that plaintiff did not tell him how he fell nor did he complain about any condition in the parking lot or about the class. He testified that the class was frequently taught outside and everyone loved to go outside, including plaintiff.

Kevin Murphy testified that he worked for RXR Property Management as a portfolio manager at the time of the incident. He testified that he inspects the subject property two to three times per week and that, if he discovers any issues, he creates a work order in a computer program known as "Angus." He testified that he also has three employees who inspect the premises on a daily basis, respond to tenant service calls and complaints, and maintain the premises. Murphy testified that he searched the Angus program for the period from January 1, 2013 through May 6, 2013, and found no work orders or complaints regarding the subject parking lot.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289

AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]).

A plaintiff's inability in a premises liability case to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (***Richichi v CVS Pharmacy***, 127 AD3d 951, 7 NYS3d 398 [2d Dept 2015]; ***Martino v Patmar Props., Inc.***, 123 AD3d 890, 891, 999 NYS 2d 449 [2d Dept 2014]; ***Palahnuk v Tiro Rest. Corp.***, 116 AD3d 748, 983 NYS2d 603 [2d Dept 2014]). Therefore, in a trip-and-fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall (***Davis v Sutton***, 136 AD3d 731, 26 NYS3d 100 [2d Dept 2016]).

Here, defendants Lake Park 7600 Jericho Turnpike, LLC, CLK-HP 7600 Jericho Turnpike, LLC, and RXR Realty LLC established a prima facie case of entitlement to summary judgment in their favor by submitting the transcript of plaintiff's deposition testimony showing he was unable to identify what caused him to fall at the time of the incident. Plaintiff's testimony that he inspected the subject area two to three months following the incident with an investigator and found a crack in the surface of the parking lacks probative value, as it would be speculative to assume that this alleged condition proximately caused his fall (***Rivera v J. Nazzaro Partnership, L.P.***, 122 AD3d 826, 995 NYS2d 747 [2d Dept 2014]).

Having established, prima facie, its entitlement to judgment as a matter of law on the issue of liability by tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923), defendants shifted the burden to plaintiff to proffer evidence in admissible form raising a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). In opposition to the motion, plaintiff submits his own affidavit and the transcripts of the parties' deposition testimony. In his affidavit, plaintiff states that his toe caught a raised edge of the asphalt in the parking lot. Plaintiff's affidavit, which is inconsistent with his deposition testimony and raises a feigned factual issue, is insufficient to show the existence of a triable issue of fact (*see* ***Denicola v Costello***, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007]; ***Tejada v Jonas***, 17 AD3d 448, 792 NYS2d 605 [2d Dept 2005]). Accordingly, the motion of defendants Lake Park 7600 Jericho Turnpike, LLC, CLK-HP 7600 Jericho Turnpike, LLC, and RXR Realty LLC for summary judgment in their favor is granted.

Defendant Equinox Holdings, Inc. (hereinafter Equinox) also moves for summary judgment dismissing the complaint and cross claims against it on the ground that plaintiff is barred from recovering under the doctrine of primary assumption of risk, as plaintiff assumed the risk of his injuries from voluntarily participating in the ETS class. The defense of assumption of the risk relieves a defendant of legal duty owed to a plaintiff; and being under no duty, a defendant cannot be charged with negligence (***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). "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" (***Ferrari v Bobs Canoe Rental, Inc.***, 143 AD3d 937, 938, 39 NYS3d 522 [2d Dept 2016], quoting ***Morgan v State of New York***, 90 NY2d 47, NYS2d 421 [1997]). Inherent risks are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation (***Mamati v City of New York Parks & Recreation***, 123 AD3d 671, 997 NYS2d 731 [2d Dept 2014]). However, in order for the doctrine to apply, participants of the activity must fully comprehend the risks and they must be obvious, as a participant in such an activity is not deemed to have assumed the risks of concealed or unreasonably increased risks (***Morgan v State of New York***, 90 NY2d at 485, 662 NYS2d 421; *see also* ***Brown v Roosevelt Union Free School Dist.***, 130 A D3d 852, 14 NYS3d 140 [2d Dept 2015]; ***Mussara v Mega Funworks, Inc.***, 100 AD 3d 185, 952 NYS2d 568 [2d Dept 2012]). "The primary assumption of risk doctrine also encompasses risks involving less than optimal conditions" (***Bukowski v Clarkson Univ.***, 19 NY3d 353, 948 NYS2d 568 [2012]), and those risks associated with the construction of the playing surface (***Brown v City of New York***, 69 AD3d 893, 895 NYS2d 442 [2d Dept 2010]). Furthermore, open and obvious risks such as the risk of activities played on an irregular surface are activities which an injured plaintiff assumes the risk of (***Sykes v County of Erie***, 94 NY2d 912, 707 NYS2d 374 [2000]).

Here, Equinox established its prima facie case entitlement to summary judgment under the doctrine of primary assumption of the risk. Plaintiff, an experienced fitness member, who voluntarily participated in the ETC program, assumed a foreseeable risk while running in the parking lot (***Ramirez v Lucille Roberts Health Clubs, Inc.***, 110 AD3d 975, 973 NYS2d 572 [2d Dept 2013]). As plaintiff could not identify a dangerous condition which caused him to fall and injure himself, Equinox has established that it did not unreasonably increase the risk of injury (*see* ***Freeman v Village of Hempstead***, 120 AD3d 1393, 993 NYS2d 142 [2d Dept 2014]). In opposition to the motion, plaintiff submits his own affidavit and the affidavit of Alphonses Heraghty, a professor, among other things, of physical education at Suffolk Community College. In his affidavit, Mr. Heraghty states that plaintiff "was caused to trip and fall over a height differential" in the surface of the parking lot. In as much as his opinion is based on a fact which is not in evidence, his affidavit is insufficient to raise a triable issue of fact. Accordingly, the motion of defendant Equinox Holdings, Inc. for summary judgment in its favor is granted.

Dated: May 4, 2017

PETER H. MAYER, J.S.C.