SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

TRIAL/IAS, PART 28
NASSAU COUNTY

SUSAN CROWLEY,

Plaintiff,

Index #: 04948/00

-against-

Motion Seq. #:02 & 03

WESTBURY KENNEL, ASSOCIATION, INC., and MB-F, INC.,

Motion Date: 01/27/03

Defendants.

The following paper read on this motion:

Notices of Motions	1,2
Affirmation in Opposition	3
Reply Affirmation	4,5
Memorandum of Law	6

The motions by both defendants, Westbury Kennel Association, Inc. ("WKA.") and MB-F, Inc., ("MB-F"), for an Order granting them summary judgment dismissing the plaintiff's complaint and the cross-claims against them are determined as follows.

The plaintiff commenced this action for personal injuries she allegedly sustained on October 3, 1999, when she fell while attending a dog show in Oyster Bay, New York. At the time of the occurrence plaintiff had walked to the "agility" tent to observe the events, however, she was too early and she began to walk back to her car. Plaintiff claims that a dog brushed against her thigh, startling her, causing her to lose her footing and fall. Plaintiff alleges the defendants failed to provide enough room between the stands and the show ring locations. Plaintiff indicated the area in which she fell was crowded to the point that her movement was severely restricted (see exhibit D page 6 annexed to WKA's motion). Plaintiff argues there was overcrowding at the dog show and said overcrowding was compounded by inadequate crowd control.

WKA contends plaintiff's movement was not restricted, and plaintiff assumed the risk of

such a fall by attending the dog show. WKA contends there is no link between the alleged condition and plaintiff's fall. WKA notes the absence of any expert report by plaintiff in support of plaintiff's contention that WKA or MB-F violated any safety codes or statutes.

MB-F states it merely constructed the ring for the dog show and placed them as directed by WKA (see exhibit E, pages 14, 23, 26, 28 annexed to MB-F cross motion). MB-F asserts that it had limited input as to the dog rings, such as if MB-F noted that the rings were situated on / or over a big, large muddy area (ex. E page 20).

It is the duty of a landowner or lessee "to use all reasonable care to protect a person from injuries reasonably to be anticipated," such as providing security in anticipation of large crowds (**Cejka v R.H. Macy and Co., Inc.**, 3 AD2d 535,536).

When the plaintiff's negligence claim is premised on the theory that his or her injuries were caused by overcrowding and inadequate crowd control, the plaintiff must establish that he or she was unable to find a place of safety, or that his or her free movement was restricted due to alleged overcrowding condition (**Greenberg v Sterling Doubleday Enterprises,** 240 AD2d 702).

Here, the deposition of plaintiff creates an issue of fact as to whether her freedom of movement was unduly restricted or that she was unable to find a place of safety (**Palmeri v Ringling Brothers and Barnum and Bailey Combined Shows,** 237 AD2d 589).

There are issues of fact as to whether the plaintiff's freedom of movement was **unduly** restricted by the crowd, or that the crowd was unruly and / or unmanageable (**Hsieh v New York City Transit Authority**, 216 AD2d 531).

As a general rule, the question of proximate cause is to be decided by the finder of fact,

because questions concerning what is foreseeable and what is normal may well be the subject of varying inferences. As is the question of negligence itself, the issue of foreseebility is also an issue for the finder of fact (**Derdiarian v Felix Contracting Corp**, 51 NY2d 308). Here, it is for the finder of fact to decide: whether the set up of the dog performance rings and the concession stands constituted a dangerous condition: whether the defendants had actual or constructive notice of the dangerous condition and failed to correct it, and whether this condition was the proximate cause of plaintiff's injuries.

Here, the duty which is owed the plaintiff was the exercise by WKA and of reasonable and ordinary care against foreseeable dangers, and this includes the furnishing of an adequate degree of general supervision of such activities as would endanger others utilizing the area; what degree of care is reasonable necessarily depends upon the peculiar attendant circumstances of the particular case (**Rotz v City of New York**, 143 AD2d 301).

The doctrine of the primary assumption of risk is limited to those injured while voluntarily participating in a sporting or recreational activity. (**Hawkes v Catatonk Golf Club, Inc.** 288 AD2d 528). Whether it is applicable in this situation is an issue of fact as to whether the plaintiff's alleged injury was caused by an inherent danger associated with attending dog shows (**see Vogel v Venetz,** 278 AD2d 489).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (**Alvarez v Prospect Hospital** 68 NY2d 320).

Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to

determine whether or not there exists a genuine issue for trial (**Miller v Journal News**, 211 AD2d 626). Thus, the burden on the moving party for summary judgment is to demonstrate a ***prima facie*** entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (**Ayotte v Gervasio**, 81 NY2d 1062).

In support of a motion for summary judgment, the movant has the burden of establishing ***prima facie*** entitlement to judgment as a matter of law by offering sufficient evidence to eliminate any triable issue of fact (**Quinn v Nyack Hospital**, 286 AD2d 675). Here, WKA has not met its burden. WKA must supply the experts, evidence, etc., to show no issues of fact exist. It cannot succeed merely by pointing to plaintiff's ultimate burden of proof at trial.

Accordingly, the motion by defendant, Westbury Kennel Association, Inc., for summary judgment, is denied.

However, as the role of defendant, MB-F, was limited (as to plaintiff's injury) to setting up the rings, and not security or crowd control, the motion by MB-F for summary judgment is granted and the plaintiff's complaint and the cross-claims against defendant MB-F, Inc. are dismissed.

This constitutes the decision and order of the court.

Dated: March 20, 2003

JOSEPH COVELLO, J. S. C.