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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

-----X  
**LINDA GERENA AND HUSSEIN ABDEL WAHAB,**

**Plaintiff,**

**-against-**

**THOMAS SCHOOL OF HORSEMANSHIP, INC.,**  
**Defendants,**

**TRIAL PART: 14**

**NASSAU COUNTY**

**INDEX NO: 18222-09**

**MOTION SEQ. NO: 1**

**SUBMIT DATE:07/13/11**

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**The following papers having been read on this motion:**

<b>Notice of Motion .....</b>	<b>1</b>
<b>Opposition .....</b>	<b>2</b>
<b>Reply.....</b>	<b>3</b>
<b>Memorandum of Law.....</b>	<b>4</b>

**Before the Court**

This action was commenced with the filing of a Summons and Complaint on August 6, 2009. The defendant filed an Answer on October 7, 2009. Plaintiff filed a Bill of Particulars on November 12, 2009. The parties deposed the plaintiff, Linda Gerena, on June 30, 2010 and Nancy Thomas, on behalf of the defendant, Thomas School of Horsemanship, Inc., on December 7, 2010.

**Undisputed Facts**

Plaintiff Laura Gerena was injured when she fell off a horse during a group horseback riding lesson at Thomas School of Horsemanship, Inc. (Thomas School) on June 18, 2009.

Plaintiff enrolled in riding lessons at Thomas School with her then fourteen year old son. When she enrolled, she signed a Rider's Release of Liability form for herself and on behalf of her son. In this form, plaintiff assumed all risks inherent in horseback riding and "agreed that the school, following proper procedures, would not be held liable for any accidents or injuries involving student riders." [Motion for SJ, ¶ 10, citing Gerena Transcript, p.34]. At the time plaintiff enrolled, she was a novice rider and had taken approximately 30-35 horseback riding lessons prior to her lessons at Thomas School. [Motion for SJ, ¶ 9].

At the time of the accident, plaintiff was riding a horse named Tori. Tori had been at the Thomas School for fifteen years prior to the incident date. [Motion for SJ, ¶ 20]. Plaintiff had ridden Tori once or twice before the incident and had seen other students ride Tori three or four times before the incident. [Motion for SJ, ¶ 11].

Plaintiff's horse was bouncing as plaintiff rode the horse around a turn, and plaintiff lost her balance and fell to the ground in the riding ring. [Reply Opposition, ¶ 9]. The incident occurred approximately forty-five minutes into a one-hour lesson at Thomas School. [Motion for SJ, ¶ 16]. Ms. Kristen Garcia, director and head instructor at Thomas School, was the instructor conducting the lesson when she fell. [Motion for SJ, ¶ 19].

At the time of the accident, Tori was saddled with a safety stirrup. A standard safety stirrup is fitted with a break-away rubber band. [Motion for SJ, ¶ 12]. A purpose of the rubber band is "to stop you if you fall out so the horse does not drag you and prevent future accident" [Gerena Transcript, pg. 46]. That is, to release the foot from the stirrup easily. Plaintiff contends and defendant does not dispute that the safety stirrup of the saddle on Tori on the day of the accident was missing, and the saddle was therefore "defective." Plaintiff contends and defendant does not dispute that plaintiff was not accustomed to riding with a stirrup without the band and consequently felt insecure.

Defendant contends and plaintiff does not dispute that there is no evidence that Tori had any vicious or violent propensities prior to the accident. Plaintiff stated that she has never seen Tori buck, rear, bolt or otherwise misbehave and called Tori a "gentle horse." [Motion for SJ, ¶ 11]. Nancy Thomas stated that she was unaware of any other incident during which a rider was injured while riding Tori, and she described Tori as the perfect horse for beginner riders. [Motion for SJ, ¶ 20]. Christopher Miller, D.V.M., an affiant on behalf of the defendant, examined Tori and stated that during his examination, despite his attempts to elicit an aggressive response from Tori, the horse was mild-mannered and gentle. [Motion for SJ, ¶ 21]. Plaintiff had no trouble riding Tori prior to the accident, [Motion for SJ, ¶ 16], and plaintiff does not allege at any point during this litigation that Tori was a horse with vicious propensities.

Plaintiff claims and defendant does not dispute that Tori was unsaddled when plaintiff arrived on time for her lesson and that she had to seek and find an employee of defendant to saddle

Tori. [Plaintiff's Opposition, ¶ 9].

On the day of the accident, when an attendant handed plaintiffs the reins to Tori, plaintiff noticed that the rubber band usually attached to one of the stirrups was missing, and she "mentioned this to the attendants, and the attendants gave her the reins without affixing a new band to the stirrup." [Motion for SJ, ¶ 14].

### **Disputed Facts**

The parties dispute whether an employee of the defendant inspected the saddle prior to the subject riding lesson. Plaintiff claims that defendant "fail[ed] to inspect the saddle placed on the horse given to plaintiff." [Plaintiff's Complaint, ¶ 12]. Defendant contends that "[s]afety procedures were carried out precisely for all riding lessons conducted by Kristen Garcia," that "Ms. Garcia checked the saddle and bridle on each horse prior to riding lessons," and "[w]hen a student rider mounts his or her horse, the stirrups are inspected and adjusted for proper fit." [Motion for SJ, ¶ 19]. Since it's undisputed that Ms. Garcia was conducting the lesson when Ms. Gerena was injured, the defendant's position is that safety procedures were carried out including that the stirrups were inspected prior to the subject lesson.

The parties dispute the qualifications of instructors at Thomas School. Plaintiff alleges that defendant was negligent in failing to properly train, supervise and/or hire employees and hiring unskilled employees to perform services for their students. [Complaint, ¶ 12]. Defendant claims that the instructor, Ms. Garcia, has a BS degree in equine studies, a certificate in Horsemanship Safety and has worked at Thomas School for over five years. [Motion for SJ, ¶ 17].

The parties dispute the presence of a large rock in the indoor riding area. Plaintiff alleges that defendant was negligent in allow[ing] a large rock or rocks to remain on the inner riding ring [Plaintiff's Transcript, pgs. 119 & 120]. Defendant "strongly denies that there were rocks present on the floor of the arena" and states that "[a]n arena full of rocks would pose a significant and unnecessary danger to horses and riders." [Affirmation in Reply, ¶ 11].

The parties dispute whether the defective stirrup was the cause of plaintiff's accident. Plaintiff alleges that the defective saddle caused her to feel insecure as a rider and caused her to fall off the horse. [Complaint, ¶ 10]. Defendant states that "the band in question played no part in plaintiff's losing her balance and falling from the horse, and would not have prevented her from

falling.” [Motion for SJ, ¶ 7].

### Legal Principles

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Co. v Equitable Land Services, Inc.*, 207 AD2d 880, 881 [2<sup>nd</sup> Dept. 1994]:

“It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562. Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank v McAuliffe*, 97 AD2d 607 [3<sup>rd</sup> Dept. 1983]), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York supra*, at p.562).

Summary judgment, however, is a drastic remedy which should be granted only when there is not clear triable issue of fact presented because it will deprive the Plaintiff of their day in Court. Even the color of a triable issue of fact should foreclose this remedy. Therefore, in deciding a summary judgment motion, the evidence must be scrutinized carefully in the light most favorable to the non-moving party. Issue finding rather than issue determination is the key to the proper review of a summary judgment motion. *See, Rudnitsky v Robbins*, 191 AD2d 488 [2<sup>nd</sup> Dept. 1993]; *Triangle Fire Protection Corp. v Manufacturers Hanover Trust Co.*, 172 AD2d 658 [2<sup>nd</sup> Dept. 1991].

On a motion for summary judgment, it is the proponent’s burden to make a *prima facie* showing of entitlement as a matter of law by tendering sufficient evidence in admissible form, to demonstrate the absence of any material issue of fact. *JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005], *Andre v Pomeroy*, 33 NY2d 361 [1974].

## Decision

The defendant, an owner of a horseback riding school, owes a duty of care to not increase the risks to a participant in a sport or recreational activity over and above those inherent in the sport or recreational activity.

Defendant argues that plaintiff can only recover in negligence against defendant for injuries caused by falling off a horse where plaintiff shows evidence that defendant knew or should have known that the horse had vicious propensities before the incident for which the defendant is strictly liable. Although the general rule is that “when harm is done by a domestic animal, its owner’s liability is determined solely by application of the rule of strict liability,” (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009]), the rule does not abdicate a sport or recreational facility owner’s duty of care to its customers to not increase the risks to a participant over and above those inherent in the sport or recreational activity. The involvement of a domestic animal does not inherently restrict the theory of negligence available to plaintiff to the theory of strict liability for a vicious animal.

Defendant next claims that plaintiff’s ability to recover in negligence against defendant is precluded by plaintiff’s assumption of the risks that gave rise to her injury because she signed a Rider’s Release of Liability form. The doctrine of assumption of the risk provides that a voluntary participant in a sport or recreational activity 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. *Kirkland v Hall*, 38 AD3d 497 [2<sup>nd</sup> Dept. 2007]; *Morgan v State of New York*, 90 NY2d 471 [1997]. Although a participant is deemed to have consented to inherent risks that participant is aware of, appreciates and voluntarily assumes, (*Hyde v North Collins Cent. School Dist.*, 83 AD3d 1557 [4<sup>th</sup> Dept. 2011]), a participant is not deemed to have assumed any risks of reckless or intentional conduct or concealed or unreasonably risk, (*Corica v Rocking Horse Ranch, Inc.*, 84 AD3d 1567 [3<sup>rd</sup> Dept. 2011]), unless defendant produces evidence that said risk was fully comprehended and perfectly obvious to the participant. An unreasonably increased risk is a risk that results from defendant creating a dangerous condition over and above the usual dangers that are inherent in a sport or recreational activity. *Morgan* at 485; *Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 970 [1992]; *Finn v Barbone*, 83 AD3d 1365 [3<sup>rd</sup> Dept. 2011].

The parties agree that the stirrup on the horse during the incident was without a break-away

band. Injury caused by a defective stirrup is not, as a matter of law, an inherent risk of horseback riding. *See, e.g., Teles v Big Rock Stables, L.P.*, 419 F.Supp.2d 1003 [denying defendant's summary judgment where plaintiff fell off horse because of defendant's alleged negligence in providing a faulty stirrup too long for plaintiff's legs, which allegedly caused her to lose balance and fall off a horse]. Although the risk of falling off a horse is an inherent risk of horseback riding, (*Morelli v Giordana*, 206 AD2d 464 [2<sup>nd</sup> Dept. 1994]), a participant does not assume any unreasonably increased risk of falling off a horse. *See, Lipari v Babylon Riding Center, Inc.*, 18 AD3d 824 [2<sup>nd</sup> Dept. 2005] [denying defendant's summary judgment because a novice participant assumed the risk of falling off a frightened horse but did not assume the heightened risk of falling off created by the allegedly negligence conduct of a trail guide who left the participant unattended in the rear of a line of horses]. Whether defendant increased the risk of plaintiff falling off a horse by abruptly saddling plaintiff's horse, failing to inspect the saddle prior to the lesson, permitting the use of a defective stirrup, and ignoring plaintiff's expressed concern about the defective saddle is a genuine issue of material fact.

In determining whether a plaintiff consented to a risk, awareness of risk is assessed in context of the skills and experience of a particular plaintiff. *Joseph v New York Racing Ass'n, Inc.*, 28 AD3d105 [2<sup>nd</sup> Dept. 2006]; *Wendt v Jacus*, 288 AD2d 889 [4<sup>th</sup> Dept. 2001]. Assumption of risk and implied consent require knowledge and appreciation of risk, and such determinations are fact dependent. *Marcano v City of New York*, 296 AD2d 43 [1<sup>st</sup> Dept. 2002]. Plaintiff rode Tori twice before the day of the accident. Plaintiff was not accustomed to riding a horse with a stirrup missing the break-away rubber band. Defendant categorized plaintiff as a novice. Defendant failed to produce evidence that plaintiff was aware of the risks associated with defective equipment and that plaintiff voluntarily assumed those risks.

The disputed fact as to whether a large rock was present in the inner riding ring does not give rise to any genuine issues to prevent a grant of summary judgment. A participant is deemed to have assumed risks associated with the construction of a play surface of a sport or recreational activity and any open and obvious condition on it. *Joseph v New York Racing Ass'n, Inc.*, 28 AD3d105 [2<sup>nd</sup> Dept. 2006]. "If an athlete is injured as a result of a defect in or feature of the field, court, tract or course upon which the sport is being played, the owner of the premises will be protected by the doctrine of

primary assumption of risk as long as the risk presented by the condition is inherent in the sport.” *Cotty v Town of Southampton*, 64 AD3d 251 [2<sup>nd</sup> Dept. 2009]; see, also *Morrelli* at 464 [granting defendant’s summary judgment where plaintiff suffered injuries upon impact with tree after being thrown from a horse because the tree was an open and obvious condition of the corral and was not unreasonable]. Plaintiff did not produce evidence that the rock was not an open and obvious condition of the riding ring or unreasonable, and so there is no dispute that plaintiff did not assume the conditions of the inner riding ring.

Defendant has the burden to show a *prima facie* case that it did not breach its duty to not increase the risks to a participant in a sport or recreational facility over and above those inherent in the sport. Defendant met its initial burden of proof of establishing a *prima facie* case of its freedom from negligence, however, plaintiff met her burden of competently creating issues of fact that necessitate a trial of such issues. Although the defendant demonstrated, *prima facie*, that the defective stirrup was not a substantial cause in plaintiff’s fall, the plaintiff in opposition raised triable issues of fact that the defective stirrup was in fact a substantial cause in plaintiff’s fall. The issues include whether defendant failed to inspect plaintiff’s saddle, had notice of the defective saddle because of plaintiff’s conveyance to the attendant of the missing strap, and whether the defective stirrup caused her to lose balance and fall to the ground.

The Court has considered all of the other bases proffered by the defendant for summary judgment dismissal of the plaintiff’s Verified Complaint herein and finds same unavailing and, therefore, do not warrant discussion.

Accordingly, defendant’s motion for summary judgment is hereby denied.

This constitutes the decision and order of this Court.

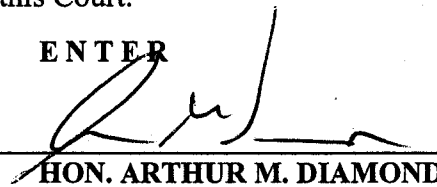
DATED: September 1, 2011

**ENTERED**

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