SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. JOHN P. DUNNE, Justice

TRIAL/IAS, PART 12

JOSEPH TESTAVERDE, ANTHONY TESTAVERDE and KATHLEEN TESTAVERDE

Plaintiff(s),

Index No. 9337/01
Motion Seq. No. 2
-against- Motion Submission: 10/1/03
Motion for summary judg.

FREDERICK LYMAN, JANNA LYMAN, POOLS PLUS, d/b/a FREEDOM POOL CORP., and WEATHER FLEX, INC.

Defendant(s)

The following papers read on this motion:

Notice of Motion x
Answering Affidavits.....x
Replying Affidavits..... x
Exhibits..... x

Upon the foregoing papers, it is hereby ordered that the motion pursuant to CPLR 3212 by defendants Frederick Lyman and Janna Lyman for summary judgment dismissing the complaint is granted, and the complaint is dismissed as against defendants Frederick Lyman and Janna Lyman.

The within action for negligence arises out of a pool accident at the Wantagh

home of defendants Frederick and Toni Lyman. Their daughter, high school senior Janna Lyman, threw a Fourth of July keg party while her parents were traveling in Spain. Approximately 120 high school students attended. Plaintiff Joseph Testaverde (hereafter plaintiff or Testaverde), seventeen at the time, either dove, jumped or fell from a railed second story balcony and suffered tragic injury.

The backyard of the Lyman residence is divided by a fence. On one side is a pool and on the other a patio. The pool is enclosed on three sides by a fence and on the fourth by the house. A gate allows passage to the patio side, which is where the party was held on July 4th . Late in the evening, several guests, including Matt Studdert, Matt Roseland and Tim Connors, went to the pool side and were jumping from a height of fourteen feet into the pool from the railing of a second floor balcony. The balcony is outside a second floor kitchen, and photographs reveal that the balcony is a small one just deep enough to accommodate a barbecue grill and not much wider than the double doors to the kitchen. The photographs also reveal a set of stairs at the end of the balcony, leading down to the pool, which is oblong and perpendicular to the house. The deep water is at the far end of the pool, and the shallow water near the house. The shallow end features wide steps with a raised tubular handrail that extends out over the water and curves down above the steps, right near a gate to the patio side of the yard. Photographs taken in daylight reveal that the

steps and handrail are highly visible, particularly since the enclosure around the steps juts out from the oblong pool. There is no diving board at the deep end, just a ladder. Viewing the photographs of the steps and the ladder, it is clear which end is which.

The deposition testimony concerning the facts surrounding the subject accident are in conflict. The following is harmonious testimony from several witnesses at the party, including Chris Goetchius, a lifelong friend of plaintiff. Goetchius, who had been sitting at a table on the patio with plaintiff, testified that plaintiff climbed on the handrail and stood there while many of his school mates watched. He held his hands up in the air as if to say, "I'm going to do it". Goetchius also testified that plaintiff was going to do a flip. Other non-party witnesses uniformly testified that there was enough light at the pool to see a difference in the color of the water between the deep and shallow ends of the pool. They testified that Testaverde attempted to do a forward flip into the pool. Tragically, he landed in the shallow end head first. He suffered severe disabling injury, and was rendered quadriplegic.

Joseph Testaverde's testimony is in stark and singular contrast. He testified that he slipped when he attempted to climb on the railing and fell into the pool. He testified that his left foot slipped from under him "because of the fact that there were four or five people on the balcony, so it was a little crowded". It was his intention to jump into the pool, as had the other guests, but when he attempted to lift his second

foot onto the railing, as noted, he slipped and he fell into the water. He testified that he had been sitting at a table on the patio with friends for about an hour before he decided to jump, and that he had only one twelve-ounce cup of beer. At first he thought jumping from the balcony was crazy and dangerous, but when after at least three others had jumped without incident, he decided he would too. He "glanced" at the pool's deep end when he went through the gate but did not check the depth. He did not look at or see the shallow steps or railing close by or look at the water from the balcony before he attempted to climb on the railing.

"On a motion for summary judgment, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties . . . Summary judgment is inappropriate where questions of fact or credibility are raised that require a trial" (*Nicklas v. TedlenRealty Corp.*, 305 AD2d 385, 386).

Interpreting the conflicting testimony and facts in a most favorable light to plaintiff, and without questioning his credibility, the record allows that he was sober and intended to jump from the balcony into the pool, as had several other guests without incident. Plaintiff felt that the wooden railing was damp. He did not know the depth of the pool, but, according to his testimony, believed it did not have a shallow end based upon his "glance" at two people in the deep end. He was an

experienced excellent swimmer and diver and admittedly knew the danger of injury associated with a head first dive in shallow water. He was fully familiar with pools and had experience in pools which had a deep and shallow end, including one at his family's summer place in Pennsylvania and at that of a neighbor where he swam three times a week over a ten year period.

The Complaint and Bill of Particulars assert negligence in failing to adequately light and mark the pool, as well as negligent design of the kitchen balcony and railing, as constituting a dangerous condition for use as a diving platform to jump or dive into the shallow end of the pool. The Complaint also asserts a dram shop cause of action.

The dram shop cause of action is dismissed, as there is no evidence that plaintiff was intoxicated, a requirement of the Act (see, General Obligations Law §§ 11-100, 11-101). In addition, no private right of action exists for a breach of General Obligations Law § 65 (*Moyer v. Lo Jim Café*, 19 AD2d 523, affd 14 NY2d 792).

With regard to the negligence causes of action, it is the burden of the moving defendants to show that plaintiff's conduct was reckless, and also that such reckless conduct "constituted an unforeseeable superceding event, sufficient to break the causal chain and thus absolve the defendant of liability" (*Boltax v. Joy Day Camp*, 67 NY2d 617, 620; *Kriz v. Schum*, 75 NY2d 25). Plaintiff admitted that he did not look at the pool to ascertain its depth before he climbed the stairs to the balcony. Such

conduct is relevant to both causation and recklessness. The absence of pool markers or warning signs, or a rope between the shallow and deep ends, as a matter of law, did not constitute a proximate cause of plaintiff's injury, particularly in light of the open and obvious pool steps and railing indicating that the shallow end of the pool was under the balcony. Before plaintiff fell, he wilfully ignored the condition of the pool, claiming that it was his intention to look once he was on the railing. He also relied upon his erroneous belief that the pool did not have a shallow end based upon his glimpse of two swimmers in the deep end.

One acts recklessly when one "consciously disregards a substantial and unjustifiable risk" (*see, People v. Reagan*, 256 AD2d 487, *affd* 94 NY2d 804). Planning to stand on a railing, intended to safeguard users of the balcony, is dangerous in and of itself. To do so, fourteen feet above a pool, while planning to stand and maintain balance on a six to eight inch railing long enough to survey the pool below and then to decide and determine whether it was deep enough to jump, is conduct which qualifies as reckless. The risk of falling from a railing is patent, as is the risk that the pool's shallow end may be below. Indeed, according to plaintiff's testimony, he could not even get a secure footing before he lost his balance and fell.

The next question is whether plaintiff's reckless conduct was foreseeable. Pool accident cases are instructive with respect to unforeseeable reckless conduct, even though only one rises to the level of reckless conduct displayed here (*see, Kelsey v. Muskin, Inc.*, 1987 WL 17075 [N.D.N.Y., 1987][dive from two and a half foot balcony railing to pool seven and one half feet below constitutes sole proximate cause of injury]).

"Summary judgment is an appropriate remedy in swimming pool injury cases when from his or her 'general knowledge of pools, his [or her] observations prior to the accident, and plain common sense,' the plaintiff should have known that, if he or she dove into the pool, the area into which he or she dove, contained shallow water and, thus, posed a danger of injury" (*Mason v. Anderson*, 300 AD2d 551, 552). Here, plaintiff's general knowledge of pools is established as a matter of law. So too, common sense militates against his reckless actions, a fact which he acknowledged himself before changing his mind due to the conduct of others. The only element warranting discussion is whether plaintiff should have known of the danger based upon his observations prior to the accident and thus can be charged with constructive knowledge of the shallow water.

No condition prevented plaintiff from discerning the depth of the water. Indeed

the pool steps unmistakably indicated the location of the shallow end and, were located precisely at the point where plaintiff had to pass through the gate to get to the pool. Moreover the deposition testimony of the student witnesses that the deep and shallow ends were distinguishable because of a change in the water color is uncontroverted. Plaintiff had but to look. As he attempted no observation, and, according to his own testimony, he intentionally made none before climbing onto the railing, his lack of knowledge must be attributable solely to his own conduct and he must be charged with constructive knowledge of the shallow water. Plaintiff's reckless climb onto a narrow railing for a jump or dive "into an area of water which he could only assume was of sufficient depth . . . constituted an unforeseeable superseding event relieving defendants of liability" *(Lionarons v. General Elec. Co.,* 215 AD2d 851; *Sardella v. Hei Hotels No. 101,* 277 AD2d 302, *lv app denied* 96 NY2d 705; *Kelsey v. Muskin, Inc., supra; see also, Bird v. Zelin*, 237 AD2d 107 [plaintiff was not looking when she jumped into pool]). As noted by the Federal District Court, the New York rule is "that a plaintiff who dives into a swimming pool, with actual or constructive knowledge that the depth of the water will not permit such action safely, has disregarded an obvious or known danger and, as a result, will be considered the sole proximate cause of his or her injuries" (*Kelsey v. Muskin, Inc., supra*).

Plaintiff's reliance upon *Denkensohn v. Davenport* (144 AD2d 48, *affd sub nom Kriz v. Schum*, 75 NY2d 25) is inapposite. There the plaintiff, who was unaware of the water's depth because she had removed her contact lenses and because she believed that slides were normally placed at the deep end of a pool, dove from a pool slide into shallow water after a companion who had just dived in, assured her that it was safe to do so. Diving off the pool slide was found to be a predictable use of such pool equipment. Moreover, there was no basis for constructive knowledge as the plaintiff was unable to see the depth of the water and was assured that it was safe. Here, plaintiff attempted to jump from a balcony railing, clearly not pool equipment and not a predictable use. Nor was he assured by anyone that it was safe. Moreover, he was able, but chose not to observe the water's depth. Nor is plaintiff's reliance upon *Mason*, *supra*, justified. Primarily, in *Mason* there was no reckless attempt to jump from a balcony railing. In addition, the plaintiff observed his friend who "dove immediately before him, surfaced without any difficulty" (*Mason v. Anderson*, 300 AD2d 551, 552, *supra*). Again, although he was not aware of the water's depth, there was no basis for a finding of constructive knowledge, as the plaintiff in *Mason* directly witnessed a dive without injury and did not wilfully disregard an open and obvious danger.

Plaintiff makes an argument that a question of fact is raised, based upon the

safely executed jumps of the other guests. While the argument has a superficial appeal, the jumps of three others without mishap, with landings that plaintiff did not observe, did not obviate the danger of the elevated railing and patent risk of a fall off the balcony into water of an unknown depth (*cf. Olsen v. Town of Richfield,* 81 NY2d 1024, 1026 [no question of fact where eighteen year old dove into shallow creek from a bridge, notwithstanding that he had safely made the dive "hundreds of times"]).

Accordingly, the plaintiff's general knowledge of pools, his intentional disregard of the water's depth prior to the accident, and plain common sense, render his actions reckless and unforeseeable and a superseding cause of his accident and tragic injury, and warrant dismissal of the complaint against the moving defendants.

Dated: December 17, 2003

Hon. John P. Dunne