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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. JOHN P. DUNNE, Justice

TRIAL/IAS, PART 8

PETER CURCIO and ELIZABETH CURCIO

Plaintiff(s)

Index No. 4182/02
Motion Seq. No. 2
Motion Submission: 5/21/04
Motion for summary judgment

-against-

LLOYD POINT INDOOR TENNIS CLUB, INC. and "JOHN DOE" (whose name is fictitious as it is unknown)

Defendant(s)

The following papers read on this motion:
Notice of Motion x
Answering Affidavits x
Reply x

Upon the foregoing papers, it is hereby ordered that this motion by Lloyd Point Indoor Tennis Club Inc. for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries sustained by plaintiff

Peter Curcio on March 20, 1999, when he got hurt while playing tennis at the defendant Lloyd Point Indoor Tennis Club. It was plaintiff's first time playing there but he had been playing tennis for about 40 minutes before his accident. When asked at his examination-before-trial to describe how the accident occurred, plaintiff testified that "Diana hit a lob. I ran backwards and then I turned and as I turned, I tripped and went into the wall." When asked if there was anything that he tripped on or anything that caused him to trip, plaintiff replied "I remember going back and I must have possibly hit - there was like a netting and I tripped and I turned around and I went into the wall. That's what I recall." Plaintiff could not specifically recall whether one or both of his feet got caught in the netting. He did remember that he had been moving back at a steady quick rate when he tripped and fell.

The defendant tennis club seeks summary judgment dismissing the complaint based on the doctrine of assumption of the risk.

"A plaintiff is barred from recovery for injuries which occurred during voluntary sporting or recreational activities if it is determined that he or she assumed the risk as a matter of law (*citations omitted*). A voluntary participant in a sporting or recreational activity consents to those commonly-appreciated risks which are inherent in and arise out of the nature of such activity generally, and which flow from the participation (*citations omitted*)." *(Leslie v Splish Splash at Adventureland, Inc.*, 1 AD3d 320, 321;

see also, Morgan v State of New York,

90 NY2d 471; *Milea v Our Lady of Miracles R.C. Church*, 290 AD2d 424). "The risk of running into a wall [is] 'inherently part of the playing and participation of' tennis at a facility such as" defendant's. (*Kazlow v City of New York* 253 AD2d 411, *quoting Morgan v State of New York*, 90 NY2d 471, 488).

The defendant tennis's club has sustained its burden of proving its *prima facie* entitlement to judgment as a matter of law. *(See, Zuckerman v City of New York,* 49 NY2d 557, 562). It has presented evidence that plaintiff understood and voluntarily assumed the risks inherent in playing tennis. (*Leslie v Splish Splash at Adventure Land, supra; see also, Morgan v State of New York, supra; Milea v Our Lady of Miracles R.C. Church, supra*).

In reply, plaintiff has failed to establish an issue of fact as to whether his fall was caused by a dangerous condition over and above the risk inherent in the game. In his affidavit, plaintiff states that he was playing tennis at the defendant tennis club and one of the players hit up a lob. He ran backwards and then turned and as he turned, he tripped and went into the wall. He states that he tripped on a netting like structure behind the tennis' court baseline. While the defendant tennis club is correct in arguing that plaintiff cannot create an issue of fact by submitting a self-serving affidavit that directly contradicts his prior sworn testimony *(Ferber v Farm Family Cas. Ins. Co.,*

272 AD2d 747, 749), here, plaintiff has not done so. Plaintiff did not make affirmative statements at his examination-before-trial that have been directly controverted by or are inherently inconsistent with his affidavit. (*See, O'Leary v Saugerties Cent. School Dist.*, 277 AD2d 662, 663; *Molina v Roosevelt Hotel*, 300 AD2d 195; *Covello v American Golf Corp.*, 254 AD2d 100). Again, when asked as his examination-before-trial if there was anything he tripped on or that caused him to trip, plaintiff replied **"I remember going back and I must have possibly hit... There was like a netting and I tripped** and I turned around and went into the wall." Plaintiff's affidavit in which he states that he tripped on a netting like structure is not so at odds with his deposition testimony as to require this court to reject it. (*Comp., Gadonniex v Lombardi,* 277 AD2d 281; *Shpizel v Reo Realty & Construction Co.,* 288 AD2d 291; *Zylinski v Garito Contracting*, 268 AD2d 427).

In an attempt to establish the defendant tennis court's negligence, plaintiff has submitted the affidavit of Denise P. Bekaert, A.I.A., a registered architect, who examined the tennis court where plaintiff was injured. Ms. Bekaert inspected the tennis court several years after plaintiff's accident. There are no assurances that the condition of the tennis court remained unchanged. Her opinion is, therefore, not probative concerning the existence of defects in the court at the time of the plaintiff's accident. *(McGarvey v Bank of New York*, __AD2d __, 2004 WL 1152192; *Kruimer v National*

Cleaning Contractors, Inc., 256 AD2d 1). Even if Ms. Bekaert's inspection of the tennis court was relevant, she has failed to raise an issue of fact. Relying on numerous publications, Ms. Bekaert concluded that the defendant tennis court violated various recommended guidelines. The Architectural Graphic Standards, 1932 Edition, and the Architectural Graphic Standards, 1981 Edition, both recommend a 21' clear distance in back of the base line. The United States Tennis Court & Track Builders Association's "Guidelines for Tennis Court Construction" also recommended a minimum of 21' from baseline to backstop or wall as well as backdrop curtains which fall to 1" to 2" off the ground. "Tennis Courts: A Construction and Maintenance Manual," published by the United States Tennis Association and the United States Tennis Court and Track Builders Association, recommends 21' to the backdrop curtain and 3' between the backdrop curtain and the court enclosure. Opaque perimeter curtains which fall to ½" above surface or only draping on the surface are also recommended. This is "to avoid a possible hazard to a player stepping on the fabric and falling, curtains should not be permitted to lay more than 1" on the court surface." This publication also recommends that Divider nets should be ½" to 2" above the surface. Ms. Bekaert found that the netting on which plaintiff tripped was 27" from the rear wall; reduced the clear distance behind the base line to 18' 9"; and, draped on the court surface in excess of 1." Ms. Bekaert concluded that the distance behind the baseline

was not sufficient; that "the net on which [plaintiff] tripped was draped on the court in excess of recommended guidelines and was dangerous in a manner that was a cause of [plaintiff's] fall"; and, that the defendant tennis court failed to use an opaque perimeter curtain. She further concluded that the defendant tennis club failed to warn patrons that the court was not constructed in compliance with USTA and other applicable standards.

Ms. Bekaert's conclusion that the improperly draped net contributed to plaintiff's accident is grounded on a fact that simply finds no support in the record and must be rejected. (*See, Zammiello v Senpike Mall Co.*, 5 AD3d 1001, *citing Hugelmaier v Town of Sweden*, 144 AD2d 934, 935, *lv dism.*, 74 NY2d 699, *quoting Cassano v Hagstrom*, 5 NY2d 643, 646, *rearg den.*, 6 NY2d 882; *see also, Leslie v Splish Splash at Adventureland, supra*, at p. 321; *Tomol v Sbarro, Inc.*, 306 AD2d 461). There is nothing in the record to indicate that the netting surrounding the tennis court even fell to the floor, let alone how much. In fact, plaintiff's partner Lee G. Kilbirth attests that "the net does not drape onto the ground and the net does not pose a trip hazard." In any event, Ms . Bekaert's findings are premised upon a failure to comply with **recommendations,** which does not constitute evidence of negligence. (*See, Davidson v Sachem Cent. School Dist.*, 300 Ad2d 276, 277; *Merson v Syosset Cent. School Dist.*, 286 AD2d 668; *Pinzon v City of New York*, 197 AD2d 680;

McCarthy v State of New York, 167 AD2d 516). Furthermore, Ms. Bekaert has failed to link all of these deficiencies to plaintiff's accident by explaining how they caused his fall. To the extent that she simply draws such conclusions, they are, again, not supported by the record. In sum, Ms. Bekaert's opinion "on the element of causation [is] without the requisite factual basis and [is] therefore too speculative to constitute competent expert proof of causation (quotations omitted)." *(Zammiello v Senpike Mall Co., supra, citing Pascuzzi v CCI Cos.*, 292 AD2d 685, 687). As the Court of Appeals stated in *People v Jones* (73 NY2d 427, 430), "an expert's opinion not based on facts is worthless" because "an expert's opinion is only as sound as the facts upon which it is based" *(citing Clinton v Doug Urban Constr. Co., 65 NY2d 909, 911;* and *People v Cronin*, 60 NY2d 430, 434).

The affidavits of Lee E. Kilbirth, plaintiff's tennis partner, and James Sheridan, a professional member of, *inter alia,* the United States Tennis Court & Track Builders Association and President of Court Care Systems, Inc., submitted by the defendant tennis court in reply only further confirm the lack of any issue of fact.

The motion is granted and the complaint is dismissed.

It is, so Ordered.

Dated: May 27, 2004

Hon. John P. Dunne