SHORT FORM ORDER

INDEX NO. 04-18726
CAL. NO. 07-02437-OT

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 1-29-08
ADJ. DATE 3-18-08
Mot. Seq. # 001 - MD

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MICHAEL McCARTHY, an infant by his mother and natural guardian, MARYBETH McCARTHY and MARYBETH McCARTHY, individually,

Plaintiffs,

- against -

SPINS GYMNASTICS PARENTS CLUB, INC.,

Defendant.

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Upon the following papers in this matter: (1) Notice of Motion by defendant, dated December 21, 2007, and supporting papers; (2) Affirmation in Opposition by plaintiffs, dated March 7, 2008; and Reply Affirmation by defendant, dated March 17, 2008; and now

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

ORDERED that this motion by the defendant for summary judgment dismissing the plaintiffs' complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff, Michael McCarthy, as he participated in defendant's gymnastics class on October 11, 2001. Michael, who was seven years old at the time and legally blind, was attempting to go over a vaulting horse, when the defendant's instructors allegedly released him too soon, causing him to fall and injure his back on a wooden springboard. The plaintiffs' bill of particulars alleges that the defendant was negligent in failing to adequately and properly supervise and spot Michael, and in failing to provide adequate cushioning material beneath the horse.

The defendant now moves for summary judgment and seeks dismissal of the plaintiffs' complaint, arguing that based upon the doctrine of assumed risk, defendant cannot be liable for Michael's alleged injuries. In essence, the defendant contends Michael voluntarily participated in the gymnastic activity and is deemed to have assumed the risk of and consented to any apparent or reasonably foreseeable consequences of engaging in the sport. Additionally, the defendant argues that there is no evidence to establish the claim for negligent supervision. It alleges that the evidence shows that there were two instructors spotting Michael at the time of his accident, and that there was a demonstration, as well as verbal instructions each time the children used any piece equipment or performed any gymnastics maneuver.

In opposing the defendant's motion, the plaintiffs argue that the defendant has not shown that seven-year-old, legally blind Michael knew or should have known that the two spotters assisting at the time were going to drop him. They claim that the defendant has not shown that Michael's skill and experience were such that the defendant is entitled to judgment as a matter of law on the assumption of risk doctrine. The plaintiffs allege that Michael would not have attempted the maneuver without expecting and depending upon the assistance furnished by the instructors to every other gymnastics participant. The plaintiffs maintain that the defendant has not shown that Michael fully appreciated and, therefore, assumed the risk of the gymnastics activity. Plaintiffs also assert that the risk in this case was concealed, and not open or obvious, and that the ou-of-place mat unreasonably increased the risk of injury.

At her deposition, plaintiff Mary Beth McCarthy, Michael's mother, testified that Michael is legally blind, although he is able to see in some capacity depending upon the lighting, surroundings, size, and congestion of a room. In the summer of 2001, when Michael was six years old, Ms. McCarthy enrolled Michael and his brother, also blind, in the defendant's gymnastics program. The enrollment came after Ms. McCarthy had spoken with a woman who she believed was the defendant's manager. She explained to the woman that her sons were both blind and that Michael had a problem with depth perception and distance. Prior to the first gymnastics session, Ms. McCarthy and the woman also discussed the children's disabilities with the coaches who would be working with the children. After Michael completed the defendant's summer session, Ms. McCarthy enrolled him in the fall session. Prior to the fall session, Michael's vision teacher met with Michael's instructors to discuss how to accommodate Michael's needs.

On the date of the incident, October 11, 2001, Ms. McCarthy observed two coaches assisting Michael with his vault. After running to the springboard, Michael was in mid-air when Ms. McCarthy observed both coaches remove their hands from the trunk of Michael's body, resulting in his fall. She then heard Michael scream after he struck his back on something on the other side of the horse. Ms. McCarthy learned from the woman that Michael had struck his back on the edge of the wooden springboard, which was supposed to have a mat covering it; however, the mat had apparently been moved. Likewise, Michael confirmed that he had struck the wood which was usually covered by a mat, but which was not covered at the time of his accident. According to Ms. McCarthy, the spotters that day were teenagers who were talking and may have been distracted at the time of Michael's accident. Michael also testified that when he was running up to the horse, the instructors were talking to each other and that they let go of him a little sooner than everybody else.

Also deposed was Marialaina Kraft, the member of defendant's office staff who spoke with Ms. McCarthy before Michael was enrolled in the gymnastics program. Ms. Kraft confirmed that Ms. McCarthy told her that her sons were blind and may have vision limitations, and that she spoke to the instructors regarding the boys' vision impairment and the need to instruct them differently because of their vison impairment. Ms. Kraft believed that Michael's instructors for the fall session were Matt Towers and Rob Wing.

In October, 2001, Mr. Towers, a 17 year-old junior instructor, was being trained by senior instructor, Rob Wing. Mr. Towers acknowledged that before the fall program he was told of Michael's vision impairment, and was instructed by Mr. Wing to closely watch Michael and his brother in case they needed extra help with any specific skills. With regard to the mats covering the equipment, Mr. Towers essentially testified that the instructors would lean on the mats to make sure they did not move; however, he could not recall leaning against the mat on the day of Michael's accident.

It is well settled that a participant engaging in a recreational activity or sporting event "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" (*Morgan v State of New York*, 90 NY2d 471, 484; 662 NYS2d 421, 426 [1997]). To establish that a participant assumed the risk of engaging in an activity, a defendant must establish that the participant was aware of the dangerous situation and the resultant risk (*Trainer v Camp Hadar Hatorah*, 297 AD2d 731, 748 NYS2d 386 [2d Dept 2002]). "Awareness, appreciation, and assumption of risks known, apparent, or reasonably foreseeable, is not to be determined in a vacuum, but is rather to be assessed against the background of the skill and experience of the particular plaintiff" (*Taylor v Massapequa Int'l Little League*, 261 AD2d 396, 397; 689 NYS2d 523, 525 [2d Dept 1999] [internal quotation marks omitted]). Furthermore, participants in a recreational or sporting event assume the risks to which their roles expose them, but not to risks which have been unreasonably increased (*Morales v Beacon City School Dist.*, 44 AD3d 724, 843 NYS2d 646 [2d Dept 2007]).

In this case, it cannot be determined as a matter of law that Michael, who was seven years old, legally blind, and using the vault for perhaps only the second time, was aware of, appreciated, and voluntarily assumed the risks from which his injuries allegedly arose (*Taylor v Massapequa Int'l Little League, supra*). There was an assurance of safety implicit in the instructors' spotting, upon which Michael was relying (*see, Petretti v Jefferson Valley Racquet Club, Inc.*, 246 AD2d 583, 668 NYS2d 221 [2d Dept 1998]). Moreover, even if the Court were to accept the defendant's claim that Michael voluntarily assumed the risks inherent in participating in the defendant's gymnastics program, there clearly exists an issue of fact as to whether the defendant's instructors provided adequate supervision. This is particularly true, since they were aware that Michael needed more attention due to his impairment (*see, Myers v Friends of Shenendehowa Crew, Inc.*, 31 AD3d 853, 819 NYS2d 143 [3d Dept 2006]; *Lorenzo v Monroe Community College*, 72 AD2d 945, 422 NYS2d 230 [4th Dept 1979]).

Here, defendant's proof reveals that issues of fact exist as to whether the instructors were talking and distracted, and whether the instructors released Michael too soon from the maneuver. The law clearly holds that a participant in a sporting or recreational activity does not assume the risk of another participant's negligent act which enhances the risk of injury (*Schoenlank v Yonkers YMCA*, 44 AD3d 927, 845 NYS2d 69 [2d Dept 2007]). In addition, there is an issue of fact as to whether the mat, an

obvious safety feature, was in its proper place or whether it had shifted, thereby exposing a piece of wood and unreasonably increasing risk of injury (*see*, *Ross v New York Quarterly Mtg. of the Religious Society of Friends*, 32 AD3d 251, 819 NYS2d 749 [1st Dept 2006]). Accordingly, the defendant has failed to make a prima facie showing of entitlement to judgment as a matter of law, and its motion for summary judgment must be denied.

Dated: August 22, 2008

PETER H. MAYER, J.S.C.