SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SHULMAN Justice J.S.C. PART 1

Index Number : 108665/2006
NUTLEY, LISA
vs
SKYDRIVE THE RANCH
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. 108665/06
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

...his motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-I	1
Answering Affidavits — Exhibits A-D	2
Replying Affidavits Exh. A	3, 4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JAN 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JAN 20 2009

MARTIN SHULMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

----------X

LISA NUTLEY,

Plaintiff,

Index No. 108665/06

-against-

SKYDIVE THE RANCH,

Defendant.

----------X

SHULMAN, J.:

In this negligence action, defendant Skydive The Ranch ("Skydive" or "defendant") moves for summary judgment dismissing the complaint pursuant to CPLR 3212. Skydive also moves for a default judgment on its counterclaim against plaintiff, Lisa Nutley ("Nutley" or "plaintiff"), pursuant to CPLR 3215 along with an inquest and assessment of damages.

The following facts are undisputed. Skydive is a New York corporation with its principal place of business located in Gardiner, New York. Defendant operates a skydiving facility that has been in business for over thirty years. It specializes in both individual and tandem parachute jumping. On July 12, 2003, plaintiff traveled to Skydive's facilities at 45 Sandhill Road, also in Gardiner (the "Premises"), to participate in a tandem jump, the cost of which was paid by a third party for a birthday gift. Prior to her jump, Nutley signed three separate written waivers and releases whereby Skydive would incur no liability for any injuries she might sustain during the course of her jump. Plaintiff also viewed a video prior to her jump.

During the course of her tandem parachute jump, the main chute malfunctioned. Although Nutley's tandem parachute companion was able to deploy the reserve chute,

she sustained fractures to the third and fourth fingers on her right hand between the time of the malfunction and her landing. As a result, plaintiff commenced this lawsuit asserting a single cause of action sounding in negligence. She is seeking damages that exceed the maximum monetary jurisdiction of all lesser courts of this State, together with costs and disbursements in this action.

Skydive argues that it is entitled to summary judgment because: (1) plaintiff signed enforceable releases of liability; (2) New York General Obligations Law ("GOL") §5-326 is inapplicable to the case at bar; and (3) assumption of the risk bars plaintiff's claims.

Nutley argues that Skydive is not entitled to summary judgment because: (1) the contractual waiver and release provisions defendant relies upon are void as against public policy pursuant to GOL § 5-326 in light of plaintiff being engaged in a recreational activity; (2) the instruction that was offered to plaintiff was ancillary to the recreational aspect of her activity as marketed by defendant; and (3) plaintiff did not assume the risk of her injury, namely, the failure of the first parachute to open.

In support of the motion for summary judgment, Skydive argues that Nutley was fully aware of all the risks associated with skydiving, and thus all her claims are barred. Defendant points to a number of releases signed by plaintiff. The document entitled "Skydive The Ranch Agreement 3-05-00" ("Agreement I") included a covenant against bringing suit for any personal injuries that she might incur during her skydiving jump. Agreement I provides in part:

> "1. Assumption of the Risk
>
> The Participant knows and understands that skydiving,

parachuting and all aspects of aviation associated with these activities present risks of permanent catastrophic injuries, disfigurement, or death. The participant understands the scope, nature, and extent of the risks and voluntarily chooses to incur such risk.

2. Exemption from Liability

The Participant releases Skydive the Ranch, the Ranch Parachute Club, Ltd., Blue Sky Entertainment, Inc., Freefall Express Inc., the United States Parachute Association ('U.S.P.A') and all these entities' and associations' operators, officers, agents, servants, employees, and lessors, from any and all liability, claims, loss, or injury to the Participant or the Participant's property while upon the premises, aircraft, or vehicles of Skydive the Ranch or while participating in any of the activities contemplated by this Agreement; whether such loss, damage or injury, results from the negligence of Skydive the Ranch, its operators, officers, agents, servants, employees or lessors or from any other cause. It is acknowledged that the Blue Sky Entertainment Inc., is in no way involved or connected with the operation, business, or facilities of Skydive the Ranch but merely leases to the Skydive the Ranch the real property upon which Skydive the Ranch conducts its business"

(Exhibit E to Affidavit of Joe Richards, dated July 17, 2008) ("Richards Aff."). The above-quoted language unequivocally bars suits for personal injuries as a result of Skydive's negligence.

Plaintiff executed another agreement entitled "The Ranch Parachute Club-Agreement" ("Agreement II"). Agreement II provides in part:

"Exemption from Liability

The Participant releases the Club, Blue Sky Entertainment, Inc., Freefall Express Inc., Skydive . . . and all these entities' and associations' operators, officers, agents servants, employees, and lessors, from any and all liability claims, loss or injury to the

Participant."

(Exhibit F to Richards Aff.).

Nutley argues that both releases are void as against public policy under GOL §5-326, which provides:

> "Every covenant, agreement, or understanding in or in connection with, or collateral to any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator, or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable."

The statutory language voids any agreement exempting an owner or operator of a recreational facility from liability for damages caused by or resulting from the negligence of the owner or operator. Thus, any issue of liability rests upon whether the plaintiff's activities on the day in question were of a recreational nature (*Debell v Wellbridge Club Mgmt., Inc.*, 40 AD3d 248, 249 [1st Dept 2007]).

Skydive argues that Nutley was not engaged in a recreational activity on July 12th. It contends that plaintiff was given a thirty-two minute video to watch prior to her jump and she received "extensive instruction" from a tandem instructor, as well as instruction from the tandem partner instructor (Richards Aff.). Therefore, defendant argues that plaintiff was undergoing instruction in parachute jumping and was actually injured during an instructional session, and thus, GOL § 5-326 does not apply.

The First Department has held that rather than focusing on whether plaintiff's activity was recreational or instructional, it is necessary to examine whether Skydive's purpose was recreational or instructional, and furthermore, whether the facility promotes a recreational pursuit, to which instruction is provided as an ancillary service (*Debell v Wellbridge Club Mgmt., Inc., supra*). In accessing whether a facility is instructional or recreational, courts have examined the organization's name, its certificate of incorporation, its statement of purpose and whether the money it charges is tuition or a fee for use of the facility (*Bacciocchi v Ranch Parachute Club, Ltd.*, 273 AD2d 173, 175 [1st Dept 2000]).

Here, the training sessions, arguably instructional in nature, appear to be ancillary to the recreational activities offered by Skydive (*see Debell v Wellbridge Club Mgmt., Inc., supra*). Published advertisements from Skydive's website proclaim that it will provide customers with "a rush of a lifetime with confidence" (Exhibit B to Affidavit of Sinead F. Cunningham, Esq., dated September 17, 2007) ("Cunningham Aff."). The site further proclaims that "with no worries about the technical aspect of the equipment, all you need is a fifteen minute training from your instructor and you will be ready to throw yourself out of an airplane" (*id.*). The website promoted specials that included free hotdogs, raisins and early bird specials (*id.*). The website lists the fee for a first jump at $195 (*id.*). There is no mention of any tuition rate.

In her examination before trial, Nutley testified that the tandem instructor spent no more than two or three minutes giving direction to the group of people that she was with prior to boarding the airplane (Exhibit H to Richards Aff., pages 50-52). She further

testified that she did view an introductory video about jumping on the bus ride to the site but there was no representative from Skydive present during the viewing to answer questions or concerns (Exhibit H to Richards Aff., pages 24-26). Plaintiff also testified that the video was extremely old and outdated. Plaintiff avers that she was going to participate in a tandem skydive as a recreational event to celebrate her birthday and the participation fee was paid for by her husband, George Van Brunt (Exhibit A to Cunningham Aff.). Nutley further avers that she had no interest or intention of learning, studying or receiving instruction on the mechanics of skydiving or pursuing proficiency in the sport. She desired to participate in the jump solely for pursuit of a one time thrill. She regarded the forms and instruction as ancillary matters to experiencing the thrill involved in a skydive (*id.*).

Skydive also argues that it is relieved of liability in this matter under the primary assumption of the risk doctrine. The doctrine of primary assumption of the risk provides that 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 the sport [or recreational activity] generally and flow from such participation" (*Morgan v State*, 90 NY2d 471, 484 [1997]; *Joseph v New York Racing Ass'n, Inc.*, 28 AD3d 105, 108 [2d Dept 2006]; *Koubek v Denis*, 21 AD3d 453 [2d Dept 2005]). The Court of Appeals and the Appellate Division have held that individuals are not restricted to playing organized sports for this doctrine to apply. It also applies to various types of unorganized sports as well as many forms of recreational activity (*see Marcano v City of New York*, 99 NY2d 548, 549 [2002] ["plaintiff assumed the risk of injury when he

swung on, and subsequently fell off, an exercise apparatus constructed over a concrete floor"]; *see Koubek v Denis*, *supra*) [plaintiff assumed the risk of injury when she climbed on a three-foot high trampoline located in defendant's back-yard]); *see Yisrael v City of New York*, 38 AD3d 647, 648 [2d Dept 2007] [plaintiff assumed risk when jumping rope on concrete pavement]).

A plaintiff who voluntarily participates in a recreational activity is deemed to consent to the apparent or reasonably foreseeable consequences of that activity. This includes those risks associated with the construction of the playing surface and any open and obvious condition on it (*Joseph v New York Racing Ass'n, Inc.*, *supra*). Moreover, it is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which the injury occurred, so long as he or she is aware of the potential for injury from the mechanism from which the injury results (*id.*). Therefore, "if the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty" (*id.*) (*internal quotation marks and citation omitted*). As stated above, plaintiff signed three separate written waivers and releases whereby she acknowledged that her participation in any phase of skydiving could result in major or minor injuries or possibly death. Nutley also testified that she viewed a videotape and received pointers from instructors regarding her tandem parachute jump on the day in question.

In assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendant's negligence are "'unique and created

a dangerous condition over and above the usual dangers that are inherent in the sport'" (*Morgan v State*, *supra*, 90 NY2d at 485). "A 'showing [of] some negligent act or inaction, referenced to the applicable duty of care owed'" to a plaintiff by the defendant, which may be said to constitute "'a substantial cause of the events which produced the injury'" is necessary (*id.*). Additionally, the application of the assumption of the risk doctrine in assessing the duty of care owed by an owner or operator of a sporting facility requires that the participant "'not only have knowledge of the injury-causing defect but also appreciation of the resultant risk'" (*id.* at 486). "'It is, rather, to be assessed against the background of the skill and experience of a particular plaintiff'" (*id.*).

In the case at bar, plaintiff was injured during her first attempt at skydiving. Furthermore, in an affidavit in opposition to defendant's motion, plaintiff argues that she did not have knowledge of the injury causing defect, namely, the failure of the first parachute to open on account of its lines being tangled at the outset and therefore could not appreciate the resultant risk (Cunningham Aff.). As such, Nutley contends that Skydive created a dangerous condition over and above the usual dangers that are inherent in the sport of skydiving.

Joe Richards, Skydive's president and owner, contends that the primary fear people express prior to making a jump is the failure of the parachute to open (Affidavit of Joe Richards, dated October 2, 2008) ("Richards II Aff."). Richards contends that the main chute fails to open in one out of every four hundred tandem parachute jumps, and thus of the 5,000 to 6,000 tandem parachute jumps the company conducts annually,

there are between 12 and 14 main parachute malfunctions per year. He further asserts that because of this known risk, every parachute has a reserve chute which is deployed in the event of the main chute's failure.

Due to the varying testimony in the record, an issue of fact remains as to whether the parachute's tangled lines were caused by Skydive's failure to properly pack plaintiff's parachute and are "unique" circumstances, or whether the tangled lines "created a dangerous condition over and above the usual dangers that are inherent in the sport" of skydiving (*Morgan v State*, *supra*, 90 NY2d at 485). Furthermore, the question of whether the main parachute's failure to open during a tandem jump is or is not an inherent part of the sport of skydiving in and of itself, is sufficient to defeat Skydive's motion for summary judgment.

Skydive has not demonstrated its entitlement to a default judgment on its counterclaim against plaintiff under CPLR 3215. Judgment by default requires proof by affidavit made by the party of the facts constituting the claim, the default and the amount due (*Zelnik v Bidermann Indus. U.S.A., Inc.*, 242 AD2d 227, 228 [1st Dept 1997). As stated above, a question of fact remains as to Skydive's duty of care in the case at bar.

Accordingly, it is

ORDERED that defendant Skydive the Ranch's motion for summary judgment is denied.

This constitutes the decision and order of the court. Courtesy copies of this decision and order have been sent to counsel for the parties.

DATED: January 20, 2009

Martin Shulman, J.S.C.