SCANNED ON 3/2/2009

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

Index Number : 108273/2005

MORRIS, VALERIE

VS.

RED ROCK WEST SALOON

SEQUENCE NUMBER : 001

DISMISS

___ *Justice*

PART 7

INDEX NO. ___

MOTION DATE 10/24/08

MOTION SEQ. NO. 01

MOTION CAL. NO. 74

The following papers, numbered 1 to 3 **were read on this motion to/for** SJ

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... (+ reply)	1-2
Answering Affidavits — Exhibits	3
~~Replying Affidavits~~ (+ reply memo)	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum opinion.

FILED
MAR - 2 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 2/24/09

___ *J.S.C.*

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

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

----------X

VALERIE MORRIS,

Plaintiff,

Index No. 108273/05

Decision and Order

- against -

RED ROCK WEST SALOON and
114th TENTH AVENUE ASSOC., INC.,

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

Defendant SB&T Corp. s/h/a Red Rock West Saloon ("SB&T") moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint against it.

BACKGROUND

Plaintiff, Valerie Morris, commenced this action alleging that the negligence of defendants SB&T and 114th Tenth Avenue Assoc., Inc. caused her to sustain personal injuries on January 7, 2005, when she slipped and fell, allegedly on something wet, while dancing on top of a bar at SB&T, located at 457 West 17th Street, New York, New York (the "subject premises"). Defendant 114th Tenth Avenue Assoc., Inc. owns the subject premises, and SB&T operates the Red Rock West Saloon. The Complaint essentially alleges that defendants were was negligent in the ownership and operation of the premises. The Bill of Particulars contains similar allegations and includes the injuries allegedly sustained by plaintiff.

Issue was joined by defendants with the filing of an answer, generally denying the allegations in the Complaint and asserting

various affirmative defenses. However, by stipulation, dated May 7, 2008, plaintiff discontinued the action as to defendant 114th Tenth Avenue Assocs. Inc. and amended the caption to reflect the discontinuance. The stipulation was "so ordered" by this Court on July 2, 2008.

SB&T now seeks summary judgment dismissing the Complaint against it.

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this 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 the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

It is fundamental that to recover in a negligence action a plaintiff must establish the existence of a duty on the defendant's part as to plaintiff, and the breach of this duty resulting in injury to the plaintiff (*see Turcotte v Fell*, 68 NY2d 432, 437 [1986]).

At an examination before trial held on April 24, 2006, plaintiff testified as to the events giving rise to her claim. Plaintiff stated, in part, that she had been to SB&T twice before the alleged incident (Morris EBT, Not of Mot, Exh E, p. 31). Plaintiff also testified the staff at SB&T usually entertains the patrons with two types of shows; one in which the staff put on costumes and dance on the bar top, and another in which the staff pours whiskey along the length of the bar and sets the whiskey on fire, creating a line of fire on the bar top (*id.*, pp. 25-26). Plaintiff further testified that there is no dancing on the bar while the fire burns, and that the staff puts out the fire and presumably cleans the bar top before dancing is resumed (*id.*, pp. 29-30). In addition, plaintiff testified that the staff also invites the patrons to dance on the bar top, and that she had danced on the bar top once before the alleged incident (*id.*, p. 31, 32).

Plaintiff also testified that on the night of the alleged incident, she accepted the invitation to dance on the bar top because she just wanted to dance (*id.*, pp. 32, 60). She further testified that a bartender assisted her in climbing onto the bar top, but that she went up on the bar voluntarily (*id.*, p. 57). Plaintiff also testified that she was not concerned or nervous about falling from the bar top while she was dancing (*id.*, pp. 38, 59-60), but that she recognized that there was a possibility that she could fall (*id.*, p. 60). She further testified that she had

been dancing on the bar top for approximately three or four minutes when her foot slipped on something wet, and that she fell from the bar top and landed on the floor behind the bar counter (*id.*, p. 39, 42-43).

Plaintiff also testified that she goes to bars once a week, and that she is aware of what goes on behind the counter in a bar (*id.*, p. 60). Specifically, she stated that she is aware that drinks are made and served; that glasses are placed on bar tops; that ice may fall on the bar top from time to time; that things get spilled; and that sometimes the spills are cleaned up right away and sometimes they are not (*id.*, pp. 60-61).

In seeking summary judgment, defendant argues that plaintiff cannot establish that it owed her a duty of care. Specifically, defendant maintains that plaintiff's voluntary assumption of the obvious risk associated with dancing on a bar top, negated any duty that defendant may have owed to her. In opposition, however, plaintiff contends that the act of dancing is not a sport or recreational activity for the purposes of the doctrine of primary assumption of risk.

Contrary to plaintiff's contention, the doctrine of primary assumption of risk applies to leisure activities, including dancing (see *Lisok v Club Exit, Inc.*, 15 AD3d 630 [2d Dept 2005]; *Meli v Star Power Natl. Talent Co.*, 283 AD2d 617, 618 [2d Dept 2001]; *Utkin v Rademacher*, 261 AD2d 840 [4th Dept 1999]). "Voluntary participants in activities where there is an elevated risk of

danger, typically sporting and entertainment events, 'may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation'" (*Westerville v Cornell Univ.*, 291 AD2d 447 [2d Dept 2002], quoting *Turcotte v Fell, supra*). Awareness of the risk should be "assessed against the background of the skill and experience of the particular plaintiff" (*Morgan v State of New York*, 90 NY2d 471, 486 [1997]), and does not include risks which are "unreasonably increased or concealed" (*Benitez v New York City Bd. Of Educ.*, 73 NY2d 650, 658 [1989]).

Here, plaintiff's own EBT testimony establishes that she voluntarily assumed the risk of injury by dancing on top of the bar at SB&T, recognizing that there was a possibility that she could fall. Thus, defendant establishes entitlement to summary judgment dismissing the Complaint against it (*see Sy v Kopet*, 18 AD3d 463, 464 [2d Dept 2003]).

Furthermore, plaintiff fails to raise any material issues of fact which require a trial of this action. Her assertion that defendant unreasonably increased the risk of injury by periodically creating a line of fire on the bar top is refuted by her statements that there is no dancing on the bar top during the fire show and that defendant's staff puts out the fire and presumably cleans the bar top before dancing is resumed. Moreover, the conclusory assertion that the invitation to patrons to dance on the bar top increased the risk of injury is a non sequitur, is speculative and

insufficient to defeat summary judgment. In addition, as stated, plaintiff's deposition testimony demonstrates a full understanding of the consequences of her voluntary action, and refutes any assertion that the risk of injury from dancing on the bar top (even if wet) was concealed. Her speculation as to the origin of the wet bar surface on which she slipped is also unavailing.

CONCLUSION

Accordingly it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 24, 2009
New York, New York

ENTER:

J. S. C.