Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ZAYAT STABLES, LLC,

Plaintiff,

-against-

NYRA, INC.,

Defendant.

Index No. 26215/08

Motion Date January 17, 2013

Motion Cal. No. 167

Motion Sequence No. 6

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5-8
Reply.....	9-10

Upon the foregoing papers it is ordered that the motion by defendant NYRA, Inc. ("NYRA") for summary judgment pursuant to CPLR 3212 dismissing the complaint of plaintiff, Zayat Stables, LLC ("Zayat") and/or to renew and reargue is hereby decided as follows:

In a decision/order dated November 18, 2009, this Court granted defendant's prior motion for summary judgment pursuant to CPLR 3212 against plaintiff. Thereafter, via a decision/order dated September 20, 2011, the Appellate Division, Second Department reversed this Court's ruling and held that: "the motion should have been denied because the defendant failed to establish, prima facie, that the conduct of its employees did not unreasonably increase the usual risks that are inherent in the sport of thoroughbred racing."

The underlying facts of the matter are as follows:

On August 6, 2007, Phone Home, a thoroughbred race horse owned by Zayat suffered a career-ending injury while participating in the 5th race at Saratoga Springs Thoroughbred

Racing Track which is owned and operated by defendant NYRA.[1] Plaintiff's horse was assigned to the start race gate with John Velasquez aboard as the jockey. According to plaintiff, the assistant starter straightened the horse's head so that the colt's head was pointed down the track which plaintiff claims is the custom and common signal to the head starter that the horse and jockey are ready for the start of the race. Plaintiff further claims that the head starter wrongly opened the start gate before Velasquez was "tied on", (i.e., feet in the stirrups and reins securely in hand) and ready causing the jockey to be dislodged, thrown and fall from the horse. The horse then took off into a gallop without a rider, and thereafter injured his right knee when the colt attempted to jump the outer rail of the race track.

Plaintiff commenced this action alleging that the colt's injury was the result of the negligent act of the "starting gate crew",[2] employed by NYRA, of causing the starting gate to open when the rider of plaintiff's horse was not ready for the start of the race. Furthermore, plaintiff claims that the "Assistant Starter" and "Head Starter" failed to follow proper protocols by not waiting until the rider of Phone Home was ready for the start of the race before opening the starting gate.

Via the instant motion, defendant now submits for the first time: (1) the examination before trial transcript testimony of non-party witness, jockey for Phone Home, Jonathan Velasquez and (2) an affidavit of assistant starter, Gustavo Rodriguez employed by NYRA, which new evidence defendant maintains demonstrates that the conduct of defendant's employees did not increase the usual risks that are inherent in the sport of horse racing.

The Court finds that the instant motion is a second summary judgment motion. It is well-established law that multiple summary judgment motions should be discouraged in the absence of a showing of new evidence or sufficient cause (*Welch Foods, Inc.*

---

[1] For purposes of defendant's motion, the court shall view the evidence in the light most favorable to plaintiff (see, Boston v. Dunham, 274 AD2d 708 [3d Dept 2000]).

[2] Although not specifically alleged in the verified complaint, apparently plaintiff is suing NYRA as the owner and operator of the sports venue and in its capacity as the employer of the starting gate crew employees who plaintiff claims were negligent. NYRA, allegedly the employer of the starting gate crew, is being sued under the doctrine of respondent superior.

v. Wilson, 277 AD2d 882 [4th Dept 2000]; *Graney Development Corp. v. Taksen*, 62 AD2d 1148 [4th Dept 1978]). "Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be not reservation of any issue to be used upon any subsequent motion for summary judgment" (*Levitz v. Robbins Music Corporation*, 17 AD2d 801 [1st Dept 1962]). In the instant case, there has been a sufficient demonstration of new evidence. Defendant maintains that the deposition of non-party witness, Jonathan Velasquez which took place after the filing of the first summary judgment motion constitutes "new facts that were not offered on the prior motion" as discovery was reopened after the filing of the prior summary judgment motion and when discovery was reopened, the examination before trial of Jonathan Velasquez took place. Defendant additionally maintains that it was not until after Mr. Velasquez's deposition was conducted that it became apparent that an affidavit from Mr. Rodriguez was necessary to establish that once Mr. Velasquez remounted Phone Home, Mr. Rodriguez did not hear Mr. Velasquez state that he was not ready for the start of the race.

Mr. Velasquez testified inter alia that: it is very common for a horse to be injured after the start is taken when its jockey has been dismounted, he said over and over again that he was not ready, the assistant starter Rodriguez was half a foot away from him and never acknowledged that he heard him state that he was not ready, races are commenced despite the fact that a horse or jockey is not ready "all of the time," he never stated that he was okay for the race to begin, miscommunications between jockeys and starters are quite common because of the rapid speed with which the starting gate crew must release the horses from the starting gate, failed communications between the assistant starters, the head starter, and the jockeys "happens plenty," and before Phone Home's injury, he had previously made complaints to the stewards regarding the lack of communication at the starting gate.

The affidavit of Mr. Rodriguez indicates inter alia that: "[w]hile Mr. Velasquez alleges that he stated he was not ready, he did not say it in a voice loud enough for me to hear him, if he did in fact say that at all".

The Court finds that there are material issues of fact as whether the conduct of its starters unreasonably increased the usual risks that are inherent with the sport of thoroughbred horse racing. There is a question of fact as to inter alia, whether Mr. Rodriguez, the assistant starter, heard Mr.

Velasquez, the jockey, state that he was not ready for the start of the race.

Accordingly, as there are triable issues of fact, summary judgment is unwarranted and a trial is necessary. The motion is denied.

This constitutes the decision and order of the Court.

Dated: March 18, 2013

.....
Howard G. Lane, J.S.C.