Avignone v Adventure Park on Long Is., LLC

2024 NY Slip Op 34025(U)

November 12, 2024

Supreme Court, New York County

Docket Number: Index No. 152676/2020

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** — ***Justice*** **PART** **14**

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JAMES AVIGNONE,

Plaintiff,

- v -

THE ADVENTURE PARK ON LONG ISLAND, LLC,THE ADVENTURE PARK AT LONG ISLAND, LLC,OUTDOOR VENTURE GROUP, LLC,OUTDOOR VENTURE GROUP HOLDINGS, LLC,HENRY KAUFMANN CAMPGROUNDS, INC.,UNITED JEWISH APPEAL-FEDERATION OF JEWISH PHILANTHROPIES OF NEW YORK, INC.

Defendant.

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INDEX NO. 152676/2020

MOTION DATE 11/06/2024

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 99, 100, 101, 104, 106, 108, 117, 118, 119, 123

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 97, 102, 105, 109, 111, 112, 113, 121, 125

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 103, 107, 110, 114, 122, 124, 126

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 002, 003, 004 are consolidated for disposition.

Defendants THE ADVENTURE PARK ON LONG ISLAND, LLC, THE ADVENTURE PARK AT LONG ISLAND, LLC, OUTDOOR VENTURE GROUP, LLC, OUTDOOR VENTURE GROUP HOLDINGS, LLC's (collectively "Adventure Park Defendants") motion (MS002) concerning discovery is denied as moot. Adventure Park Defendants' motion for summary judgment and plaintiff's cross-motion for summary judgment (MS003) are both

denied. Defendants HENRY KAUFMANN CAMPGROUNDS, INC., UNITED JEWISH APPEAL-FEDERATION OF JEWISH PHILANTHROPIES OF NEW YORK, INC (collectively, "UJA")'s motion for summary judgment (MS004) is granted.

Background

Plaintiff brings this case arising out of injuries he suffered while on a zip line at an outdoor recreational facility operated by the Adventure Park Defendants and at a property owned by UJA. On August 5, 2017, plaintiff was at Adventure Park on Long Island. Bahman Azarm, the CEO of defendant Outdoor Venture Group LLC, testified that Adventure Park contains an aerial ropes course and that it was designed to incorporate the surrounding area, which included many trees (NYSCEF Doc. No. 74 at 13).

Plaintiff testified that he had never been to Adventure Park prior to his accident and he went to the park that day with his wife, two of his kids as well as other relatives (NYSCEF Doc. No.73 at 19). Although he did not sign a waiver, his wife signed one on his behalf (*id*. at 25-27). Plaintiff added that his two children were the first to take the zip line that day (*id*. at 44). When it was his turn, he locked into the cable and then was injured when he hit a tree stump (*id*. at 46). Plaintiff testified that he was close to the ground when he hit the stump "because it was the end of the run" (*id*. at 48). He claimed he only saw leaves and dirt near the landing area and did not see the stump (*id*. at 49-50). Plaintiff insisted that he only saw the tree stump right before he hit it and that he could not do anything to avoid it (*id*. at 63). He claimed that the left side of his hip crashed into the tree stump (*id*. at 66).

Plaintiff blames defendants for operating an unsafe zip line while the Adventure Park Defendants contend that plaintiff's injuries were caused by his failure to properly use the zip

line. They insist plaintiff did not face forward and that his own actions caused him to swing back and forth, which was the sole cause of the accident.

A video of the incident, apparently captured by plaintiff's wife, was submitted in this motion (NYSCEF Doc. No. 81). The video confirms that plaintiff jumped off the platform to start and began swinging back and forth while traveling down before hitting the tree stump. However, as detailed below, the video does not compel the Court to grant either the Adventure Park Defendants' motion or plaintiff's cross-motion.

MS002

The Court finds that this motion, in which the Adventure Park Defendants seek to strike plaintiff's complaint for failure to comply with discovery orders, is denied as plaintiff contends in opposition that he complied with his discovery obligations. And the Adventure Park Defendants did not submit a reply contesting that characterization.

MS003

The Adventure Park Defendants seek summary judgment dismissing the complaint in this motion. They contend that no dangerous condition existed that the time of plaintiff's accident and that, therefore, plaintiff cannot sustain a negligence claim. Adventure Park Defendants also maintain that plaintiff voluntarily chose to participate in the adventure course and so, by virtue of the waiver signed by his wife on his behalf, he consented to the risks associated with the zip line.

They emphasize that the site was routinely inspected and maintained. The Adventure Park Defendants also submit an expert report from Randolph Smith, who claims that plaintiff did not follow instructions about how to ride the zip line and spun sideways, which led to the impact with the stump. Mr. Smith insists that the particular zip line had a sufficient landing zone and that the tree stump was outside this area. He contends that plaintiff was only injured because he

ignored the safety protocols explained to him prior to his injuries. The Adventure Park Defendants argue that the tree stump was a naturally occurring condition and it does not constitute a dangerous condition for purposes of a negligence claim.

In opposition and in support of his cross-motion for summary judgment, plaintiff emphasizes that he did not recall receiving any instructions about how to safely start zip-lining. He claims he was only told how to buckle in, that he was shown how to put the harness on and was provided with gloves. Plaintiff also attaches the affidavit of Michael Troy Richardson, his purported expert[1], who claims that the Adventure Park Defendants should have removed the tree stump. He claims that novice users of a zip line (plaintiff had never used one before) might foreseeably swing from side to side and hit the tree stump. Mr. Richardson also contends that the four-foot window suggested by defendants is not wide enough and clearly was not wide enough here.

Plaintiff contends that the waiver of liability is not enforceable and that there are issues of fact concerning whether he assumed the risk of the injuries he suffered. He contends that the Adventure Park Defendants had a duty to remove unreasonable risks and the tree stump should have been removed. Plaintiff also demands that he is entitled to summary judgment on liability.

In reply, the Adventure Park Defendants contend that the waiver is enforceable as it specifically notes that the adventure course is a self-guided experience and so plaintiff assumed any risks associated with traversing the grounds. They insist that plaintiff was told the proper way to use the zip-line, which involved gently lifting your legs, facing forward and not swinging, and his injuries were a result of his failure to do so.

[1] The Court will consider this affirmation as it was signed and sworn under penalty of perjury.

Discussion

The Court denies both the Adventure Park Defendants' motion and plaintiff's cross-motion. There are multiple issues of fact concerning the tree stump and plaintiff's conduct. A fact finder must assess whether or not the tree stump was too close to the zip line pathway. The Court cannot conclude as a matter of law that the location of the tree stump absolves these defendants of any liability. The aforementioned video shows that plaintiff swayed from side to side and a fact finder must determine whether plaintiff's impact with the tree stump was caused by his own actions, defendants' actions or some combination of the two.

"The overarching principle governing determinations of proximate cause is that a defendant's negligence qualifies as a proximate cause where it is a substantial cause of the events which produced the injury. Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences" (*Hain v Jamison*, 28 NY3d 524, 528-29, 46 NYS2d 3d 502 [2016]). In other words, a jury must consider whether or not plaintiff's injuries were proximately caused by the tree stump's location, plaintiff's decision to jump off the platform while not facing forward or that both factors led to his accident. That this adventure park was self-guided is of no moment as that does not absolve the Adventure Park Defendants of their duty to make sure the zip line was free from dangerous conditions and obstacles.

And the jury will have to consider whether or not plaintiff received instructions concerning how to safely use the zip line, a key part of a negligence claim against the Adventure Park Defendants. Plaintiff claimed at his deposition that he could not recall if he was given instructions about how to safely start using the zip-line (NYSCEF Doc. No. 73 at 34). The

Adventure Park Defendants witness watched the video and noted that plaintiff did not hold his hands correctly on the top of the zip line and that is why he started swinging back and forth (NYSCEF Doc. No. 74 at 77). He insisted that participants are given instructions about how to safely use equipment (*id*. at 26). They were also provided with a practice area to work on these instructions prior to going on the ropes course (*id*. at 25).

The Court is also unable to grant plaintiff's cross-motion for liability as he admitted that his two children went down the zip line unscathed and the video shows that he made contact primarily because he was swinging from side to side. That is, the set up of the zip line was not inherently dangerous as a matter of law. The jury must reach a conclusion concerning the proximate cause of plaintiff's accident.

The Court rejects the Adventure Park Defendants' argument that this tree stump was somehow a natural condition and therefore they are free from liability. These defendants knew full well that participants were passing right through this corridor and that obstacles should not be left in their path. Whether this particular obstacle was too close to the zip line path is for the jury to consider.

Similarly, the Court finds that there is an issue of fact with respect to the notice issue and specifically, the Adventure Park Defendants' constructive notice of the tree stump. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). Given the maintenance logs and the Adventure Park Defendants' testimony that there is a "maintenance team at the park" (NYSCEF Doc. No. 74 at 49), there is a clear issue of fact

whether or not these maintenance workers had reason to know someone could smack into the stump and had an opportunity to remove the tree stump prior to plaintiff's accident.

The issue of the waiver signed by plaintiff's wife on his behalf is not dispositive. As plaintiff argued in opposition, a waiver is not enforceable where it was signed in connection with the payment of a fee in order to use the course (*Garnett v Strike Holdings LLC*, 64 AD3d 419, 420, 882 NYS2d 115 [1st Dept 2009] [observing that a waiver is void against public policy pursuant to General Obligations Law § 5-326 where it is conditioned on a participant paying a fee to use the recreational facility]).

Similarly, the Court cannot conclude that plaintiff assumed the risk, as a matter of law, that he would crash into a tree stump while zip lining down to the ground. The very nature of using a zip line means that a participant is moving quickly along a pre-ordained pathway towards the next stop (here, the ground). Put another way, a zip line takes a person from point A to point B—it is not as if someone can go right or left—and so obstacles that someone might hit along the way are not a reasonable risk someone assumes while zip lining.

MS004

In this motion, UJA seeks summary judgment on the ground that it discharged the duty to maintain the park to the Adventure Park Defendants, who signed a lease as a tenant at the premises. UJA argues that it left complete control of the ropes course to the Adventure Park Defendants and so it has no duty to plaintiff. It points out that the license agreement for the park granted sole and exclusive rights to operate the park to the tenants and that it only retained the right to use existing nature trails. UJA also argues that the presence of the tree stump did not violate a specific statute and so it cannot be held liable.

In opposition, plaintiff argues that the license agreement granted UJA the right to approve or disapprove the design of the park as well as any changes. He argues that these provisions are sufficient to raise an issue of fact concerning its liability.

In reply, UJA insists it had no role whatsoever in the park and that the testimony of the Adventure Park Defendants' witness confirms that UJA did not participate in the inspection of the area where plaintiff was injured.

"It is well settled that an out-of-possession landlord . . . is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497, 858 NYS2d 107 [1st Dept 2008] [internal quotations and citations omitted]).

The subject license agreement required the park operators to:

> "be responsible for all aspects of operations of the Park, including construction. ticketing, training, employment of personnel, pricing and budgeting, selection of patrons, and the content of specific programs. [The Park Operator] shall have the sole discretion to operate the Park in the manner it determines to be advisable consistent with the provisions of this Agreement, provided, however, that nothing herein shall allow OVG to construct or operate the Park or conduct other activities (such as parking and access) outside of the Park Area in a manner that interferes with Camp Activities" (NYSCEF Doc. No. 95 § 2[a][i]).

This provision makes clear that UJA ceded total responsibility for the ropes course to the Adventure Park Defendants. This conclusion is only reinforced by the subsequent section in the license agreement, 2(a)(iii), in which UJA reserves the right to use existing nature trails. UJA specifically retained the right to use certain areas of the premises, but not the area where plaintiff

was injured. Nothing submitted on this record suggests that UJA had anything to do with the maintenance or operation of the Adventure Park and so the Court grants UJA's motion.

Summary

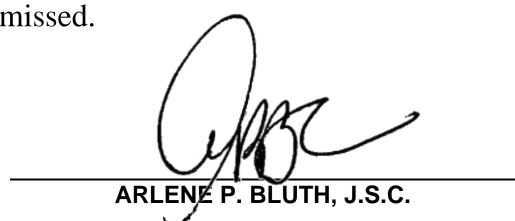
The video as well as the deposition transcripts submitted on this motion make clear that a determination of liability is best left for a jury as between the Adventure Park Defendants and the plaintiff. The fact finder will have to evaluate whether, and to what extent, plaintiff's injuries were caused by his failure to properly use the zip line and what impact the Adventure Park Defendants' purported failure to remove the tree stump had in causing plaintiff's injuries. The Court is unable to reach a conclusion as to the proximate cause of plaintiff's accident as a matter of law.

Accordingly, it is hereby

ORDERED that the Adventure Park Defendants' motion (MS002) concerning discovery is denied; and it is further

ORDERED that the Adventure Park Defendants' motion (MS003) and plaintiff's cross-motion for summary judgment are both denied; and it is further

ORDERED that defendants' HENRY KAUFMANN CAMPGROUNDS, INC., UNITED JEWISH APPEAL-FEDERATION OF JEWISH PHILANTHROPIES OF NEW YORK, INC.'s motion (MS004) for summary judgment dismissing the claims against them is granted and all claims against only these defendants are severed and dismissed.



11/12/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ DENIED	☐ GRANTED IN PART	☒ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE