

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

ISA PART 22

ZAYAT STABLES, LLC,

Plaintiff,

-against-

NYRA, INC.,

Defendant.

Index No. 26215/08

Motion
Date August 4, 2009

Motion
Cal. Nos. 28 and 29

Motion
Sequence Nos. 1 and 2

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Upon the foregoing papers it is ordered that these motions are determined as follows:

RELIEF SOUGHT

Defendant NYRA, INC. ("NYRA") moves for summary judgment pursuant to CPLR 3212 dismissing the complaint, and by separate motion for an order pursuant to CPLR 3042, 3124 and 3126 compelling the plaintiff Zayat Stables, LLC ("Zayat") to submit the thoroughbred colt race horse "Phone Home" to physical examinations in New York and to provide responses to outstanding discovery demands and an order pursuant to CPLR 3024, 3124 and 3126 precluding plaintiff from offering proof. Both motions are joined in this decision for purposes of disposition.

BACKGROUND

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 Velazquez 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 Velazquez 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.

Pretrial discovery was had in which examinations before trial were taken of Sobhy Sombol, plaintiff's Racing Manager and Vice President. Defendant NYRA thereafter filed the instant motion for summary judgment. Essentially relying on the Court of Appeals holding in [Turcotte v. Fell \(68 NY2d 432 \[1986\]\)](#), defendant NYRA argues that the complaint must be dismissed because the undisputed record conclusively establishes that any hazardous conditions claimed by Zayat to have caused injury to Zayat's horse were obvious and apparent, which Zayat knew of or should have known of as an experienced professional thoroughbred race horse owner. Therefore, by participating in the thoroughbred horse racing activity leading to the accident with such knowledge, Zayat voluntarily assumed the risk of injuries from those dangers and implicitly gave its informed consent that

¹For 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.

NYRA owed it no duty of ordinary care with respect thereto, as a matter of law.

In support of its motion, defendant submitted, among other things, the verified complaint, bill of particulars, and the deposition of Sobhy Sombol. Sombol testified that he was employed by plaintiff Zayat Stables, LLC as Racing Manager and Vice President since February 2005. His duties as Vice President and Racing Manager include managing the entire racing program, buying horses, developing horses for the race track and placing the horses in races that maximize the horses value. In August 2007, plaintiff owned approximately two hundred fifty (250) horses. He has been involved in the equine industry since the age of eight (8). He testified that between 2003 and 2005 he personally owned two race horses that he trained and raced in Egypt. He testified that it is a common occurrence for a horse to lose its rider during a race and that since his employment with Zayat he has observed horses lose their riders on many occasions, including approximately five (5) times in the start gate and coming out of the start gate more than thirty (30) times.

Prior to the accident, Zayat's trainers made complaints to him regarding the gate crew expertise and experience. However, notwithstanding his concerns about the safety of Zayat's horses participating in the August 2007 Meet at Saratoga Racetrack due to the performance of the starter gate crew, he did not withdraw a Zayat's horse from the Meet.

In opposition, the plaintiff submitted plaintiff's verified complaint, dated October 23, 2008, the affidavit of jockey John Velazquez, sworn to November 20, 2007 and the out-of-state affidavit of plaintiff's expert Clinton Pitts, sworn to May 26, 2009.

THE LAW RELATING TO SUMMARY JUDGMENT

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion ([Alvarez v. Prospect Hospital, 68 NY2d 320 \[1986\]](#)). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of triable issue of fact.

The court's function on a motion for summary judgment is issue finding rather than issue determination ([Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 \[1957\]](#)). Since summary judgment is such a drastic remedy, it should not be

granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (Stone v. Goodson, 8 NY2d 8 [1960]; Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The role of the court is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman 278 AD2d 811 [4th Dept 2000]; see also, Yaziciyan v. Blancato, 267 AD2d 152 [1st Dept 1999] ["The deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact."])

When the moving party has established entitlement to summary judgment as a matter of law, the opposing party must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action (see, LaCapria v. Bonazza, 153 AD2d 551 [2d Dept 1989]). The opponent of a motion for summary judgment, in order to avoid the granting of the motion, must ordinarily submit evidentiary proof in admissible form (see, CPLR 3212[b]).

DISCUSSION

It is fundamental that to recover in a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care and that the defendant breached that duty (Turcotte v. Fell, 68 NY2d 432, 437 [1986]). However, "[w]hen a person voluntarily participates in certain sporting events or athletic activities, an action to recover for injuries resulting from conduct or conditions that are inherent in the sport or activity is barred by the doctrine of primary assumption of risk" (Cotty v. Town of Southampton, 64 AD3d 251 [2d Dept 2009]).

"Under the doctrine of primary assumption of risk, a person who voluntarily participates in a sporting activity generally consents, by his or her participation, to those injury-causing events, conditions, and risks which are inherent in the activity" (see, Morgan v. State of New York, 90 NY2d 471, 484 [1997]; Turcotte v. Fell, 68 NY2d 432, 439 [1986]). Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation (see, Morgan v. State of New York, 90 NY2d at 484; Turcotte v. Fell, 68 NY2d at 439). Because determining the existence and scope of a duty of care requires "an examination of plaintiff's reasonable expectations of the care owed him by others" (Turcotte v. Fell, 68 NY2d at 437), the plaintiff's consent does not merely furnish the defendant with a defense; it eliminates the duty of care that would otherwise exist. Accordingly, when a plaintiff assumes the

risk of participating in a sporting event, 'the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence' (68 NY2d at 438, quoting Prosser and Keeton, Torts "68, at 480-481 [5th ed])." (Cotty v. Town of Southampton, 64 AD3d 251 [2d Dept 2009]).

"The policy underlying the doctrine of primary assumption of risk is "to facilitate free and vigorous participation in athletic activities" (Benitez v. New York City Bd. of Educ., 73 NY2d 650, 657 [1989]). Without the doctrine, athletes may be reluctant to play aggressively, for fear of being sued by an opposing player. As long as the defendant's conduct does not unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk (see, Morgan v. State of New York, 90 NY2d at 485; Benitez v. New York City Bd. of Educ., 73 NY2d at 658; Muniz v. Warwick School Dist., 293 AD2d 724 [2002])." (Cotty v. Town of Southampton, 64 AD3d 251 [2d Dept 2009]).

Awareness of the risk assumed is to be assessed against the background of the skill and experience of the particular plaintiff (Morgan v. State, *supra*). In Turcotte v. Fell, the Court of Appeals placed professional athletes³ participating in sporting events into the category of "primary" assumption of risk, which limited defendant's duty to exercising due care to make the conditions as safe as they appear to be (68 NY2d at 438-439). Thus, relieving an owner or operator of a sports venue from liability for the inherent risks of engaging in the sport is justified when a consenting participant is (1) aware of the risks, 2) has an appreciation of the nature of the risks, and (3) voluntarily assumes the risks (Morgan v. State, 90 NY2d 471; Turcotte v. Fell, *supra*; see, Verro v. NYRA, 142 AD2d 396 [3d Dept 1989] [a professional athlete who is injured while participating in the dangerous sport activity of horse racing is presumed to have greater understanding of the dangers involved and is deemed to have consented, by his participation to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation]).

"It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in

³ Some sporting commentators do consider a race horse a professional athlete. Indeed, in 1973, over a quarter of a century ago, Sports Illustrated named the thoroughbred race horse Secretariat its "Athlete of the Year" for becoming the first thoroughbred since Citation in 1948 to win America's Triple Crown. (see, Brokopp, *Are Race Horses Athletes? You Bet They Are!*, June 8, 2005).

which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (Maddox v. New York, 66 NY2d 270, 278 [1985]). However, although "knowledge plays a role" "for purposes of determining the extent of the threshold duty of care," the inherency of the risk "is the sine qua non" (Morgan v. State, 90 NY2d 471 [1997]; see, Rosati v. Hunt Racing, Inc., 13 AD3d 1129 [4th Dept 2004]).

Participants do not assume the risk of reckless or intentional conduct.

The fact that defendant was negligent is not dispositive in an action in which the defendant asserts a defense of primary assumption of the risk. Participants will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks (Morgan v. State, 90 NY2d 471; see, Kleiner v. Commack Roller Rink, 201 AD2d 462 [2d Dept 1994] [ice skater may assume the risk of being hit by out-of-control skater, but see, Reid v. Druckman, 309 AD2d 669 [1st Dept 2003] [ice skater may not have assumed the risk of being bowled over by rink safety personnel acting recklessly]).

A participant in a sporting event does not assume the risk of foreseeable harm arising from a breach by those responsible for conducting the activity of their duty to provide reasonable supervision (Kramer v. Arbore, 309 AD2d 1208 [4th Dept 2003] [rink owners could be held liable to hockey player injured by another player's reckless or intentional conduct, where among things there was evidence that during the game the refereeing was "poor" or "terrible"]]). However it should be noted that in Turcotte v. Fell, the court held that plaintiff a professional jockey with years of experience in horse racing had assumed the risk of injury arising from another jockey's violation of the rules of horse racing. The fact that another participant's conduct violated the rules of the sport does not render such conduct intentional or reckless so as to justify an exception to the assumption of risk doctrine.

Participants do not assume the risk of concealed or unreasonably increased risk

In determining whether a defendant has violated a duty of care to a plaintiff engaged in a sporting activity, the applicable standard should include whether the conditions caused by defendant's negligence are unique and created a dangerous

condition⁴ over and above the usual dangers that are inherent in the sport (*Morgan v. State*, 90 NY2d 471 [1997]; *Owen v. R.J.S. Safety Equipment, Inc.*, 79 NY2d 967 [1992]). Thus, there must be a showing of some negligent act or inaction, referenced to the applicable duty of care owed to the participant by the defendant, which may be said to constitute a substantial cause of the events which produced the injury (*Morgan v. State, supra*).

Accordingly, a participant will not be deemed to have assumed the risk where the action is based on negligence which created additional risks not inherent in the sport (*Reid v. Druckman*, 309 AD2d 669 [1st Dept 2003] [ice skater did not assume risk of being bowled over by reckless rink safety personnel]; *Huneau v. Maple Ski Ridge, Inc.*, 17 AD3d 848 [3d Dept 2005] [issue of fact as to whether actions of attendants at snow tubing facility unreasonably increased the risk of injury]; *Rosati v. Hunt Racing, Inc.*, 13 AD3d 1129 [4th Dept 2004] [issue of fact whether improperly trained or negligent flagman is a risk inherent in sport of motorcross racing] (*Minuto v. State*, NYLJ, Sept. 25, 2009, at 32, col 3 [Court of Claims] [granting summary judgment to 15 year old luge sled rider who was injured when her sled struck a worker standing in the track who was employed by defendant to perform track maintenance between sled runs, and finding that "a maintenance worker standing in the middle of the track is not an inherent risk of the sport of luge and constitutes a unique and dangerous condition beyond the usual dangers inherent in the sport]).

Defendant has established a prima facie ground for summary judgment.

Defendant has presented prima facie evidence showing that plaintiff is a highly skilled and experienced professional owner of thoroughbred race horses with many years of knowledge of the horse racing business who voluntarily participated in a professional horse racing event in which plaintiff's horse was injured in a race at a race track which defendant owned and operated. Defendant submitted proof in admissible form showing that (1) horse racing is an inherently dangerous and risky sporting or entertainment activity; (2) plaintiff voluntarily participated in horse racing and routinely placed and raced his horses, including Phone Home, the horse that is the subject of

⁴ Plaintiff claims that the unique and dangerous condition created by defendant's negligent conduct, was plaintiff's jockey dislodgment, being thrown and fall from the horse, resulting in the horse taking off into a gallop without a rider and thereafter, attempting unsuccessfully to jump the outer rail of the race track.

this action, in professional racing activities; (3) plaintiff's owner had a substantial background and numerous years of professional experience in horse racing prior to the accident and previously participated in horse races at Saratoga Springs Thoroughbred Racing Track and various other tracks; (4) that prior to the start of the race plaintiff was aware that deviation from start gate protocol, or custom practice and procedure may occur due to acts or omissions of start gate crews during a professional thoroughbred horse race.⁵ The record shows that Zayat was aware of the risks of injury in the sport of professional horse racing in general, and in particular the injury causing events and conditions that may occur at a start gate at the commencement of horse race, and as a professional is presumed to have a greater understanding of the dangers involved.

Defendant has made a prima facie showing that by plaintiff participating in the sporting/entertainment activity of horse racing, the primary assumption of the risk doctrine announced in *Turcotte* relieves defendant from liability from any injury to plaintiff's property (i.e., the colt Phone Home) that may have been caused by the negligent act or omission at the start gate when the starting gate crew, employed by defendant NYRA to officiate, supervise and manage the race, allegedly caused the starting gate to open when the jockey was not ready for the start of the race or by the negligent act of the "Assistant Starter" and "Head Starter" in failing to follow proper protocols by not waiting until the jockey aboard Phone Home was "tied on" and ready for the start of the race before opening the start gate.

Plaintiff does not raise any triable issue of fact.

In opposition, plaintiff submits the affidavit of jockey, John Velazquez, the out-of-state affidavit of its expert Clinton Pitts and plaintiff's verified complaint.

Plaintiff argues that defendant has failed to present proof in admissible form which would eliminate material issues of fact concerning plaintiff's theory of liability, i.e. that NYRA's gate crew negligently started the race before Phone Home's jockey was "tied on".

⁵ Plaintiff admits in its verified complaint that "there were seven separate negligent gate incidents in the first 20 days of the 36-day Saratoga 2007 Meet. In fact, in the week preceding the August 6th race there were three incidents at the gate one of which also resulted in the horse being declared a "non-starter." ¶17 of the Verified Complaint (see, *Kwiecinski v. Chung Hwang*, 2009 NY Slip Op 06630 [3d Dept 2009] [Admissions of fact in pleadings are considered admissible]).

Plaintiff further argues that it may have assumed the risk that its jockey could be thrown by a frightened horse, but did not assume the heightened risk created by alleged negligent conduct of defendant's employees in opening the start gate before plaintiff's jockey was ready and set to go.

Additionally, plaintiff argues that the mechanism that caused plaintiff's injury was the negligent operation of the start of the race by an incompetent, untrained and/or inexperienced starting gate crew. Plaintiff asserts that defendant submits no proof to establish that plaintiff was aware or assumed the risk of injury of the start of the race by an incompetent, untrained and/or inexperienced starting gate crew.

Plaintiff's submission is incompetent.

When the moving party has established entitlement to summary judgment as a matter of law, the opposing party must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action (see, [LaCapria v. Bonazza, 153 AD2d 551 \[2d Dept 1989\]](#)). The opponent of a motion for summary judgment, in order to avoid the granting of the motion, must ordinarily submit evidentiary proof in admissible form (see, CPLR 3212[b]).

In plaintiff's expert's affidavit, Clinton Pitts states that in reaching his opinion, he reviewed a videotape of the August 6, 2007, 5th race at Saratoga Race Course and "the contemporary press accounts of the August 2007 Race Meet at Saratoga". (§5 Affidavit of Clinton Pitts). The videotape reviewed by Mr. Pitts was not submitted by plaintiff and is not part of the record before the court. The "contemporary news accounts" (Exhibit B Affidavit of Clinton Pitts) is clearly hearsay and inadmissible ([Young v. Fleary, 226 AD2d 454, 455 \[2d Dept 1996\]](#) [newspaper articles submitted on summary judgment motion constitute inadmissible hearsay]). "[It] is settled and unquestioned law that opinion evidence must be based on facts in the record or personally known to the witness". ([Hamsch v. NYCTA, 63 NY2d 723, 725, citing Cassano v. Hagstrom, 5 NY2d 643, 646, rearg denied 6 NY2d 882; DeTommaso v. M.J. Fitzgerald Construction Corp., 138 AD2d 341 \[2d Dept 1988\]; O'Shea v. Sarro, 106 AD2d 435 \[2d Dept 1984\]](#)). As the opinion of the plaintiff's expert was based on hearsay and evidence that is not in the record, it is inadmissible and cannot be considered by the court ([Schwartz v. Nevatel Communication Corp., 778 NYS2d 308 \[2d Dept 2004\]](#)) [inadmissible hearsay is insufficient to raise any triable issues of fact to defeat summary judgment]).

Since Mr. Pitts' conclusions improperly rested on proofs that are not before this court, they are insufficient to raise a material triable factual issue (see, [Constantinou v. Surinder](#), 8 AD3d 323 [2d Dept 2004]; [Claude v. Clements](#), 301 AD2d 554 [2d Dept 2003]; [Dominguez-Gionta v. Smith](#), 306 AD2d 432 [2d Dept 2003]; [Codrington v. Ahmad](#), 40 AD3d 799 [2d Dept 2007]). As plaintiff's submissions are not in admissible form or probative evidence, they may not be considered by this court as plaintiff's opposition to the summary judgment motion.

Notwithstanding, even considering the affidavit of plaintiff's expert, in which he asserts based on industry custom, training and common understanding, the assistant starter should not have straightened the horse's head so that the horse's head was pointed down the track, which is the custom and common signal to the head starter that the horse and jockey are ready for the start of the race, when the jockey was not tied on and ready, the Court finds that any such conditions created by defendant's employees alleged negligence were neither unique nor created a dangerous condition over and above usual dangers that were inherent in the sport of horse racing.

Inasmuch as a participant in a sporting event does not assume risks that are unreasonably increased, a jury question is presented as to whether the risk of injury inherent in the sport activity was increased by the acts or omissions of the defendant ([Maurer v. Feinstein](#), 213 AD2d 383 [2d Dept 1995]; [Henig v. Hofstra University](#), 160 AD2d 761 [2d Dept 1990] [where plaintiff was injured while playing football by falling into a hole on the field, a jury question was presented as to whether the hole was "typical of the terrain upon which the game of football is normally played" or whether the hole was an unreasonable, unnecessary and unforeseen addition to the risks inherent in the sport]).

However, as in this case, before reaching the question as to whether the risk of injury inherent in the sport was increased, the threshold legal determination of the scope of defendant's duty, and whether the defendant activity created a condition or risk of injury of the kind that is inherent in a sport, is a question for the court. Hence, although, a court may consider expert opinion regarding the risk customarily considered inherent or associated with the sport activity, the expert opinion is not controlling on the ultimate legal question of the duty. Once the court has resolved the issue of what are customarily inherent risks, the question of whether the defendant increased those risks may be a question for the jury.

Whether certain injury causing events, conditions and risk are inherent in the activities of horse riding or racing, and the scope of the duty of the owner or sponsor of a horse racing or horse riding related activity have been considered by several courts. In Tilson v. Russo, 818 NYS2d 311 (3d Dept 2006) the court held that even if the owner failed to comply with industry standards, any conditions created by owner's alleged negligence were neither unique nor created a dangerous condition over and above usual dangers that were inherent in sport of horseback riding, including the sudden and unintended action that the horse would bite the rider. In Norkus v. Scolaro, 699 NYS2d 550 (3d Dept 1999) the court held that an inherent risk in sporting events involving horses is injury due to the sudden and unintended actions of the animal. In Eslin v. County of Suffolk, 795 NYS2d 349 (2d Dept 2005) the Appellate Division, Second Department held that being thrown from horse, or horse acting in an unintended manner were dangers inherent in the sport of horseback riding and a horse back rider assumed risk of injury when she fell from a horse after the horse took off into gallop and rider's foot dislodged from stirrup.

In this case, plaintiff claims the injury causing condition or risks created by defendant's negligence was the opening of the start gate before the jockey was ready and "tied on" which caused the colt to take off, the jockey to be dislodged, thrown and fall from the horse. Although, defendant's negligent conduct may have caused the jockey to fall from the horse at the start gate, it was the horse acting in an sudden and unintended manner when the colt took off into a gallop without a rider and thereafter, unsuccessfully attempted to jump the outer rail of the racetrack that ultimately caused the colt to sustain injury.

Being thrown from a horse in a horse race, a horse taking off riderless and a horse acting in an unintended manner are all dangers inherent in the professional sport of thoroughbred horse racing.⁶ Any injury-causing condition or risks created by

⁶ The court notes that the occurrence of mishaps at start gate are of known and reasonably foreseeable in the sport of horse racing to such an extent that specific rules have been promulgated with the apparent intent to afford wagers refunds of their bets when there has been a starter gate problem that as a result the "horses" chances were compromised leaving the starting gate."

9(E) NYCRR § 4009.21 provides in pertinent part:

When a horse starts. Every horse shall be considered a starter when the stall gates open the signal of the starter, unless the stewards declare a horse or horses non-starters because, in their opinion, horses' chances were compromised leaving the starting gate. If so, all bets on the non-starters will be refunded unless the horse wins.

defendant's negligence was neither unique nor created a dangerous condition over and above the usual dangers that are inherent in the sport of horse racing.

Furthermore, although the plaintiff claims the defendant's start crew failed to start the race properly, in fact it is undisputed that the injuries to plaintiff's horse, which occurred when the riderless horse attempted to jump over a fence, arose from dangers or conditions inherent in horse racing activity, precluding any property damage action against the owner/operator of the race track, even though the owner of the horse claimed that the injuries were caused by the "starter's" failure to properly start the race only after the jockey was ready, but without due consideration of the propensity of a horse to behave in ways that are unintended and that may result in injury.

Additionally, plaintiff's claim that defendant's employees failed to follow proper protocols by not waiting until the jockey was ready for the start of the race before opening the starting gate is insufficient to raise a triable issue of fact. In order to constitute conduct outside the doctrine of primary assumption of the risk, the conduct must be a flagrant infraction unrelated to the normal method of playing the game and done without a competitive purpose (*Turcotte v. Fell, supra*; [*Barton by Barton v. Hapeman, supra*](#)). In this case plaintiff makes no claim that defendant's conduct was flagrant, reckless, done without a competitive purpose or intentional, and only makes claims of ordinary negligence.

Furthermore, while it is true that a plaintiff who consents to voluntarily participate in the inherently dangerous sport of thoroughbred horse racing does not waive all rules, infractions and violations of protocol, nonetheless, a professional participant in a sporting activity is deemed to fully appreciate and understand the usual incidents of competition resulting from the errors in human judgment of officials of the sport, such as referees, stewards, race track employees and personnel, umpires, judges, etc., who are otherwise charged with the responsibility of officiating, controlling, supervising and managing the sporting event, and accepts them.⁷ Such conduct and actions, including errors in human judgment, by such officials is within the known apparent and foreseeable dangers of the sport, or commonly appreciated risks that "flow from participation."

⁷After the umpires botched several calls in the league championship series in October 2009, including three glaring mistakes in the championship game on October 20, 2009, professional Major League baseball player Derek Jeter, is quoted as saying "People are human. They make mistakes sometimes. Umpires are trying their best. Sometimes, you get calls. Sometimes, you don't." (Curry, *Umpires Are Caught Off Base by Bad Calls*, New York Times, Oct. 21, 2009).

(Turcotte v. Fell, 68 NY2d 432; Joseph v. NYRA, 28 AD3d 105 [2d Dept 2006]).

CONCLUSION

Accordingly, defendant's motion for summary judgment is granted and the complaint is dismissed.

As the complaint is dismissed, defendant's motion for an order pursuant to CPLR 3042, 3124 and 3126 compelling the plaintiff Zayat Stables, LLC to submit the thoroughbred colt race horse "Phone Home" to physical examinations in New York and provide responses to outstanding discovery demands and an order pursuant to CPLR 3024, 3124 and 3126 precluding plaintiff from offering proof is hereby denied as moot.

This constitutes the decision and order of this court.

Dated: November 18, 2009

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Howard G. Lane, J.S.C.