LEGAL INSIGHTS

A Publication of Havkins Rosenfeld Ritzert & Varriale, LLP

HRRV Relocates Manhattan Office

After spending our first 12 years in Midtown, we have moved our Manhattan office to 1 Battery Park Plaza in the Financial District.

Our new Manhattan address is:

1 Battery Park Plaza, 6th Floor
New York, New York 10004

All of our phone numbers and e-mail addresses remain the same.

We are excited to be relocating to Lower Manhattan and look forward to becoming a part of the vibrant downtown business community.

We will continue our strong commitment to Long Island and the northern suburbs through the significant growth of our offices in Mineola (114 Old Country Road) and White Plains (170 Hamilton Avenue).

At Last: NY Court of Appeals Narrows Additional Insured Coverage

By Abbie Havkins and Robert Pethick

INSURANCE COVERAGE CORNER

For years we have counseled insurers to be alert to the unpredictable risks posed by granting coverage to additional insureds. No other industry allows the customer (the insured) to obligate its supplier (the insurer) to provide the same product (insurance coverage) to another party (the additional insured) for no additional cost (premium). Making matters worse, the additional insured is not subject to prior approval or additional underwriting but is entitled to the same rights as the named insured.

Recently, however, the New York Court of Appeals in a 4-2 decision, in *The Burlington Insurance Company v. NYC Transit Authority,* 2017 N.Y. Slip Op 04384 (2017), sharply narrowed the scope of such coverage. For years, the phrases "relating to," "caused by" or "arising out of" were interpreted similarly, and extended coverage to any injury somehow, even if remotely causally linked to the named insured. This

▶ continued on page 2

Summer 2017 — Volume 11, Issue 1

INSURANCE COVERAGE CORNER

FROM PAGE 1

is no more. In *Burlington,* the Court held that an insurance policy providing coverage for an injury "caused in whole or in part by the acts or omissions of the named insured requires that the injury be proximately caused by the named insured." The Court held that the Appellate Division, First Department had erred in interpreting that language as extending coverage to a named insured for any injury causally linked to the named insured, even where the accident was caused by the sole negligence of the additional insured.

Burlington argued that the New York City Transit Authority and Metropolitan Transit Authority were not additional insureds because the acts or omissions of the named insured were not a proximate cause of the accident.

The Court of Appeals accepted Burlington's argument. It distinguished "but for causation" as any case "without which an event could not have occurred" from "proximate cause"—which it held was a term for a case is in which the law assigns liability. The Court reasoned that Burlington's policy endorsement stating that the injury must be caused "in whole or in part" by the named insured requires proximate cause "since 'but for' causation cannot be partial."

In dismissing the dissent's concern that the decision could have a "destructive" impact on liability insurance coverage, the Court noted that the parties "may freely negotiate the terms of the policy." And it reiterated that point. "Of course, if the parties desire a different allocation of risk, they are free to negotiate language that served their interests. Our desire should not be interpreted to limit the venerable rights to contract on terms agreed to by the parties."[1] Since the insurer is not a party to the underlying contract, the only contract by which it can allocate risk is the insurance policy.

Going forward, at least in New York, the choice of phrases "arising out of," "caused in whole or in part by," "related to," "caused by," "as a result of" or "pursuant to the underlying contract" in additional insured provisions can make the difference between coverage or no coverage. Insurers must accept the Court of Appeals invitation to utilize language that properly allocates its additional insured risks and consider imposing an additional premium. The *Burlington* decision throws a lifeline to insurers seeking to reduce their wide-open exposure to additional insured claims. The prudent insurer will grab that lifeline and narrow those risks.

Contact

Abbie Havkins: 646-747-5100 or abbie.havkins@hrrvlaw.com

Robert Pethick: 646-747-5106 or robert.pethick@hrrvlaw.com

1. The Court was apparently not deterred in this rebuttal to the dissent by its repeated prior holdings that insurance contracts are contracts of adhesion, that additional insureds are entitled to the same right as the named insured or by the fact that practically speaking neither insurance policies nor construction contracts are freely negotiated in the marketplace—at least not on the issue of risk allocation. That being said, careful policy writing can sharply limit the additional risks that additional insureds pose to insurers.

HRRV in the Public Eye

TARA FAPPIANO

Legal Perspectives: The Rights, Duties and Concerns of Families and Property Owners Dealing with Lead Paint Issues
New England Regional Conference, Lead and Healthy Housing, Marlborough, MA—May 2017

Protecting Yourself from Liability in Lead-Based Paint Investigations: Forewarned Is Forearmed
National Lead and Healthy Housing Conference, Indianapolis, IN—March 2017

Contributor to:
LinkedIn Marketing Techniques for Law and Professional Practices by Marc W. Halpert, recently published by the American Bar Association (June 2017)

SHAWN SCHATZLE

Current Issues in Sports Law
National Student Leadership Conference–Sports Management Conference, Fordham University, Bronx, NY—July 7, 2017

CARLA VARRIALE

Current Issues in Sports Law
National Student Leadership Conference–Sports Management Conference, Fordham University, Bronx, NY—July 7, 2017

Venue Safety
National Center for Sports Spectator Safety Conference—July 12, 2017

It's A Wrap! The Enforceability of Clickwrap Agreements and Waivers of Liability

By Carla Varriale

Online waivers of liability are ubiquitous, thanks to the Internet. Are they enforceable, like their paper counterparts? If so, what factors will be instructive to those crafting waivers of liability? A recent decision in the United States District Court for the Southern District of New York provides a framework for analysis and some guidance for drafting a successful online waiver of liability.

In *Corwin v. NYC Bike Share, LLC*, 2017 U.S. Dist. Lexis 29034, plaintiff Ronald D. Corwin, an annual member of the popular Citi Bike bicycle program, sustained serious personal injuries while riding a Citi Bike in Midtown Manhattan. He collided with a concrete wheel stop and violently struck his head on the cement. He sued several defendants, including New York City Bike Share, LLC (the company operating the Citi Bike system). He alleged common law negligence and gross negligence causes of action, and he asserted negligent design, installation and maintenance claims against the other defendants.

All of the defendants moved for summary judgment on several defenses, including primary assumption of the risk and the lack of a duty to protect or to warn the plaintiff of an open and obvious condition. The court initially examined the subject Bicycle Rental, Liability Waiver, and Release Agreement (the "Agreement") that the plaintiff was required to sign as a condition of his Citi Bike membership. The Agreement purportedly released the plaintiff's common law negligence claims against the City of New York, NYC Bike Share and Alta Planning + Design, a wholly owned subsidiary who drafted the site plans for the Citi Bike system.[1]

There was no dispute that in order to become a member of the Citi Bike program, the plaintiff was required assent to the release of claims (including personal injury claims) as set forth in the Agreement. This was done through an electronic interface. Although the plaintiff did not dispute that he "must have" signed a waiver (electronically), he argued that the waiver was an unconscionable and unenforceable contract of adhesion.[2] He also argued that it was void and against public policy. Because the plaintiff did not dispute that he must have entered into a contract, the question of whether the plaintiff's claims were barred depended on the effectiveness of his assent under the circumstances and the enforceability of the waiver provisions as to the various defendants.

According to the court, the Agreement was a *clickwrap* (also known as a *browsewrap*, *scrollwrap* or *sign-in-wrap*) agreement. A feature of a clickwrap agreement is that the adhering party does not need to use a pen, and it requires the user to take affirmative action, such as clicking a box located on the website which states that he or she has read and agrees to the terms of service. In other words, with a clickwrap agreement, the user must expressly and unambiguously manifest assent or rejection prior to being given access to the product.

The *Corwin* court noted that clickwrap agreements are more readily enforceable than other online agreements which do not require the user to take affirmative action for the simple reason that a court can infer that the user was at least on "inquiry notice" of the terms of the putative agreement and that he or she manifested assent to the terms by clicking a box. According to the *Corwin* court, and the authority it relied on from other New York cases, clickwrap agreements are

▶ continued on page 4

It's a Wrap! The Enforceability of Clickwrap Agreements and Waivers of Liability

FROM PAGE 3

presumptively enforceable.

The *Corwin* court did, however, also note that a user's clicking of the box, without more, is not sufficient to signal their assent to any contract term. For example, the website must provide "reasonably conspicuous" notice that users are about to bind themselves to contract terms. This is, the court held, a fact-intensive inquiry, but there is some judicial guidance.

The *Corwin* court examined the factors that Judge Weinstein of the U.S. District Court for Eastern District of New York articulated in *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 357 (E.D.N.Y 2015). Although that case involved a class action lawsuit regarding the purchase of Internet service connection while on an airplane, Judge Weinstein conducted a detailed analysis whether the average Internet user would have been informed of the binding effect of a use agreement. Judge Weinstein focused on the following factors to determine whether the alleged notice to a putative user is sufficient:

- The terms of use should not be enforced if a reasonably prudent user would not have had at the very least "inquiry notice" of the terms of the agreement.
- The terms should be enforced when a user is encouraged by the design and content of the website and the agreement's webpage to examine the terms, such as when they are clearly available through hyperlink.
- Conversely, the terms should not be enforced when they are buried at the bottom of a webpage or tucked away in obscure corners.
- Special attention should be paid to whether the site design brought the consumer's attention to material terms that would alter what a reasonable consumer would understand to be his or her default rights when initiating an online transaction.

In *Corwin*, the court applied these factors and determined that NYC Bike Share had established that before a prospective member pays for membership, he or she is shown a "User Agreement" on a page with its own scrollable text box that can be opened in a new window for ease of viewing and printing. In fact, the "continue" button leading to the payment screen did not activate unless the user (such as the plaintiff) clicked on a statement certifying that he or she was 18 years old or older and that he or she had read and agreed to the conditions set forth in the User Agreement.

The *Corwin* court also noted that the release language was bolded and underlined. The general text was a normal-sized font, but the *Releases, Disclaimers, Limited Liability,* and *Assumption of the Risk* headings were in larger font. Plaintiff had no recollection of reading the language but admitted that he signed whatever he had to sign to obtain his Citi Bike pass.

The court determined that the Agreement was enforceable and not unconscionable, noting that "[w]hile it is possible to imagine a clearer signaling of the waiver provisions to an unwary or unsophisticated consumer, the terms are not hidden or buried in an obscure part of the website, but rather are in plain view." The court also held that the waiver language was not void due to ambiguity, finding the terms were not inconsistent or contradictory. The exculpatory language was clear and coherent and expressly released a defendant from ordinary claims.

A feature of a clickwrap agreement is that the adhering party does not need to use a pen, and it requires the user to take affirmative action, such as clicking a box located on the website which states that he or she has read and agrees to the terms of service. In other words, with a clickwrap agreement, the user must expressly and unambiguously manifest assent or rejection prior to being given access to the product.

Finally, and of particular interest in New York, the court considered the issue of whether the Agreement was void as against public policy pursuant to New York General Obligations Law § 5-326, which invalidates certain exculpatory clauses in agreements with operators of recreational facilities. The court considered the case law and the legislative intent of § 5-326 and held that the Citi Bike station was not a "facility" within the meaning of the statute. The court determined the stations were "storage facilities" for bicycles and not facilities for recreation. Moreover, the court noted (as had many

▶ continued on page 5

It's a Wrap! The Enforceability of Clickwrap Agreements and Waivers of Liability

FROM PAGE 4

courts before it) that the City's roadways and bike lanes were public thoroughfares and not places of amusement or recreation (something any City driver can attest to). Either way, the Citi Bike station was not a "place of amusement or recreation" or similar establishment falling within § 5-326, which, as such, did not apply to the Agreement.

Consequently, the court held that the Agreement effectively released the plaintiff's common law negligence claims against NYC Bike Share. The Agreement was not applicable to the City of New York because the City's duties with respect to maintaining its roadways is nondelegable and a release would be contrary to public policy. Therefore, the plaintiff could proceed with his negligence claims against the City of New York. The court held that Alta Planning + Design, which drafted the site plans for the Citi Bike system did not owe the plaintiff a duty of care.

The court also held that the doctrine of primary assumption of the risk was unavailable—largely because the Citi Bike station was on a public roadway and the plaintiff was not injured while participating in a *sporting* activity. Likewise, it held that the *open and obvious* defect defense was not applicable because there was a question of fact whether the wheel stop partially obstructed the pathway utilized by cyclists such as the plaintiff. It was not, therefore, open and obvious and not inherently dangerous as a matter of law.

Corwin offers guidance in crafting waivers and releases, particularly in an electronic format. For example, the waiver and release language must be clear and unambiguous so that an ordinary person can understand the warnings provided and that certain rights are being waived. However, the *Corwin* decision also highlights that the design of the site (and the online waiver) and interface with the user are also critical factors. The terms should trigger some *inquiry notice* on the part of the user that important rights are being waived. The terms should be clearly visible and encourage a review of the terms, such as through hyperlink. To be enforceable, the language should not be obscured or shrouded in a tiny font. Because exculpatory clauses are material and alter a contracting party's commonly understood rights, those clauses should be prominent and unmistakable. Electronic waivers, particularly ones that require assent or acknowledgment before proceeding to the signature stage, are enforceable and may provide valuable protection.

Contact

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

NOTES

1. The relevant portions of the Agreement that were analyzed by the *Corwin* court were:

Section 6. Releases:

In exchange for you being allowed to use any of the services, Citi Bike bicycles, stations, bike docks, or related information, you . . . do hereby fully and forever release and discharge all released persons for all claims that you have or may have against any released person, except for claims caused by the released person's gross negligence or willful misconduct. Such releases are intended to be general and complete releases of all claims. The released persons may plead such releases as a complete and sufficient defense to any claim, as intended third beneficiaries of such releases.

Claims [include] any and all claims, injuries, demands, liabilities, disputes, causes of action (including statutory, contract, negligence, or other tort theories), proceedings [or] damages that arise from or relate to (a) any of the services, including any of the Citi Bike bicycles, stations, bike docks, or related information . . . .

released persons [include] (i) NYCBS and all of its owners, managers, affiliates, employees, agents, representatives, successors, and assigns [and] (ii) the City of New York.

Section 7. Disclaimers:

You do hereby acknowledge and agree that your use of any of the services, Citi Bike bicycles, stations, bike docks, or related [sic] information, is at your sole risk. . . . All of the services, Citi Bike bicycles, stations, bike docks, or related information are provided "as is" and "as available" (and you rely on them solely at your own risk). . . . You assume full responsibility and risk of loss for using any of the services, Citi Bike bicycles, stations, bike docks, or related [sic] information, and NYCBS and all other released persons are not liable for any claim attributable to any of the foregoing.

Section 8. Limited Liability:

You do hereby acknowledge and agree that, except as may otherwise be limited by New York General Obligation Law Section 5-326, NYCBS and all other released persons are not responsible or liable for any claim, including those that arise out of or relate to (A) any risk, danger, or hazard described in the Agreement, (B) your use of, or inability to use, any of the services, Citi Bike bicycles, stations, bike docks, or related (sic) information, (C) your breach of this agreement or your violation of any law, (D) any negligence, misconduct, or other action or inaction by you, (E) your failure to wear a bicycle helmet while using Citi Bike bicycle, or (F) any negligence, misconduct, or other action or inaction of any third party. You do hereby waive all claims with respect to any of the foregoing, including those based in contract, tort (including negligence), statutory, or other grounds, even if NYCBS or any of the other released persons has been advised of the possibility of such claims. The total liability of NYCBS and all other released persons for all claims, including those based in contract, tort (including negligence), statutory, or other grounds, is limited to the sum of $100.

Section 9. Assumption of Risk by Member:

Member agrees that riding a Citi Bike bicycle involves many obvious and not-so-obvious risks, dangers, and hazards, which may result in injury or death to Member or others, as well as damage to property, and that such risks, dangers, and hazards cannot always be predicted or avoided. Member agrees that such risks, dangers, and hazards are Member's sole responsibility.

2. Defendants were unable to produce an actual copy of the Release Agreement with the plaintiff's electronic signature, or a copy of the Agreement as it existed when he became an annual member.

HRRV in the Community

Third Annual Building Bridges: Understanding People with Different Abilities

For the third consecutive year, Tara C. Fappiano has chaired a program for the Tuckahoe Union Free School District called Building Bridges: Understanding People with Different Abilities.

Building Bridges, an innovative program developed by Tara, aims to teach children, in grades kindergarten to fifth grade, about understanding people with different types of disabilities: sight impairments, hearing impairments, autism, physical disabilities and learning disabilities.

This year's program involved more than 40 parent volunteers who helped to foster awareness and understanding by going into classrooms to show children what it is like to live with different abilities.

The program was universally well received by children, parents and teachers. Tara was proud and happy to donate her time to this important community program on a topic that is important and personal to her. All of us at HRRV are proud of Tara's effort and accomplishment for the community.

HRRV Participates in High School Internship Program

HRRV is currently participating in an internship program sponsored by the Tuckahoe Union Free School District by hosting a college-bound senior, with an interest in the law, who is about to graduate from Tuckahoe High School. Intern Adnan Kajoshi has been working in HRRV's White Plains office learning various aspects of working in a law firm as well as observing attorneys in court. He is headed to NYU in the fall.

HRRV's White Plains Office Participants in 9/11 Remember + Serve Day

Our White Plains office participated in 9/11 Remember + Serve Day, a community volunteer event to honor those lost and who have served. We made more than 700 sandwiches for distribution to the Open Arms shelter in White Plains.

HRRV DECISIONS OF INTEREST

Fishing Tournament Participant's Claim Dismissed Based on Assumption of Risk

Tanner v. The Orange Lake Fish and Game Association, Inc.
Supreme Court, Orange County
Index No. 9942/13
September 28, 2016

In an action commenced on behalf of an experienced fisherman against The Orange Lake Fish and Game Association, Inc. (of which he was also a board member), the defendant's motion for summary judgment was granted by Justice Gretchen Walsh of the Supreme Court, Orange County. The plaintiff was allegedly injured at the defendant's Pavilion, where a fishing tournament was held, while participating in the tournament. The plaintiff slipped on wet stairs while exiting the Pavilion, injuring himself.

In support of its motion for summary judgment, the defendant argued that the plaintiff voluntarily assumed the risk of the water-related conditions he knew to define the activity and the property. The court held that the plaintiff was an experienced fisherman at the Pavilion who assumed the risk of injury by navigating wet stairs that were partially submerged in lake water. One of the risks that was known, or should have been known, to the plaintiff was the risk in losing one's balance in descending stairs submerged in water by a lake. The court highlighted the plaintiff's extensive knowledge and experience at the Pavilion and held that the condition of the stairs (submerged in murky water, and the absence of a handrail) was an "open and obvious" condition that required no warning to him by the defendant.

Plaintiff's experience as a board member of Orange Lake Fish and Game also charged him personally with a duty to supervise the property, and he did not take any measures to correct what he later claimed was a "dangerous condition." The judge also held that it was of no consequence that the plaintiff was not fishing at the time he injured himself, holding that he was still engaged sufficiently in the event (the fishing tournament) when he was injured. Lastly, the judge gave no credence to the opinions of the plaintiff's purported construction expert, holding that there was no proof that any building codes applied or were violated.

Contact

Carla Varriale represented The Orange Lake Fish and Game Association, Inc.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

The court held that the plaintiff was an experienced fisherman at the Pavilion who assumed the risk of injury by navigating wet stairs that were partially submerged in lake water. One of the risks that was known, or should have been known, to the plaintiff was the risk in losing one's balance in descending stairs submerged in water by a lake.

HRRV DECISIONS OF INTEREST

Omission by a Municipality Does Not Exempt Plaintiff's Claims from the Prior Written Notice Requirement

Margaret Bangerter v. Best Western Mill River Manor and Incorporated Village of Rockville Centre
Supreme Court, Nassau County
Index No. 878/15
May 11, 2017

Plaintiff Margaret Bangerter was injured when she slipped and fell on ice in a parking lot owned and maintained by the Incorporated Village of Rockville Centre on February 17, 2014. The plaintiff filed a lawsuit in Supreme Court, Nassau County against the Village of Rockville Centre ("Village") alleging that the Village failed to properly remove snow and ice from the subject parking lot.

On behalf of the Village, HRRV moved for summary judgment, arguing that the claims against the Village must be dismissed as the Village did not have prior written notice of the alleged condition and did not exacerbate the alleged condition. HRRV argued that the Village has enacted a prior written notice statute, which excuses it from liability absent proof that the Village had prior written notice of the defect giving rise to the plaintiff's injury. Further, we argued that an exception to this rule did not apply as the Village did not create the alleged condition. In support of our motion, HRRV submitted affidavits from the codirectors of the Department of Public Works indicating no prior written notice was received regarding the alleged condition and the Village removed snow in accordance with its procedures prior the plaintiff's fall.

The plaintiff opposed our motion arguing that the Village did not salt the subject lot and therefore contributed to the icy condition upon which the plaintiff fell. The plaintiff argued that there were omissions in the Village's snow removal records. Specifically, the plaintiff argued that the word "salt" was noted on February 15, 2014; however, the records did not indicate where the salt was deposited throughout the Village.

Justice Jeffrey Brown agreed with HRRV's position and granted our motion in its entirety holding that the Village's prior written notice statute is applicable to the subject parking lot and no prior written notice was given to the Village. In addition, Justice Brown pointed out that the parking lot was plowed on February 14 and 15, 2014 and that there was no additional snowfall after February 14, 2014. Further, Justice Brown pointed out that the plaintiff's speculation as to the Village application of salt, without more, cannot raise a triable issue of fact "as passive failure to remove all snow from a particular area cannot give rise to liability, failure to salt a particular area likewise cannot give rise to liability." Therefore, as the alleged failure to apply salt is an act of omission, the plaintiff's claim is not exempt from the prior written notice requirement.

Contact

Susan B. Boland represented Incorporated Village of Rockville Centre.

Susan B. Boland: 516-620-1711 or susan.boland@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Assumption of Risk Applied to Claim of Ice Skater Collision

Pisany v. City of New York and Bryant Park Market Events, LLC
Supreme Court, New York County
Index No. 158071/13
2016 N.Y. Misc. LEXIS 3270; 2016 N.Y. Slip Op 31711(U)
September 12, 2016

Plaintiff Arthur Pisany alleged that he was injured on January 27, 2013, at an ice skating rink located in Bryant Park in Manhattan after colliding with another skater when the rink became overcrowded. Plaintiff moved to strike the answer of defendant Bryant Park Market Events, LLC (BPME) or, in the alternative, for a negative inference at trial, for BPME's alleged spoliation of video surveillance footage of the accident. Defendants City of New York and BPME moved for summary judgment dismissing the complaint.

Justice Nancy Bannon granted the defendants' motion in its entirety and denied the plaintiff's motion.

In granting the defendants' motion, Justice Bannon held that the plaintiff's action was barred based by the doctrine of primary assumption of risk. She noted that "[c]ollisions between ice skaters are a common occurrence, and thus an inherent risk of ice skating." As the plaintiff's accident allegedly occurred when a young skater bumped into him, causing him to fall, and the risks inherent to ice skating were "not increased above and beyond those [inherent to] ice skating," the judge held that the plaintiff could not hold the defendants liable for his injuries.

Plaintiff's action was also subject to dismissal as against the City because (1) plaintiff failed to appear for a statutory hearing pursuant to General Municipal Law section 50-h; and (2) the City was an out-of-possession landlord in relation to the ice rink.

Justice Bannon denied the plaintiff's motion for spoliation sanctions as academic in light of the fact that she granted the defendants' summary judgment motion. She did note, however, that denial was warranted regardless because the video had been deleted before the plaintiff provided notice of his intent to pursue a claim.

In granting the defendants' motion, Justice Bannon held that the plaintiff's action was barred based by the doctrine of primary assumption of risk. She noted that "[c]ollisions between ice skaters are a common occurrence, and thus an inherent risk of ice skating."

Contact

Carla Varriale and Shawn Schatzle represented the City of New York and Bryant Park Market Events, LLC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Summary Judgment Granted to Project Manager Based on its Lack of Supervisory Control in Labor Law Case

Villada v. TLM Group, LLC, et al
Supreme Court, Queens County
Index No. 25332/2012
December 30, 2016

Carlos Villada, a construction worker, was hired to work on a roof demolition project at a building owned by defendant 452 Fifth Owners. Defendant CBRE was the managing agent of the building and was responsible for the daily operations of the building, while defendant TLM Group was retained to manage the roof rehabilitation project, who in turn recommended hiring the construction company that employed the plaintiff. Plaintiff alleged he was seriously injured while pulling a metal cart filled with debris up a plywood ramp to a hoisting gantry that was approximately one foot above ground level, and which tipped over onto him and fractured his ankle. Plaintiff sued for damages under sections 200, 240(1) and 241(6) of the Labor Law.

Plaintiff testified that he was directed by his employer, MRS, to collect debris in a wheeled dumpster and to roll it onto the plywood ramp before hoisting it to a lower level using the gantry. He further testified that he was unfamiliar with TLM or any of its employees and never interacted with anyone from TLM while working on the roof demolition project. Likewise, TLM's representative testified that TLM was not responsible for monitoring the work performed on the rooftop or overseeing site safety. Instead, MRS was the only party responsible for overseeing the construction on the roof.

Accordingly, TLM filed its motion for summary judgment and argued that it did not have any control over the plaintiff's work and the evidence demonstrated that the plaintiff's employer, MRS, exclusively directed and controlled the methods and means of the plaintiff's work at the subject premises. In addition, TLM argued that any general supervisory authority it may have had over the project was insufficient to establish liability under Labor Law § 200. Furthermore, TLM also argued that the ramp in question was a mere passageway and not a tool used in the performance of any work, in accordance with Labor Law § 240(1), and that the plaintiff did not suffer from a "gravity-related" risk as required under the Labor Law. More specifically, the plaintiff did not fall from a height and was not struck by a falling object while working. Finally, TLM argued that the plaintiff failed to demonstrate a violation of Industrial Code Rules 23-1.7 (f), 23-1.11(a) and 23-1.22(b) as alleged, as these Industrial Code Rules were simply not applicable to the facts of this case.

In granting TLM's motion for summary judgment, Queens County Supreme Court Justice Darrell L. Gavrin found that the plaintiff failed to satisfy his prima facie burden of demonstrating that Labor Law 240(1) applied to the underlying accident, as "not every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law 240(1)" (citing *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259, 267 [2001]), and that the one-foot elevation was de minimis and not significant enough to trigger the Labor Law. Moreover, the wheeled cart was found to be at the same level as the plaintiff at the time of the accident and was not "elevated," and the alleged harm did not flow directly from the application of the force of gravity to the object.

Justice Gavrin also granted summary judgment as against the plaintiff's claims under Labor Law 241(6), as plaintiff failed to show that his own negligence did not play a role in the accident, and the Industrial Code provisions relied upon by the plaintiff were irrelevant and inapplicable to the instant action. More specifically, the court found that Industrial Code Rule 23-1.11(a) was inapplicable as the plaintiff himself testified that the ramp had no visible defects and had proper supports to keep the ramp in place; that Rule 23-1.22(b), which refers to "runways and ramps," was inapplicable as the wheeled cart involved in the instant action was not a "wheelbarrow, power buggy, hand car or hand truck" as required by the rule; and that Rule 23-1.7(f) was inapplicable as there was basis to determine that the plaintiff's activities required a means of access to "another working level," as the ramp leading to the gantry was only approximately four to 12 inches above the roof surface.

Finally, in granting summary judgment as against the plaintiff's Labor Law 200 claims, the court found there was no evidence that TLM exercised any supervisory control or had any input into how the plaintiff was to perform his work, or that it had created the alleged condition or had any actual or constructive notice of said condition and failed to correct it. Although there was some ambiguity in the language of the written agreement between TLM Group and 452 Fifth Owners, which required TLM to "monitor all work," the court held that the right to generally supervise the work, stop the contractor's work if a safety violation is noted or ensure compliance with safety regulations was insufficient to impose liability under Labor Law 200.

Contact

Carla Varriale represented TLM Group LLC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Speculation as to the Cause of Accident Fatal to Plaintiff's Negligence Claim

Haubenreisser v. Festival Fun Parks, LLC
Supreme Court, Nassau County
Index No. 601347/2016
January 17, 2017

Alyssa Haubenreisser alleged that she sustained injuries to her right foot while she rode a hydro-magnetic water coaster known as "Bootleggers' Run" at Splish Splash Water Park located in Calverton, New York (owned and operated by Festival Fun Parks, LLC). Plaintiff claimed that her right foot made contact with an object inside the flume of Bootleggers' Run.

Throughout the entirety of the litigation, the plaintiff was unable to identify the cause of her injury without engaging in speculation and conjecture. At the time of her deposition, the plaintiff testified that she did not know what had caused her accident. Rather, the plaintiff testified that a number of various objects or conditions may have been the cause of her injury.

Based upon the plaintiff's deposition testimony as well as the inspection records of Splish Splash and an affidavit from Splish Splash's general manager, Festival moved for summary judgment. Festival argued that the plaintiff's inability to identify the cause of her accident was fatal to her negligence cause of action because a finding that Festival's negligence, if any, proximately caused her injuries would be based upon mere speculation. Festival asserted that mere speculation as to the cause of an accident, where there can be many causes, warrants summary judgment as a matter of law.

Festival also argued that no dangerous or defective condition existed inside the flume at Bootleggers' Run, as the inspection records showed that on the morning of the plaintiff's accident the flume was free from any rough/sharp edges and foreign objects. Furthermore, Festival argued that it did not owe a duty to the plaintiff and did not breach any purported duty.

In granting summary judgment to Festival, Nassau County Supreme Court Justice Robert Bruno agreed that the plaintiff's inability to identify the cause of her injury without engaging in speculation was fatal to her negligence claim. Judge Bruno also concluded that, based upon the affidavit of Splish Splash's general manager and the daily inspection records, Festival established that there was no defective or dangerous condition in Bootleggers' Run nor did Festival create or have actual notice of any condition. Plaintiff failed to meet her burden in opposition.

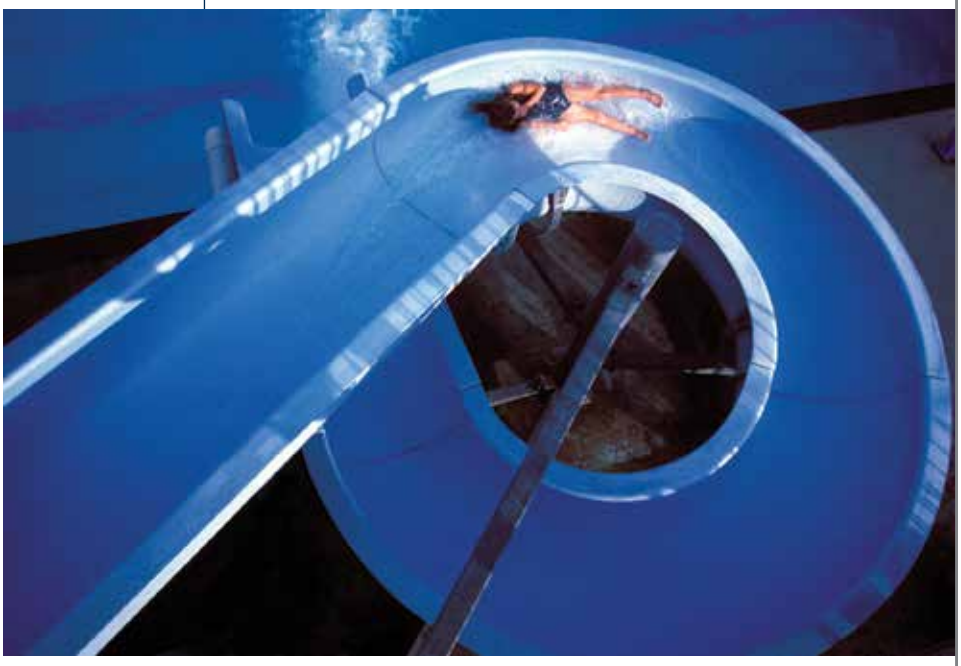
Justice Bruno also denied the plaintiff's cross-motion for summary judgment, which was based upon res ipsa loquitur, as academic. Although Justice Bruno did not discuss the denial of the plaintiff's cross-motion at length, it was noted that the plaintiff's evidence was insufficient to establish each of the requisite elements of res ipsa loquitur—the event was one that does not ordinarily occur in the absence of someone's negligence; that it was caused by an agency or instrumentality within the exclusive control of defendant; and that it was not caused by any voluntary action or contribution on part of the plaintiff.

Contact

Carla Varriale and Jaclyn SchianodiCola represented Festival Fun Parks, LLC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Jaclyn SchianodiCola: 646-747-5121 or jaclyn.schianodicola@hrrvlaw.com



HRRV DECISIONS OF INTEREST

Workers' Compensation Law Bars Claims of Property Owners Where No Contractual Obligation Exists

Bunting v. Frontseat, LLC and Twenty-Three Maple Avenue Realty, Inc. v. Incorporated Village of Rockville Centre, Rockville Centre Water Department and The Town of Hempstead
Supreme Court, Nassau County
Index No. 4957/15
January 19, 2017

The plaintiff, an employee of the Incorporated Village of Rockville Centre, was injured when he tripped and fell on a defective or unsecured water-meter vault cover outside of 23 Maple Avenue, Rockville Centre, New York, on February 23, 2015, during the course of his employment as an inspector for the Village of Rockville Centre. The plaintiff filed a Notice of Claim with the Village in April 2015. Subsequently, the plaintiff's counsel was advised that the plaintiff's claim was barred pursuant to, *inter alia*, New York Workers' Compensation Law § 11. The plaintiff filed a lawsuit in Supreme Court, Nassau County against the property owners, Frontseat LLC and 23 Maple Avenue Realty, Inc., and thereafter, the owners brought a third-party action against the Incorporated Village of Rockville Centre and the Rockville Centre Water Department.

On behalf of the Village, HRRV moved for summary judgement arguing that the claims against the Village were barred by New York Workers' Compensation Law § 11 as the plaintiff was employed by the Village at the time of the incident, he did not sustain a grave injury and the Village did not have any contractual obligation to indemnify the third-party plaintiffs. The third-party defendants opposed our motion arguing that a contractual obligation existed by reason on the Village's statutory obligation to maintain its water meters and vaults. In addition, the third-party defendants argued that a contractual obligation exists as the Village contracts with the property owners in the Village, and therefore, there is an obligation to indemnify the owners for any damage sustained as a result of equipment owned by the Village.

Justice R. Bruce Cozzens agreed with our position and granted our motion in its entirety and the action was dismissed against the Village. Justice Cozzens held that the action was barred by the Workers' Compensation Law § 11 in that the plaintiff did not sustain a "grave injury" nor was there a contract indemnifying the third-party plaintiffs. Therefore, the third-party complaint was dismissed in its entirety against the Village and the Rockville Centre Water Department.

Contact

Susan B. Boland represented Incorporated Village of Rockville Centre and Rockville Centre Water Department.

Susan B. Boland: 516-620-1711 or susan.boland@hrrvlaw.com

Suspension of Swim and Fitness Club Membership Upheld

Tarulli v. American Leisure Services Corp. and Board of Directors of Bayview Leisure Association, Inc.
Supreme Court, Queens County
Index No. 2329/16
October 5, 2016

This action suit was originally commenced in Civil Court and arose out of the suspension and termination of the plaintiff's membership at a private swim and fitness center. Mr. Tarulli sued for breach of contract, return of common charges paid the center, discrimination, emotional damages and loss of income opportunities, i.e. the ability to network at the club.

The Civil Court adopted all of our arguments, including that the suit was barred by the plaintiff's execution of a Waiver of Liability and Indemnity Agreement and that the suit was barred by the terms of the plaintiff's membership agreement. Plaintiff waived an appeal and instead commenced a new action in Supreme Court, Queens County, slightly altering his factual allegations and the relief sought. We again moved by pre-answer motion to dismiss based upon res judicata, statute of limitations, enforceable waiver and a failure to state a cause of action against American Leisure. Judge Timothy J. Dufficy issued a scathing decision granting our motion. The action was ultimately precluded based upon res judicata and the statute of limitations applying to intentional torts. Justice Dufficy stated that the Civil Court addressed and resolved the same litigated issues in a "thorough and erudite" decision. Justice Dufficy warned plaintiff "this should be the end of the road for this lawsuit."

Contact

Carla Varriale represented American Leisure Services Corp. and Board of Directors of Bayview Leisure Association, Inc.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Oil Spill Remediation and Property Damage Case Dismissed Based on Plaintiff's Failure to Move for Default Judgment Against Testing Company within One Year of Supposed Default

Silver Galore, Inc. v. New Generation Realty, LLC; All-Boro Tank Testing; Castle Oil Corporation; and S.J. Fuel Co., Inc.
Supreme Court, New York County
Index No. 650303/13
February 7, 2017

This action arose out of an oil spill that occurred shortly after an oil tank was refilled in the basement of premises in which the plaintiff rented space pursuant to lease with defendant New Generation Realty LLC, which owns the building. Defendant All-Boro Tank Testing was retained by New Generation to conduct remediation of the oil spill. Plaintiffs allege, *inter alia*, that the spill damaged its business, caused the loss of merchandise and exposed its employees to toxic and hazardous fumes causing injuries.

All-Boro failed to answer, move or otherwise respond to the complaint within the required time, although the plaintiff never moved for a default judgment. Several years later, the plaintiff filed a motion seeking to amend the complaint to add certain claims against the other defendants, all of which had answered, which motion was granted. Immediately thereafter, the plaintiff served an amended complaint in accordance with the court's order.

All-Boro moved to dismiss the complaint and all cross-claims against it arguing that the plaintiff's failure to move for a default judgment within one year of its default (the time required by statute), without any acceptable excuse, required dismissal of the case against it.

In addressing All-Boro's motion, the court noted that the plaintiff offered no explanation for its failure to move for default within the year. Rather it argued that the amended complaint superseded the original complaint and that All-Boro's failure to timely answer the amended complaint restarts the time for the plaintiff to move for default. The court held that this argument was without any legal or factual basis and said that, in fact, the amended complaint appeared to support a finding that plaintiff had abandoned its claims against All-Boro, based on the absence of any counts against All-Boro in the amended complaint, a point noted by All-Boro in its motion.

The court also dismissed cross-claims asserted by the other defendants against All-Boro, noting that the record was devoid of evidence to support these claims.

Contact

Carla Varriale and Shawn Schatzle represented All-Boro Tank Testing.
Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com
Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Federal Court Dismisses Claim Arising Out of Car Versus Truck Accident Based on New York's Threshold Requirement and the Absence of Causation

Martinez v. Stevens
U.S. District Court for the Southern District of New York
13 Civ. 1400 (RWS)
April 24, 2017

This action, in which HRRV represented a trucking company and its driver, arose out of an accident between the aforementioned driver and the plaintiff, Jose Martinez, who was driving his automobile, although it involved a considerable discussion of a prior accident in which the plaintiff had been involved.

Martinez was a passenger in a car hit by another vehicle in 2008. He was treated for injuries on his back, neck and right shoulder, and eventually complained about constant pain and stiffness in his back, right leg and shoulder. There was also a concern that he was suffering from spinal dysfunction, right shoulder injury and bulging spinal discs.

In 2011, Martinez was involved in an accident with a truck driven by Ross J. Stevens and owned by the Martin-Brower Company, LCC. The impact between the vehicles, as described by both drivers was negligible. In conversations with police immediately following the accident, Martinez did not express that he was experiencing pain. Several days later, however, he sought medical treatment from a number of doctors and complained of back, neck, shoulder and hip pain. Examinations performed by his doctors exhibited complaints of pain and stiffness, but noted that Martinez was able to move without pain. X-rays taken soon thereafter did not reveal any fractures or dislocations of any of the bones or joints noted. MRIs taken soon thereafter showed some spinal disc bulges, and Martinez missed a few weeks of work and, within a few months, reported that he had returned to work full-time.

During the course of litigation, Martinez had been treated by doctors, complained of myriad of pains and had several surgeries performed, including a wrist surgery and a spinal fusion.

Defendants moved for summary judgment based on Article 51 of New York's no-fault insurance law, which provides in pertinent part, that:

> "[I]n any action by or on behalf of a covered person against another covered person for personal injuries arising out of the negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of serious injury, or for basic economic loss [exceeding $50,000]."

A "serious injury" is defined by statute, in relevant part, as:

> A personal injury which results in . . . significant disfigurement . . . and permanent loss of use of a body organ, member, function or system; permanent consequential limitations of use of a body order or member; significant limitations of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Whether a plaintiff has suffered a "serious injury" is a threshold question for the court to decide.

Judge Robert Sweet held that the defendants met their burden of establishing that plaintiff did not meet the statutory threshold, primarily based on the significant injuries alleged in connection with his 2008 accident and that the "[d]efendants' submissions show that plaintiff exhibited the same injuries following his 2008 accident that he claims as a result of the 2011 accident."

As such, the burden shifted to the plaintiff, who, Judge Sweet held, showed that he had suffered a significant limitation of use of a body function or system ,but, nevertheless, failed to establish the requisite causation between the accident and his current injuries. The court noted that "Plaintiff's injuries are a result of either preexisting degenerative or 2008 accident injuries, and [that] Plaintiff's submissions 'failed to adequately address' them, and therefore [fail] to support a finding of proximate cause for the 2011 accident."

Contact

Carla Varriale, Lindsay R. Kaplow and Jaclyn SchianodiCola represented Ross J. Stevens and The Martin-Brower Company, LCC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Lindsay R. Kaplow: 516-620-1725 or lindsay.kaplow@hrrvlaw.com

Jaclyn SchianodiCola: 646-747-5121 or jaclyn.schianodicola@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Waiver and Release Results in Summary Judgment for Motorcycle Training School

Duchatellier v. Trama's Auto School, Inc.
Supreme Court, Queens County
Index No. 707829/2016
May 3, 2017

Plaintiff alleged to have been injured while taking a motorcycle lesson at defendant Trama's Auto School. On the date of the alleged incident, the plaintiff was provided with a registration form, also containing a release and waiver. Plaintiff completed the signed document and executed the releases and waivers contained within the registration form.

HRRV moved for summary judgment on behalf of the defendant, and argued that the release contained an acknowledgment of the dangers and risks assumed in using motorcycles, motorcycle equipment and participation in any activities and that the plaintiff would be "relinquishing any and all rights [he] now ha[s] or may have in the future to sue the Safety Course Providers for any and all injury, damage, or death [he] may suffer arising from motorcycle riding or its equipment, including claims based on the Safety Course Providers' negligence." We argued that the release was not void under New York General Obligations Law § 5-326, since instruction constitutes an exception thereto, as opposed to recreational activities. The release and waiver of liability undeniably precluded the plaintiff from asserting any claims against the defendant.

Plaintiff cross-moved seeking to dismiss the affirmative defense that spoke to the release and waiver. Plaintiff argued that the contract was fraudulent and one of adhesion.

Relying on a long string of New York appellate level cases, the court held that the release and waiver was enforceable. The court also held that the plaintiff's argument that the registration form was fraudulent in a contract of adhesion was unpersuasive, especially given the plaintiff's admission that he realized he had the option to refuse to sign the form, but did not do so as he did not want to engage in the hassle of obtaining a refund.

The court granted the defendant's motion for summary judgment dismissing the complaint and denied the plaintiff's cross-motion.

Contact

Carmen A. Nicolaou and Danit L. Sibovits represented Trama's Auto School, Inc.

Carmen A. Nicolaou: 914-290-6341 or carmen.nicolaou@hrrvlaw.com

Danit L. Sibovits: 646-747-5129 or danit.sibovits@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Contractor Held to Owe No Duty in Tort to the Plaintiff, Resulting in Summary Judgment

Ben-Hassann v. 16301 Jamaica Avenue LLC, Fabco Shoes and Jamaica Center Business Improvement District Inc. v. Academic Stone, Inc.
Supreme Court, Queens County
Index No. 15834/12
January 30, 2017

Plaintiff alleged that she fell on a broken and raised brick paver on the sidewalk of 163-01 Jamaica Avenue in Queens and suffered personal injuries. The premise is and the surrounding area were located within the Jamaica Center Mall, in which Fabco leased a store directly in front of where the plaintiff alleges to have fallen.

Prior to the plaintiff's fall, Jamaica Center Business Improvement District Inc. (JCBID) had agreed to by contract with the City of New York to provide certain maintenance and repair services at the mall, including in respect to sidewalk paving. Also prior to the plaintiff's fall JCBID entered into a contract with Academic Stone which required the latter to provide certain repair services to the sidewalks in issue.

All of the defendants and third-party defendants sought summary judgment on multiple bases. The branches of the motions which sought dismissal on the ground that the sidewalk defect was trivial were denied. The court noted that the defendant seeking dismissal of the complaint on the basis that the alleged defect is trivial is required to make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not somehow increase the risk it poses. Only after this showing does the burden shift to the plaintiff to establish the existence of an issue of fact. The court held that the defendants had not made a prima facie showing sufficient to shift the burden to the plaintiff.

Notwithstanding the denial of the trivial defect branch of the motions, Academic Stone's motion was granted based upon a finding that it owed no duty in tort to the plaintiff. The court cited the New York Court of Appeals decision in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.3d 120, 773 N.E.2d 485 (2002) for the proposition that a contractual obligation, standing alone will generally not give rise to liability in favor of a third party. Noting the exceptions to this general rule (1) where the contracting party failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely, the court held that Academic Stone had established that it did not owe a duty of care to the plaintiff, since its limited maintenance contract with JCBID did not displace JCBID's duty to maintain the sidewalk in a reasonably safe condition and it (Academic Stone) did not launch an instrument of harm.

Contact

Carla Varriale and Shawn Schatzle represented Academic Stone, Inc.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Summary Judgment Granted to Building Owner

Valdez v. Diego Beekman Mutual Housing Association Housing Development Fund Corporation
Supreme Court, Bronx County
Index No. 309797/12
February 22, 2017

Plaintiff claimed that she was injured on October 5, 2011, when she tripped and fell descending an interior staircase in the defendant's building. Specifically, the plaintiff cited loose, cracked and uneven tiles, and the absence of a handrail. In dismissing the case, Justice Julia I. Rodriguez granted the defendant's motion for summary judgment dismissing all claims.

Justice Rodriquez ruled that the defendant met its burden of proof by showing that it maintained the building in a reasonably safe condition, did not create the condition and lacked notice of same. It was held that the plaintiff failed to present questions of fact about there being any dangerous condition in the area where she fell. The court also held that when the proper law was applied, the Tenement House Law of 1901, there was no requirement for the stairs at issue to have a handrail, nor had any evidence been put forth to show that any work has been done in the building to change the occupancy group classification for the building.

Contact

Tara C. Fappiano represented Diego Beekman Mutual Housing Association Housing Development Fund Corporation.

Tara C. Fappiano: 914-290-6453 or tara.fappiano@hrrvlaw.com

Appellate Division Affirms Dismissal of Bowling Lane Fall Claim

Priola v. Herrill Bowling Corp. d/b/a Herrill Lanes
Supreme Court of the State of New York
Appellate Division, Second Department
2016-03450
May 24, 2017

Plaintiff, who was bowling with her usual Tuesday league at the defendant's bowling alley, claimed that her foot became stuck to the wooden floor of the approach while she was about to release her ball into the lane. The plaintiff fell forward into the lane and allegedly was injured when she fell.

The defendant moved for summary judgment dismissing the complaint, and the Supreme Court granted the motion. The Appellate Division affirmed, holding that in a premises liability case such as this, involving a slip and fall allegedly caused by a dangerous condition, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation

The Court noted that the defendant established its entitlement to judgment as a matter of law by submitting, *inter alia*, the deposition testimony of the plaintiff, which demonstrated that the plaintiff was unable to identify the cause of her fall. The Court also noted that, in opposition, the plaintiff failed to raise a triable issue of fact.

Contact

Steven H. Rosenfeld represented Herrill Bowling Corp.

Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Assumption of Risk Bars Claims Based on Alleged Crowd Crush

Lechtrecker v. Splish Splash, Festival Fun Parks, LLC, and Titan Global, LLC
Supreme Court, Suffolk Country
Index No. 061850/2013
October 7, 2016

Plaintiff alleged that she sustained personal injuries on August 30, 2012 while a patron of Splish Splash water park and was caused to slip and fall and sustain a serious injury due to an "on rush of a massive crowd of riotous patrons as plaintiff was attempting to traverse a steeply inclined/declined pedestrian walkway."

Plaintiff's accident was unreported, and the defendants had no knowledge of the alleged accident. There is a countdown leading up to the opening of the park each morning and also a sign that instructs patrons "no running." The court granted summary judgment to the defendants.

In a "crowd control" case, the plaintiff must show that she was "unable to find a place of safety or that her free movement was restricted due to the alleged overcrowding conditions."

The court highlighted that the plaintiff testified that in the five years prior to August 30, 2012, she had been to Splish Splash on numerous occasions; she had a habit to try to get to Splish Splash early before the park got too crowded; she had observed the park's opening procedures numerous times; prior to the opening of the park on the date of loss, the plaintiff and family members made their way to the front of the crowd; when the rope dropped, family members took off running, and plaintiff "took off" barefoot, to catch up to them, over a footbridge.

While the plaintiff was running, there were people all around her, but they did not restrict her ability to run. Plaintiff's fall occurred on the downward side of the footbridge. To her knowledge, no one pushed her or contributed to her fall. Plaintiff testified that as she was attempting to push off from a jog to a sprint, there was a small rock or pebble "on the top of her foot" at the exact moment when she was pushing her weight into it. She felt something give in her leg, and she went flying to the cement. She testified that she did not see the rock or pebble prior to the accident or after it; rather, she testified that she felt it on the bottom of her foot before she fell.

Festival (which operates Splish Splash) submitted the affidavit of a crowd safety and security expert, who opined that Splish Splash management took all reasonable steps to ensure that on August 30, 2012, the opening procedure for the park was sufficiently safe and ensured orderly entry into the attractions area of the park. He further opined that, on the date of the accident, the plaintiff knowingly ran after her children, despite signage clearly warning of the dangers of running in the water park. In addition to this, the plaintiff failed to look where she was going, even though she was admittedly aware of the risk.

In a fact intensive opinion, the court held that Festival established its prima facie entitlement to summary judgment dismissing the complaint and the cross-claim against it. In a "crowd control" case, the plaintiff must show that she was "unable to find a place of safety or that her free movement was restricted due to the alleged overcrowding conditions." Festival established, through the testimony of the plaintiff, and a nonparty witness that the plaintiff could freely move around in the crowd, and could have retreated backwards toward a less crowded part of the crowd; that the plaintiff's decision to run in the park was not caused by the crowd, and finally, that her accident was not caused by a member of the crowd, but by the plaintiff's own choices and action.

▶ continued on page 19

HRRV DECISIONS OF INTEREST

FROM PAGE 18

Therefore, the plaintiff's crowd control claim was without merit.

The court further held that Festival established a prima facie case that the plaintiff is barred from recovery under the doctrine of primary assumption of risk in that the plaintiff was aware of the risks inherent in running as the rope dropped to open the park's attractions, having seen people injured on prior visits to the park. "Plaintiff voluntarily chose to run, and then started to sprint, in a park which she testified that she had visited numerous times, and which is replete with signs requesting that patrons not run." Plaintiff's testimony also revealed that her injuries were caused when she stepped on a small pebble or rock while running, as she was attempting to accelerate, causing her to injure herself, which resulted in her fall. "Thus, plaintiff voluntarily assumed the risk of injury, and in fact, her injuries were caused by her own decisions and action, and not due to any negligence on the part of Festival."

In opposition, the plaintiff failed to raise an issue of fact.

Titan also established its prima facie entitlement to summary judgment and the plaintiff failed to establish that defendants failed to control the crowd because the plaintiff could have safely withdrawn to the rear of the crowd and found a "place of safety," but chose not to. Titan also established that it owed no duty to the plaintiff, and it is not liable to the plaintiff as a third-party beneficiary of its contract with Festival.

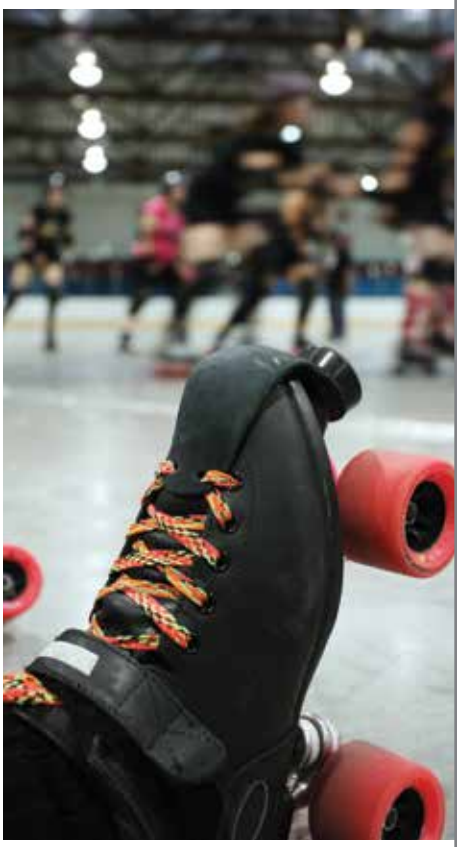
Contact

Carla Varriale represented Festival Fun Parks, LLC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

HRRV Wins Summary Judgment for Roller Skating Rink Based Upon Assumption of the Risk Doctrine

Hudson v. Leisure Time Sports, Inc.
Supreme Court, Kings County
Index No. 507712/2015
January 9, 2017



Randy Hudson alleged to have incurred personal injuries when he was bumped by another skater while participating in an open-rink skating session held at the defendant's roller skating rink. Plaintiff attempted to hold the defendant liable based upon a theory of negligence, in failing to properly operate, control, maintain and otherwise supervise the premises.

Hudson testified that he had been regularly skating at open-rink skating sessions for years, but alleged that on the particular date in question some of the younger skaters were skating too fast and cutting in front of him, which caused his accident. The accident was captured on the video surveillance, which the plaintiff argued depicted that he was in fact bumped by another patron while skating. A representative of the defendant testified that it had two rink guards supervising the session at the time the plaintiff fell.

In support of its motion for summary judgment, the defendant argued that the plaintiff appreciated the risk that he could be bumped by another skater and fall while skating during an open-rink session. The court agreed that the defendant met its prima facie burden with evidence showing that it did not breach any duty of care owed to the plaintiff. The court held that the plaintiff, an experienced roller skater, voluntarily assumed the risk of participating in an activity where the risk of injury was a known, apparent and reasonably foreseeable consequence of his participation. Thus, since he was aware of the risk of open-rink skating, the plaintiff could not hold the defendant liable for his injuries. The case was dismissed in its entirety.

Contact

Steven H. Rosenfeld represented the defendant.

Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com

HRRV ON TRIAL

HRRV Secures Defense Verdict in Kings County Slip and Fall

Marrero v. Liberty Janitorial Services, LLC
Supreme Court, Kings County
Index No. 500403/2014

After a multiday jury trial in the Supreme Court, Kings County before Justice Loren Baily-Schiffman and with less than one hour of deliberation, the jury returned a defense verdict in favor of HRRV's client, Liberty Janitorial Services. Up to and through the trial, the plaintiff's counsel conditioned settlement on payment of the entirety of our client's $1 million commercial general liability policy.

The plaintiff alleged that she slipped and fell on a bathroom floor within a commercial building due to the alleged negligence of Liberty, the building's commercial cleaning contractor. As a result, the plaintiff alleged, she was forced to undergo two knee surgeries and claimed millions of dollars in economic loss, which the plaintiff supported through an expert life care planner.

During trial, Gail L. Ritzert cross-examined the plaintiff, making pointed inquiries about the plaintiff's cellular telephone use around the time of the incident. After the plaintiff denied use of her cellular telephone at the time of alleged incident, Ritzert confronted the plaintiff with her very own cellular telephone records, which had been obtained during discovery and subpoenaed for trial. The records confirmed that the plaintiff was using her cellular telephone around the time of the alleged incident and thereby distracted.

The jury was swayed that the plaintiff's rendition of events lacked credibility as she was not candid about her cellular telephone use.

Contact

Gail L. Ritzert, Amol N. Christian and Robert Coleman represented Liberty Janitorial Services, LLC.

Gail L. Ritzert: 516-620-1710 or gail.ritzert@hrrvlaw.com

Amol N. Christian: 516-620-1703 or amol.christian@hrrvlaw.com

Robert Coleman: 516-620-1719 or robert.coleman @hrrvlaw.com

HAVKINS ROSENFELD RITZERT & VARRIALE, LLP
HRRV
COUNSELORS AT LAW

1 Battery Park Plaza
6th Floor
New York, New York 10004
212-488-1598
212-564-0203 Facsimile

114 Old Country Road
Suite 300
Mineola, New York 11501
516-620-1700
516-746-0833 Facsimile

170 Hamilton Avenue
Suite 210
White Plains, New York 10601
914-290-6430
914-560-2245 Facsimile

www.hrrvlaw.com