New York's Appellate Division, Citing "Plain Common Sense", Among Other Things, Affirms Dismissal of Negligence Action In Diving Accident At Water Park

New York's Appellate Division, Second Department affirmed the decision of the Supreme Court, Queens County which granted defendants' motion for summary judgment in a negligence action arising out of a diving accident at a popular water park.

Plaintiff alleged that he was riding in a raft on the attraction known as "Hollywood Stunt Rider" at the Splish Splash water park located in Riverhead, New York, when he suddenly dove headfirst out of his raft into a shallow pool. As a result, he sustained serious personal injuries. Plaintiff commenced a negligence action and alleged that defendants were negligent in allowing a dangerous and defective condition to remain on their premises which caused his injuries. Specifically, he claimed that he was not warned or made aware of the depth of the water and that had he known the depth of the water, he would not have dove headfirst at the conclusion of the ride.

The defendants moved for summary judgment contending that they did not owe or breach a duty of care to plaintiff based on his assumption of a known or obvious risk. Defendants established that plaintiff's own reckless conduct was the proximate cause of plaintiff's injuries and not any action of defendants. In support of their motion, defendants submitted plaintiff's deposition testimony, as well as several non-party witnesses who were riding the attraction with plaintiff at the time of the alleged accident. The testimony established that plaintiff suddenly and unexpectedly stood up and dove headfirst out of his raft into the shallow "run out" area at the end of the ride. The defendants also submitted deposition testimony of Splish Splash personnel and evidence confirming the signage and instructions provided at the "Hollywood Stunt Rider." In addition, the rafts contained conspicuous printed warnings prohibiting diving and there were depth markings in the run out area regarding the water depth. Plaintiff denied observing the same.

The Supreme Court, Queens County held that defendants established that plaintiff assumed the risk of diving into a shallow pool. The court held that, "summary judgment is an appropriate remedy in swimming pool injury cases when from his 'general knowledge of pools, his observations prior to the accident, and plain common sense' *Smith v. Stark*, 67 N.Y.2d 693, 694 [1988], the plaintiff should have known that, if he dove into the pool, the area into which he dove contained shallow water and, thus, posed a danger of injury." *Sciangula v. Mancuso*, 204 A.D.2d 708 (2d Dept. 1994). The court held that given plaintiff's familiarity with amusement parks and the activity of diving into water, he was able to appreciate the risk associated with diving into shallow water. Furthermore, the court held that although plaintiff might not have observed the posted warning signs or heard the audio warnings, such was not the proximate cause of plaintiff's injuries.

The Appellate Division, Second Department affirmed the Supreme Court, Queens County's decision. The Appellate Division agreed that defendants satisfied their burden by demonstrating that plaintiff's own actions were the sole proximate cause of his injuries. Noting plaintiff's prior experience with swimming and diving, the audio and visual warnings advising of

the depth of the water and the express warnings against diving, as well as "plain "common sense," the Appellate Division, Second Department determined that plaintiff should have known that if he dove into the pool, he the area into which he dove contained shallow water and, thus, posed a danger of injury.

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