At a Virtual Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Madison County Courthouse, Wampsville, New York, on the 27th day of January, 2023.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF MADISON
HON. JOSEPH A. MCBRIDE

DAVID KATLESKI,

Plaintiffs

vs.

CAZENOVIA GOLF CLUB, INC., JUSTIN HUBBARD, and RICHARD HUBBARD,

Defendants.

DECISION AND ORDER

Index No.: EF2020-1607

APPEARANCES:

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JOSEPH A. MCBRIDE, J.S.C.

This matter follows a lawsuit initiated by Plaintiff, David Katleski, ("Katleski") against Cazenovia Golf Club, Inc. ("CGC"), Justin Hubbard, ("Justin")[1] and Richard Hubbard ("Richard").[2] Currently before the Court is a Motion for Summary Judgment pursuant CPLR §3212 filed by CGC and Plaintiff filed opposition thereto. Court received and reviewed said motion and decided; as discussed below.[3]

BACKGROUND FACTS

The case at hand follows Katleski's personal injury complaint following an accident that occurred at CGC during a tournament. Justin and Richard were partners in a golf tournament at CGC, Justin hit a tee shot off the white tee box at the third hole. Katleski was standing in the adjacent fairway of the seventh hole when Justin's ball hit Katleski in the face causing significant serious injury. On Septmeber 15, 2020, Katelski filed a summons and complaint against CGC for negligent design.

The matter was scheduled for oral argument on January 27, 2023, via Microsoft Teams. CGC argued that Katleski was outside the probability of play and therefore the safety test analysis is not applicable. CGC submitted expert affidavit that concluded that since there was no requirement to protect against an errant shot, no unreasonable increase of risk was created. In opposition, Katleski said that CGC is negligent since there was no safety analysis performed prior to the incident. Moreover, that there remains a question of fact as to whether he was in the probability of play. The Court decides as described below.

LEGAL DISCUSSION AND ANALYSIS

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. When seeking

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[1] On Septmeber 26, 2022, the Court granted Justin's Motion for Summary Judgment, releasing him from all claims.
[2] On March 10, 2021, the Court granted Richard's Motion to Dismiss, releasing him from all claims.
[3] All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Amedure v. Standard Furniture Co., 125 AD2d 170 (3rd Dept. 1987); *citing* Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [Ct. of App. 1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." Boston v. Dunham, 274 AD2d 708, 709 (3rd Dept. 2000); *see*, Boyce v. Vazquez, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." Haner v. DeVito, 152 AD2d 896, 896 (3rd Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (Ct. of App. 2012) (citation omitted).

As pertinent here, it is well accepted that when engaged in a sporting event, such as golf, the participant assumes the risk of foreseeable injury. See Morgan v. State, 90 NY2d 471, 485 (Ct. of Appeals 1997). More specifically, "the possibility that the ball will fly off in another direction is a risk inherent in the game" of golf. Rinaldo v. McGovern, 78 NY2d 729, 733 (Ct. of App. 1991). That being said, "participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced." Custodi v Town of Amherst, 20 N.Y.3d 83, 88 (Ct. of App. 2012). Very similarly to the case at hand, the Second Department dismissed a case that is nearly identical to the very question present before this court. See Thornberg v. Town of Islip, 127 AD3d 1162 (2nd Dept. 2015). The Thornberg Court granted the moving golf course's motion for summary judgment because despite opining that the golf course was negligently designed, the injured plaintiff's expert failed to identify any specific industry standard upon which he relied in coming to his conclusion. See Id. at 1163. Even more, the Second Department previously granted a motion for

summary judgment when the injured golfer failed to establish that the golf course breached a duty of care when "the record established a that the injured player willingly assumed the risks consistent with participating in the sport of golf." Ludin v. Town of Islip, 207 AD2d 778, 779 (2nd Dept. 1994).

It should be noted that this is the third motion this Court has reviewed under this case analyzing the same set of facts. On September 26, 2022, the Court granted Justin's motion for summary judgment dismissing Katleski's claims as a matter of law against Justin, the player who hit the subject shot. In dismissing the claims against Justin, this Court found that Katleski assumed the risk of participating and was hit by a mishit shot making his injury a foreseeable injury in the sport of golf. As stated in the previous Decision an Order of the Court, there is no debate that Justin hit the ball that seriously injured Katleski. Moreover, the Court found that Katleski specifically did not meet his burden that raised a question of fact when the record was devoid of any evidence of Justin's reckless or intentional conduct.

Now turning specifically to this motion, and as stated above, the Court finds that CGC does not owe Katleski an independent duty of care for a mishit ball. It is well accepted that when engaged in a sporting event, such as golf, the golfers assume the risk of foreseeable injury. See Morgan, 90 NY2d 471. Being hit by a mishit ball is a foreseeable injury in the sport of golf. See Rinaldo, 78 NY2d at 733. Therefore, Katleski assumed the risk. However, the Court must look to see if that the risks inherent in the sport of golf were "unreasonably enhanced" under the theory of negligent golf course design. See Custodi, 20 N.Y.3d at 88. "Participants will not… be deemed to have assumed risks that result from a defendant creating a dangerous condition over and above the usual dangers that are inherent in the sport." Finn v Barbone, 83 A.D.3d 1365, 1365 (3rd Dept. 2011). This is a distinct set of facts for which this present analysis is based.

In support of the motion for summary judgment, CGC submitted an expert affidavit of Barry Jordan, RLA, a professional golf course architect. Mr. Jordan submits that while it is a modern-day industry standard that architects typically provide greater separation between tees and greens and wider safety zones that delineate "probable areas of play" there are no authoritative texts or guidelines which establish minimum standards for golf course design. Further, Mr. Jordan went through several of Katleski's specific allegations as to the negligent course design. Mr. Jordan opined that within a reasonable degree of certainty, that neither the

topography nor the proximity of the holes to one another or the trees unreasonably increased the risk of play. Moreover Mr. Jordan asserted that there are no industry standards that direct the usage of signs, require barricades, or govern the placement of structures or shelters. Finally, in analyzing the placement of the tee box on the third hole, Mr. Jordan opined that no matter where the tee was placed on the tee box, while there is always an inherent risk of a mishit shot, the placement did not unreasonably increase that risk. As such, the Court finds that CGC meets their burden by showing a *prima facie* entitlement as a matter of law.

Next, the burden shifts to Katleski to present admissible evidence to show an issue of material fact exists. In support of Katleski's opposition, he submits two expert affidavits. First, from James Weiss, a Professional Golfers' Association ("PGA") Class A Professional and second, from Stephen Eisenberg, a PGA Professional with experience training other golf professionals in Golf Course Design. Both of Katleski's experts disagree with Mr. Jordan as to the existence of written industry standards, and both conclude that CGC was negligent in their golf course design by not following the industry standard safety practices. Specifically, Mr. Weiss submits that PGA and USGA rules, guidelines, and manuals, concerning the operation and management of golf courses dictate the industry standards. Additionally, Mr. Weiss states that it is an industry standard that golf courses should undergo a safety evaluation by an architect, especially historic golf courses and those that undergo changes or additions to their design. When a safety evaluation reveals a safety concern, it is custom that the concern is then analyzed by a golf course design architect, or golf course design professional, to discuss and implement a remedy. Mr. Weiss opined that if CGC underwent a safety evaluation, it would reveal that the proximity of the holes to each other, the placement of the lightning shed, and the lack of barriers all create safety concerns that would warrant remedy. Further, Mr. Eisenberg opined that upon his inspection of CGC, it was obvious that the lack of buffering between holes three and seven coupled with the poor tee placement created an extremely dangerous situation. Furthermore, that CGC's affirmative changes to the placement of the tee box on the third hole required CGC to undergo a safety evaluation that would then reveal these safety concerns.

Upon reviewing all the moving papers and affidavits attached thereto, the Court is presented with two distinct sets of expert opinions. It is without question that while mere conclusory statements and speculations of expert affidavits are insufficient to defeat a defendant

summary judgment motion, the Court's role is to spot whether there are outstanding questions of fact, not to determine the outcome of a fact question. Natale v. Riverview Cancer Care Med. Assoc., 68 A.D.3d 1574, 1575 (3rd Dept. 2009). Here, the Court can distinguish this set of moving papers with the Thornberg case as cited above. See 127 AD3d 1162. Here, Plaintiff's experts point to several industry standards upon which CGC is claimed to have acted negligently. The Court cannot conclude that any of the expert opinions are conclusory or speculative. Therefore, the Court finds that Katleski met his burden of providing admissible evidence that a triable issue of fact exists as to whether defendants created a danger over and above the inherent dangers of the sport. See Finn, 83 A.D.3d at 1366.

CONCLUSION

With conflicting expert opinions to the issue of negligence and viewing this evidence in a light most favorable to Katleski, as the nonmovants, a triable issue of fact exists. Therefore, summary judgment is not appropriate and CGC's motion is DENIED. The matter will be scheduled for trial.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this DECISION AND ORDER by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 3/9, 2023
Norwich, New York

HON. JOSEPH A. MCBRIDE
Supreme Court Justice