

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

-----X  
JUDITH ROSENFELD,

Plaintiff-Appellant,

-against-

HUDSON VALLEY STADIUM CORP.,  
ROHDE, SOYKA & ANDREWS CONSULTING  
ENGINEERS, P.C., LISCUM, McCORMACK &  
VANVOORHIS, KEYSTONE PROFESSIONAL  
BASEBALL CLUB d/b/a HUDSON VALLEY  
RENEGADES, DUTCHESS COUNTY  
ENTERTAINMENT CORP., THE GREATER  
SOUTHERN DUTCHESS CHAMBER OF  
COMMERCE, INC. and COUNTY OF DUTCHESS,

Defendants-Respondents.  
-----X

**NOTICE OF MOTION  
FOR REARGUMENT  
OR LEAVE TO APPEAL**

**Docket No.: 2008-07030**

Dutchess County Clerk's  
Index No.: 7524/07

PLEASE TAKE NOTICE that upon the annexed affirmation of David L. Kremen, dated the 25th day of September, 2009, and upon all other papers and proceedings had herein, a motion will be made to the Supreme Court, Appellate Division, Second Department, 45 Monroe Place, Brooklyn, New York on Friday, the 9th day of October, 2009, at 9:30 A.M. of that day or as soon thereafter as counsel can be heard, pursuant to CPLR §§ 2221 and 22 NYCRR §§ 670.5 and 670.6 for reargument of the September 15, 2009 decision and order of this Court, and, upon reargument, for a further order reversing, vacating or modifying that order, holding that plaintiff did allege that the screening was not sufficient to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, holding that plaintiff did state a cause of action, holding that the Supreme Court improperly granted those branches of the motions of Keystone Professional Baseball Club d/b/a Hudson Valley Renegades and the County of Dutchess which were to dismiss the complaint

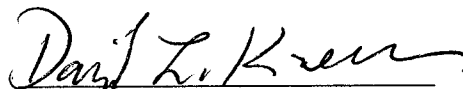
insofar as asserted against them pursuant to CPLR 3211(a)(7) and, for the same reason, holding that Liscum, McCormack & Vanvoorhis did not establish its entitlement to summary judgment dismissing plaintiff's complaint as asserted against it and that plaintiff raised a triable issue of fact, denying the defendants' motions as asserted against plaintiff and reinstating plaintiff's complaint or, alternatively, pursuant to CPLR §§ 5513(b), 5516, 5602 and 22 NYCRR §§ 670.5 and 670.6, for an order granting plaintiff leave to appeal to the Court of Appeals with respect to the question(s) of: (1) Whether the opinion and order of this Court properly made?; (2) Whether plaintiff has or stated a cause of action?; (3) Whether plaintiff has a negligence cause of action against the owner, lessee or designer of a professional baseball stadium for inadequate screening where the plaintiff claims she sat in unprotected seats because protected seats behind home plate were sold out?; (4) Whether the policy behind the rule in Akins v. Glens Falls City School District, 53 N.Y.2d 325 (1981) - the recognition that "many spectators attending such exhibitions desire to watch the content taking place on the playing field without having their view obstructed or obscured by a \*\*\* fence or a protective net" - is furthered by the installation of unprotected seating in an area where patrons views are obstructed and obscured to the point that they are no longer spectators?; (5) Whether the rule in Akins, supra, that protective netting is only required in the area behind home plate because that area is "where the danger of being struck by a ball is the greatest," was erroneously based on a common misconception and at odds with currently available data/studies establishing that the area down the lines are actually more dangerous given that more foul balls are hit down the lines than behind the plate and given that the speed of a pitched ball is slowed down when fouled off behind the plate but sped up when lined down the sidelines?; and (6) Whether the risk of being struck by a foul ball is unreasonably increased where a proprietor installs picnic tables with attached benches in an area that is traditionally

outfitted with tiered box seats or bleachers, where such seating creates obstructed and intentionally distracted views because the seats are on one level rather than tiered, because the seats do not face the field of play and because patrons are seated facing each other and where such seating makes it more difficult to avoid any foul ball that may be observed because patrons have to step over the attached benches to get out of their seats or are prevented from crouching down because the table top is in the way?, together with such other and further relief as to this Honorable Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b) answering affidavits, if any, are required to be served upon the undersigned at least seven (7) days prior to the return date hereof.

Dated: New York, New York  
September 25, 2009

Yours, etc.,



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By: David L. Kremen

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*Judith Rosenfeld*

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HUDSON VALLEY STADIUM CORP., DUTCHESS COUNTY ENTERTAINMENT  
CORP. and THE GREATER SOUTHERN DUTCHESS CHAMBER OF COMMERCE,  
INC. have not appeared or answered.

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND DEPARTMENT

-----X  
JUDITH ROSENFELD,

Plaintiff-Appellant,

-against-

HUDSON VALLEY STADIUM CORP.,  
ROHDE, SOYKA & ANDREWS CONSULTING  
ENGINEERS, P.C., LISCUM, McCORMACK &  
VANVOORHIS, KEYSTONE PROFESSIONAL  
BASEBALL CLUB d/b/a HUDSON VALLEY  
RENEGADES, DUTCHESS COUNTY  
ENTERTAINMENT CORP., THE GREATER  
SOUTHERN DUTCHESS CHAMBER OF  
COMMERCE, INC. and COUNTY OF DUTCHESS,

Defendants-Respondents.  
-----X

**AFFIRMATION IN  
SUPPORT OF MOTION  
TO REARGUE OR FOR  
LEAVE TO APPEAL**

**Docket No.: 2008-07030**

Dutchess County Clerk's  
Index No.: 7524/07

David L. Kremen, an attorney admitted to practice in the Courts of the State of New York, affirms the following to be true under the penalties of perjury pursuant to Section 2106 of the CPLR:

1. I am an associate with the law firm of Oshman & Mirisola, LLP, attorneys for plaintiff-appellant Judith Rosenfeld and make this affirmation in support of the application, pursuant to CPLR § 2221 and 22 NYCRR §§ 670.5 and 670.6 for reargument of this Court's September 15, 2009 decision and order or, alternatively, pursuant to CPLR §§ 5513(b), 5516 and 5602 and 22 NYCRR § 670.6 for leave to appeal to the Court of Appeals.
2. Attached hereto as Exhibit "A" is a copy of the Notice of Appeal the decision and order of the Supreme Court, which first invoked the jurisdiction of this court.

3. Attached hereto as Exhibit "B" is a copy of this Court's decision and order dated September 15, 2009, which is the subject of the instant application.
4. This is an action for damages for serious personal injuries, including blindness in one eye, suffered by plaintiff Judith Rosenfeld when struck by a foul ball while attending a minor league baseball game at Dutchess Stadium, located at 2122 Rout 9D, Fishkill, New York on August 5, 2006. (24-30, 219-20).<sup>1</sup>
5. Plaintiff's appeal sought to vacate and deny the motions of defendants Keystone Professional Baseball Club b/a Hudson Valley Renegades (hereinafter Keystone) and the County of Dutchess (hereinafter County), which were to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(7), and to vacate and deny that branch of the motion by defendant Liscum, McCormack & Vanvoorhis (hereinafter LMV), which was for summary judgment dismissing the complaint as asserted against it, and to reinstate the complaint.

### REARGUMENT

6. Reargument should be permitted because the Court overlooked facts and/or misapprehended the law. CPLR § 2221.
7. The decision and order dated September 15, 2009 held, in pertinent part, that:

Since the plaintiff did not allege that she was struck in the area behind home plate or that the screening was not sufficient to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, she has failed to state a cause of action. . . . For the same reason, LMV established its entitlement to summary judgment. . . .

See Exhibit "B."

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<sup>1</sup> Numbers in parenthesis denote pages in Record on Appeal.

8. On the contrary, that plaintiff did allege that screening was not sufficient to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game.
9. “It is well settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and according the plaintiff the benefit of every possible inference (*see Leon v Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]).” *Avgush v. Town of Yorktown*, 303 A.D.2d 340, 341 (2d Dep’t 2003). Also see CPLR 3026. “[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims. Modern pleading rules are ‘designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one.’” *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976) (citations omitted).
10. As this Court held, LMV designed the stadium, the County owns the stadium and Keystone leased the stadium from the County. See Exhibit “B.”
11. Plaintiff’s first cause of action in the complaint alleged, in pertinent part, that plaintiff was struck in the eye by a foul ball while a visitor/patron at the Stadium to attend a Hudson Valley Renegades baseball game, (28), that defendants owned, maintained, managed, operated, planned, designed, supervised and controlled the stadium and its construction, (26-27), and that:

The accident and injuries alleged herein were caused, jointly and severally, by the carelessness, recklessness and negligence of the defendants, their agents, servants and/or employees in the ownership, operation, management, maintenance, supervision, inspection and control of the Stadium, facilities at the Stadium . . . , in causing, permitting and/or allowing unsafe and hazardous conditions to become and remain at said premises, . . . in creating a hazardous seating area, . . . in failing to provide proper available

and cost efficient protection and safety devices and plans, in failing to repair and/or remedy the dangerous conditions, in aggravating and increasing the dangers to visitors to the premises, in failing to provide and/or enforce adequate policies, procedures, rules, guidelines, industry standards and/or specifications for the maintenance and operation of said premises, . . . . (28-29).

12. Plaintiff's second cause of action similarly alleged, *inter alia*, that:

The accident and injuries alleged herein were caused, jointly and severally, by the carelessness, recklessness and negligence of the defendants, their agents, servants and/or employees in the planning, design, engineering, manufacture/construction of the Stadium, facilities and/or concessions, in negligently inspecting, supervising, directing and/or controlling of the construction of the Stadium, facilities and/or concessions, in negligently planning for and addressing the safety of invitees/patrons in all areas of the Stadium, its facilities and/or concessions, . . . in failing to provide and/or enforce adequate policies, procedures, rules, guidelines, industry standards and/or specifications for the planning, design, engineering, manufacture/construction of said premises, and in aggravating and/or increasing the traditional dangerous [sic] inherent in attending baseball games, in failing to warn individuals such as the plaintiff of increased dangers, hazards and risks. (29-30).

13. Plaintiff's companion to the game, Thomas Vaculik, purchased the tickets and swore that:

"I sought to purchase seats behind home plate because they . . . provide a screen from foul balls. I was told that only general admission seats were left, which do not include the area behind the screen. (221).

14. It is respectfully submitted that the above facts establish a cause of action and that the court overlooked the pleadings and/or Mr. Vaculik's affidavit and/or misapprehended the law in that it did not liberally construe the pleadings, did not accept all the facts as alleged in the pleadings to be true, did not accord the plaintiff the benefit of every possible inference, did not use the affidavit of Mr. Vaculik to preserve inartfully pleaded, but potentially meritorious claims and/or did not focus attention on whether the pleader has a cause of action rather than on whether she has properly stated one.

15. In Zambito v. Albion, 100 A.D.2d 739 (4th Dep't 1984), the Court held that “a jury question is presented regarding the alleged negligence of defendant in failing to exercise reasonable and ordinary care to protect spectators from foreseeable dangers.” The plaintiff in Zambito, supra, was injured when hit in the face by an errantly thrown ball while watching a softball game. She was seated in unprotected bleachers located behind first base, which was the only seating provided in the ball park. Behind home plate, there was a backstop but no seating. The Court determined that the situation was different from Akins v. Glens Falls City School District, 53 N.Y.2d 325 (1981), because there was no protected seating behind home plate.
16. In the case at bar, there was no available seating behind home plate due to the fact that such seating was sold out, leaving Ms. Rosenfeld in the same position as the plaintiff in Zambito, supra.
17. It is respectfully submitted that, under the circumstances, this Court should have assumed, without deciding, that defendant breached its duty to provide a sufficient number of protected seats to accommodate as many spectators as reasonably may be expected to desire such seating at an ordinary game. See Gilchrist v. Troy, 67 N.Y.2d 1034, 1036 (1986).
18. In light of the above, it is respectfully requested that reargument be granted and that, upon reargument, the September 15, 2009 order be reversed, vacated or modified and that the Court hold that plaintiff did state a cause of action, that defendants Keystone and the County are not entitled to dismissal of the complaint under CPLR 3211(a)(7), that, for the same reason, defendant LMV did not establish entitlement to summary judgment, that

plaintiff did raise a triable issue of fact that precludes summary judgment and that the complaint is reinstated accordingly.

**LEAVE TO APPEAL**

19. It is also respectfully submitted that leave should be granted to appeal to the Court of Appeals so that any or all of the following questions of law may be reviewed, each of which are believed to be decisive of the correctness of this Court's determination.

(1) Whether the opinion and order of this Court properly made?

(2) Whether plaintiff has or stated a cause of action?

(3) Whether plaintiff has a negligence cause of action against the owner, lessee or designer of a professional baseball stadium for inadequate screening where the plaintiff claims she sat in unprotected seats because protected seats behind home plate were sold out?

(4) Whether the policy behind the rule in Akins v. Glens Falls City School District, 53 N.Y.2d 325 (1981) - the recognition that "many spectators attending such exhibitions desire to watch the content taking place on the playing field without having their view obstructed or obscured by a \*\*\* fence or a protective net" - is furthered by the installation of unprotected seating in an area where patrons views are obstructed and obscured to the point that they are no longer spectators? This issue is addressed in Appellant's Brief at pages 15 and 16.

(5) Whether the rule in Akins, supra, that protective netting is only required in the area behind home plate because that area is "where the danger of being struck by a ball is the greatest," was erroneously based on a common misconception and at odds with currently available data/studies establishing that the area down the lines are actually more

dangerous given that more foul balls are hit down the lines than behind the plate and given that the speed of a pitched ball is slowed down when fouled off behind the plate but sped up when lined down the sidelines? This issue was addressed in Appellant's Brief at pages 10 and 11.

(6) Whether the risk of being struck by a foul ball is unreasonably increased where a proprietor installs picnic tables with attached benches in an area that is traditionally outfitted with tiered box seats or bleachers, where such seating creates obstructed and intentionally distracted views because the seats are on one level rather than tiered, because the seats do not face the field of play and because patrons are seated facing each other and where such seating makes it more difficult to avoid any foul ball that may be observed because patrons have to step over the attached benches to get out of their seats or are prevented from crouching down because the table top is in the way? This issue was raised in Appellant's Brief at page 11, et seq.

20. Question 5 was raised on appeal solely for the purpose of preserving the ability to seek review by the Court of Appeals as the Second Department would be constrained to follow the Court of Appeals' ruling in Akins, supra.

21. These issues ought to be reviewed by the Court of Appeals. It appears that the decision in Zambito, supra, is at odds with the decision of this Court in the instant case.

Accordingly, clarification from the Court of Appeals is a matter of statewide importance.

22. Clarification is also matter of statewide importance because the instant case presents issues not previously considered by the Court of Appeals, including whether the distraction of individuals in specific areas of a ball park, by non-traditional alternate areas of revenue, such as picnic areas and hot tubs, that increase the risk of injury by

obstructing or obscuring the playing field, have a bearing on the application of the Akins rule. Such alternative revenue streams are a phenomenon that has grown substantially over the past twenty years and are designed to bring in individuals who come to the stadium for the experience and not the game. Anderson, Kelly, Not So Minor Attractions, Recreation Management, March 2002, at 22, 39. As stated by one assistant general manager for a minor league team: “[B]aseball is secondary; entertainment is number one.” Id. at 34-41.

23. Another issue of statewide importance raised that has not been addressed in a decision is whether the Akins rule should be modified in light of the development of new materials that effectively reduce or eliminate the obstructive nature of screening and, in turn, the underlying rationale for that rule. (225-34).
24. It is also important that the Court of Appeals be permitted to revisit its conclusion that the danger of being struck by a ball is the greatest behind home plate in light of the fact that data, which was unavailable to the Court when it decided Akins, supra, 53 N.Y.2d 325, is now available and establishes that the areas down the lines are actually more dangerous. As Justice Cooke stated in his dissent in Akins, supra, “The court issues this rule with no more expertise available to it than Justice Holmes had in 1927 when he recommended that motorists venture on foot onto railroad grade crossings for a better view.” 53 N.Y.2d at 336).
25. Clarification from the Court of Appeals on these issues will benefit any related pending and future litigation in this State’s Courts.
26. For the reasons set forth above, leave should be granted to appeal to the Court of Appeals.

WHEREFORE, it is respectfully requested that this application be granted in its entirety,  
together with such other and further relief as this Court deems just and proper.

Dated: New York, New York  
September 25, 2009

  
David L. Kremen



Notice of Appeal by Plaintiff, dated July 25, 2008  
[pp. 3 - 5]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

REC'D JUL 31 2008

-----X  
JUDITH ROSENFELD,

Plaintiff,

NOTICE OF APPEAL

-against-

Index No.: 7524/07

HUDSON VALLEY STADIUM CORP.,  
ROHDE, SOYKA & ANDREWS CONSULTING  
ENGINEERS, P.C., LISCUM, McCORMACK &  
VANVOORHIS, KEYSTONE PROFESSIONAL  
BASEBALL CLUB d/b/a HUDSON VALLEY  
RENEGADES, DUTCHESS COUNTY  
ENTERTAINMENT CORP., THE GREATER  
SOUTHERN DUTCHESS CHAMBER OF  
COMMERCE, INC. and COUNTY OF DUTCHESS,

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DUTCHESS COUNTY  
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Defendants.  
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C O U N S E L:

PLEASE TAKE NOTICE that the plaintiff above named, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, from the Judgment of the Supreme Court, Dutchess County, in this action, dated July 15, 2008, made by the Hon. Christine A. Sprout, and entered in the office of the clerk of Dutchess County on July 16, 2008, which granted defendant ROHDE, SOYKA & ANDREWS CONSULTING ENGINEERS, P.C.'s motion pursuant to CPLR 3211(a)(7) dismissing plaintiff's complaint in its entirety and all cross-claims against said defendant, granted defendant LISCUM, McCORMACK & VANVOORHIS' motion pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it and all cross-claims against it, granted defendant KEYSTONE PROFESSIONAL BASEBALL CLUB d/b/a HUDSON VALLEY RENEGADES' motion pursuant to CPLR 3211(a)(1) and 3211(a)(7) dismissing plaintiff's complaint against it and

dismissing all cross-claims against it and granted defendant COUNTY OF DUTCHESS' motion for an order dismissing the plaintiff's complaint against it together with any cross-claims against it, and said appeal is from each and every part of that Decision and Order.

Dated: New York, New York  
July 25, 2008

Yours, etc.,

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By:



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HUDSON VALLEY STADIUM CORP.,  
DUTCHESS COUNTY ENTERTAINMENT CORP. and  
THE GREATER SOUTHERN DUTCHESS CHAMBER  
OF COMMERCE, INC. have not appeared or answered.

Decision and Order of the Honorable Christine A. Sproat,  
 dated July 15, 2008, Appealed From  
 [pp. 6 - 11]

STATE OF NEW YORK : COUNTY OF DUTCHESS  
 SUPREME COURT

-----X

JUDITH ROSENFELD,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 7524/2007

HUDSON VALLEY STADIUM CORP.,  
 ROHDE, SOYKA & ANDREWS CONSULTING  
 ENGINEERS, P.C., LISCUM, McCORMACK &  
 VANVOORHIS, KEYSTONE PROFESSIONAL  
 BASEBALL CLUB d/b/a HUDSON VALLEY RENEGADES,  
 DUTCHESS COUNTY ENTERTAINMENT CORP.,  
 THE GREATER SOUTHERN DUTCHESS CHAMBER  
 OF COMMERCE, INC., and COUNTY OF DUTCHESS,

Defendants.

-----X

Defendant Rohde, Soyka & Andrews Consulting Engineers, P.C. move for an order, pursuant to Rule 3211(a)(7) of the Civil Practice Law and Rules, dismissing the complaint against it in its entirety and dismissing all cross-claims that may have been asserted against it.

Defendant Liscum, McCormack & VanVoorhis move for an order, pursuant to CPLR Rule 3212, granting summary judgment dismissing the plaintiff's complaint against it and all cross-claims against it.

Defendant County of Dutchess moves for an order dismissing the plaintiff's complaint against it together with any cross-claims against it.

Defendant Keystone Professional Baseball Club d/b/a Hudson Valley Renegades moves for an order, pursuant to CPLR 3211(a)(1) and 3211(a)(7), dismissing plaintiff's complaint against it and dismissing all cross-claims which may have been asserted against it.

The following submissions were read:

Notice of Motion - Affirmation of Thomas H. Kukowski, Esq. - Annexed Exhibits	1-3
Defendant Rohde, Soyka & Andrews Consulting Engineers, P.C.'s Memorandum of Law - Annexed Exhibits	4-5
Notice of Motion - Affirmation of James F. O'Brien, Esq. - Annexed Exhibits	6-8
Defendant Liscum, McCormack & VanVoorhis' Memorandum of Law	9
Notice of Motion - Affirmation of Kimberly Hunt Lee, Esq. - Annexed Exhibits	10-11
Notice of Motion - Frank Raia, Esq.'s Affirmation - Annexed Exhibits	12-14
Exhibits to Affidavit of Jeff Goldklang	15
Defendant Keystone Professional Baseball Club d/b/a Hudson Valley Renegades' Memorandum of Law	16
David L. Kremen, Esq.'s Affirmation in Opposition - Annexed Exhibits	17-18
David L. Kremen, Esq.'s Affirmation in Opposition - Annexed Exhibits	19-20
Reply Affirmation of Kimberly Hunt Lee, Esq.	21
Reply Affirmation of Frank Raia, Esq.	22
Reply Affirmation of Thomas H. Kukowski, Esq. - Annexed Exhibits	23-24

Upon the foregoing papers it is hereby ORDERED that the defendants' motions are granted and the plaintiff's complaint against the defendants and any cross-claims against the defendants are dismissed.

The instant personal injury action arises out of plaintiff being hit by a foul ball while attending a minor league baseball game at Dutchess Stadium in Fishkill, N.Y. on

August 5, 2006. The plaintiff alleges, *inter alia*, that the defendants were negligent in that they failed “to provide proper available and cost efficient protection and safety devices and plans” for the picnic area where she was injured. (Plaintiff’s Verified Complaint, annexed as Exhibit A to defendant Rohde, Soyka & Andrews Consulting Engineers, P.C.’s Notice of Motion.) However, contrary “to the plaintiff’s contentions, by furnishing sufficient protective netting behind home plate where the danger of being struck by a baseball is the greatest, the proprietor of a ballpark fulfills its duty of care and cannot be held liable in negligence (see *Akins v. Glens Falls City School Dist.*, 53 NY2d 325 [1981]; *Sparks v. Sterling Doubleday Enters.*, 300 AD2d 467 [2002].) The operators of a ballpark are not insurers of the safety of spectators who choose to occupy unprotected seats (see *Davidoff v. Metropolitan Baseball Club*, 61 NY2d 996, 998 [1984]). Here, it is uncontroverted that the stadium had protective netting in the area behind home plate and extending up the foul lines to the dugouts. Thus, the injured plaintiff assumed the risk of injury (see *Sparks v. Sterling Doubleday Enters.*, *supra*.)” (*Ray v. Hudson Valley Stadium Corp.*, 306 AD2d 264, 264-265 (2nd Dept., 2003).)

The Court notes that the plaintiff alleges that her friend who purchased the general admission tickets had wanted to purchase tickets for seats behind home plate but they were sold out. However, the President of defendant Keystone Professional Baseball Club d/b/a Hudson Valley Renegades has submitted an affidavit in which he states, “Before each game begins, a series of public announcements are made advising the spectators who

wish to be seated or reseated within a protected area that they will be accommodated . . .

A request for seating behind the netting could and would have been accommodated.”

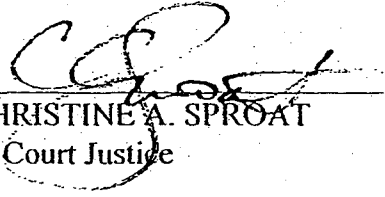
(Affidavit of Jeff Goldklang, paragraphs 5-7.) The plaintiff does not deny that such announcement was made, but merely states that she did not hear such announcement. In any event, it is undisputed that the plaintiff sat in the general admission area for about an hour into the game without incident. Rather, it was only after the plaintiff had gone to a concession stand to purchase food and sat down with the food in the picnic area that the accident occurred. (See, Affidavit of Judith Rosenfeld, paragraphs 4-5; Affidavit of Thomas Vaculik, paragraph 5.)

Accordingly, for all of the foregoing reasons, the defendants’ motions to dismiss the plaintiff’s complaint against them must be granted. (See also, *Sparks v. Sterling Doubleday Enterprises, L.P.*, 300 AD2d 467 (2nd Dept., 2007); *Procopio v. Town of Saugerties*, 20 AD3d 860 (3rd Dept., 2005), leave to appeal denied by 5 NY3d 716 (2005); *Wade-Keszey v. Town of Niskayuna*, 4 AD3d 732 (3rd Dept., 2004); *LaRocca v. Pleasant Valley Little League*, 15 AD3d 628 (2nd Dept., 2005).)

This constitutes the decision and order of this Court.

So ordered.

Dated: July 15, 2008  
Poughkeepsie, New York

  
HON. CHRISTINE A. SPROAT  
Supreme Court Justice

TO: DAVID L. KREMEN, ESQ.  
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SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

-----X

JUDITH ROSENFELD,

Index No. 07030/08

Plaintiff-Appellant,

**NOTICE OF ENTRY  
OF DECISION AND ORDER**

-against-

HUDSON VALLEY STADIUM CORP., et al.,

Defendants-Respondents,

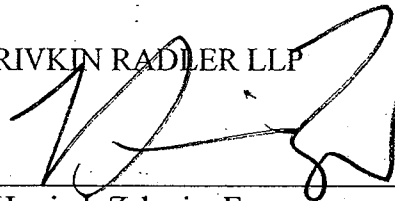
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To All Counsel:

**PLEASE TAKE NOTICE** that the attached is a true and correct copy of the Decision and Order of the Appellate Division, Second Department, entered in the Clerk's office thereof on September 15, 2009.

Dated: Uniondale, New York  
September 21, 2009

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Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

D24134  
G/kmg

AD3d

Argued - April 13, 2009

PETER B. SKELOS, J.P.  
STEVEN W. FISHER  
JOHN M. LEVENTHAL  
PLUMMER E. LOTT, JJ.

2008-07030

DECISION & ORDER

Judith Rosenfeld, appellant, v Hudson Valley  
Stadium Corp., et al., defendants, Liscum, McCormack  
& VanVoorhis, et al., respondents.

(Index No. 7524/07)

Oshman & Mirisola, LLP, New York, N.Y. (David L. Kremen of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains, N.Y. (James F. O'Brien and Richard E. Lerner of counsel), for respondent Liscum, McCormack & VanVoorhis.

Rivkin Radler LLP, Uniondale, N.Y. (Evan H. Krinick, Cheryl F. Korman, and Harris J. Zakarin of counsel), for respondent Keystone Professional Baseball Club, d/b/a Hudson Valley Renegades.

McCabe & Mack LLP, Poughkeepsie, N.Y. (Kimberly Hunt Lee and Jodie Hanrahan of counsel), for respondent County of Dutchess.

Milber Makris Plousadis & Seiden, LLP, White Plains, N.Y. (Thomas H. Kukowski of counsel), for defendant Rohde, Soyka & Andrews Consulting Engineers, P.C.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Dutchess County (Sproat, J.), dated July 15, 2008, as granted that branch of the motion of the defendant Liscum, McCormack & VanVoorhis which was for summary judgment dismissing the complaint insofar as asserted against it, granted that branch of the motion of the defendant Keystone Professional Baseball Club, d/b/a

September 15, 2009

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ROSENFELD v HUDSON VALLEY STADIUM CORP.

Hudson Valley Renegades, which was pursuant to CPLR 3211(a)(1) and (7) to dismiss the plaintiff's complaint insofar as asserted against it, and granted that branch of the motion of the defendant County of Dutchess which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against it.

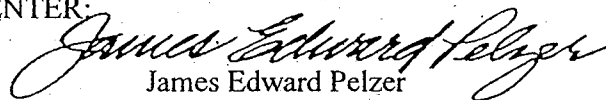
ORDERED that the order is affirmed insofar as appealed from, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

The plaintiff allegedly sustained injuries when she was struck by a foul ball while seated in a picnic area located within a minor league baseball stadium. She commenced this action against, among others, the defendants Liscum, McCormack & VanVoorhis (hereinafter LMV), the architect that designed the stadium, the County of Dutchess, which owns the stadium, and the Keystone Professional Baseball Club, d/b/a Hudson Valley Renegades (hereinafter Keystone), which leased the stadium from the County. LMV filed an answer and made a motion pursuant to CPLR 3212, inter alia, for summary judgment dismissing the complaint insofar as asserted against it. Keystone and the County made separate motions, among other things, pursuant to CPLR 3211(a)(7), inter alia, to dismiss the complaint insofar as asserted against them for failure to state a cause of action. The Supreme Court granted the three motions.

"[T]he proprietor of a ball park need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest" and, as long as such screening is "of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game," the proprietor "fulfills the duty of care imposed by law and, therefore, cannot be liable in negligence" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 331; see *Haymon v Pettit*, 9 NY3d 324, 328-330; *Davidoff v Metropolitan Baseball Club*, 61 NY2d 996, 997-998). Since the plaintiff did not allege that she was struck in the area behind home plate or that the screening was not sufficient to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, she has failed to state a cause of action (see *Akins v Glen Falls City School Dist.*, 53 NY2d at 331; *Ray v Hudson Val. Stadium Corp.*, 306 AD2d 264). Accordingly, the Supreme Court properly granted those branches of the motions of Keystone and the County which were to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(7). For the same reason, LMV established its entitlement to summary judgment dismissing the complaint insofar as asserted against it and, in opposition, the plaintiff has failed to raise a triable issue of fact (see *Procopio v Town of Saugerties*, 20 AD3d 860; *Wade-Keszey v Town of Niskayuna*, 4 AD3d 732; *Suarez v HBQVB Athletic Assn.*, 303 AD2d 396). Accordingly, the Supreme Court properly granted that branch of LMV's motion which was for summary judgment dismissing the complaint insofar as asserted against it.

SKELOS, J.P., FISHER, LEVENTHAL and LOTT, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court