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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 104120/2005
KRANTZ, ANOUK
vs
TSI EAST 41
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 1/11/07

MOTION SEQ. NO.

MOTION CAL. NO.

is motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

FILED
APR 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 17, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X

ANOUK KRANTZ,

Plaintiff,

-against-

Index No.
104120/05

TSI EAST 41 INC., TOWN SPORTS INTERNATIONAL INC. and NEW YORK SPORTS CLUBS,

Defendants,

X

JOAN A. MADDEN, J

In this action arising out of an alleged injury at a sports club, defendant TSI East 41 Inc. and Town Sports International, Inc., doing business as New York Sports Clubs, ("the defendants"), move for summary judgment dismissing the complaint against them on the grounds that (i) any cause of action has been waived based on the language in the sports club's membership agreement, (ii) recovery is barred by the doctrine of assumption of the risk, and (iii) defendants did not breach any duty of care. Plaintiff Anouk Krantz ("Krantz") opposes the motion, which is denied for the reasons below.

Background

In this action, Krantz seeks to recover damages for injuries she allegedly sustained on April 1, 2002, while taking part in a personal training session at the New York Sports Club, located at 633 Third Avenue, New York, New York 10017. Specifically, Krantz alleges, inter alia, that the defendants were negligent in permitting a personal trainer without adequate supervision, training and/or experience to train members of the club, including Krantz.

It is undisputed Krantz signed a membership agreement with New York Sports Clubs (NYSC) on February 24, 2002, which includes a section entitled "3.0 MEMBER RISK." In pertinent part the section reads "Members and members' guests should seek instruction in the use of all equipment, including fitness machines, free-weights, and cardio-aerobic equipment, before using the club(s) facilities." (Membership Agreement at 3). The section goes on to state:

> **3.2 Medical Disclaimer**. Each member has been informed and acknowledges that the club(s) have made no claims as to medical results which can or may be obtained through the use of the club(s) facilities. The club(s) have neither suggested nor will suggest any medical treatment to members. Only licensed professionals are qualified to give medical advice. Members are instructed not to act on the advice given by any unlicensed employee until such advice has been verified with a licensed professional or their own physician.
>
> **3.3 Activity Risk & Medical Recommendations.** Any strenuous athletic or physical activity involves certain risks. Members represent that they are aware of the possibility that accidents or injuries of any kind may be sustained by reason of or in connection with use of the facilities. Further, members represent that there are no medical or physical conditions that would prevent them from using any or all exercise facilities at the club(s), and that they have not been instructed by any physician to refrain from using such facilities. Physical examinations are recommended for all members and especially members who are elderly, pregnant, unaccustomed to physical exertion, or who have physical limitations . . . Before beginning any fitness program, each member is responsible for obtaining authorization, if appropriate, from his or her doctor . . .

Membership agreement at 3.

Between the time Krantz joined the gym on February 24, 2002, and the time of her injury on April 1, 2002, Krantz asserts that she used the gym "only on an occasional basis," which she explained as being less than ten times. (Krantz Affidavit ¶ 3). During her deposition, Krantz admitted to having some experience with sporting and athletic activity such as participation on an equestrian team when she was about fourteen years

old, occasionally using free weights at a hotel gym, and also briefly at another gym, but testified she had no experience with weight machines. In her affidavit, Krantz states that prior to her first training session on April 1, 2002, during which she was allegedly injured, her use of the NYSC facility was limited to using stationary bikes and elliptical machines for short periods.

NYSC assigned Denny Vazquez ("Vazquez"), a personal trainer who began his employment with NYSC on July 11, 2001, to supervise and conduct the training session. Before Krantz's training session, Vazquez completed "Foundations" training, which he described as a course offered by NYSC to certify its trainers which consisted of classroom work and practical tests.

Krantz testified at her deposition that Vazquez did not ask her to fill out a questionnaire regarding her physical condition or medical history before beginning the training session as per NYSC policy, and that her only discussion with Vazquez before the training session consisted of a brief conversation with Vazquez as to why she was pursuing personal training. Krantz did not inform Vazquez or NYSC of any prior medical conditions that would affect her ability to work out since she "didn't have any problems.[1]" (Krantz dep. at 33).

According to Krantz, the training session consisted of a short warm up, the use of certain machines and a series of abdominal exercises and push-ups, and that it was during

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[1]However, a letter written by Diego J. Herbstein, M.D. ("Dr. Herbstein"), (a neurologist who diagnosed Krantz with a disk herniation following an MRI around the time of April 3, 2002) contradicts Krantz's testimony insofar as it states that "[s]he [Kratnz] is a 26-year-old female who has had intermittent back problems for about two months. Two days ago she worked at a gym with a trainer and she woke up yesterday with severe back pain."

the abdominal exercises that her back pain began. Krantz testified that the abdominal work began with sit-ups, which exercise she had never done before and which Vasquez demonstrated to her.

Krantz testified she began to have lower back pain during her first set of sit-ups, and immediately informed Vazquez, who responded that such pain was normal as Krantz had not previously worked out her abdominals. Vazquez then instructed Krantz to complete two more sets of sit-ups, during which Krantz described her lower back pain as getting worse. Krantz testified that she told Vasquez of her complaints.

According to Krantz, Vazquez then instructed her to perform a second type of abdominal exercise. The second abdominal exercise was similar to the sit-ups, differing only in the respect that instead of bringing both shoulders to both knees, now Krantz would bring her opposite shoulder to her opposite knee. Krantz testified that she completed between three and four sets of this exercise.

After completing the second type of abdominal exercise, Krantz testified that at Vazquez's instruction, she performed a third type of abdominal exercise. Krantz indicates she could not remember the manner in which this third abdominal exercise was performed, or how many sets of this exercise she completed.

According to Krantz, Vazquez next instructed her, and explained to her how to perform push-ups, which she had never done before. After completing her first set of push-ups Krantz testified that she again complained to Vazquez about the pain she was experiencing in her lower back, and that Vazquez again responded by telling her the pain was normal. (Krantz dep. at 57).

Krantz testified that she next performed an exercise similar to the push-ups but was unable to recall any of the details about the exercise. As the training session neared completion, Vazquez brought Krantz to a stretching area and stretched with Krantz. Krantz testified that she once again complained to Vazquez about the lower back pain she was experiencing, and that Vazquez responded by explaining "[t]hat it was normal to feel this way after you had never worked out really in a gym and never done really any abs or stomach or back exercises, it is normal to feel that way, so I [Krantz] would be probably be sore for the next few days." (Krantz dep. at 60).

In support of their motion for summary judgment, defendants rely on Vazquez's affidavit. Contrary to Krantz's version of the facts, Vazquez states that before beginning the training session with Krantz, he had her complete a physical fitness workout questionnaire, indicating that she had no prior medical conditions.

Vazquez further states that he first instructed Krantz how to perform crunches, then after finishing his explanation and receiving a response from Krantz that she understood, he instructed her to complete three sets of exercise, each consisting of about ten to twelve repetitions. Vazquez's account differs most significantly from Krantz's insofar as Vasquez states that when Krantz told him she was experiencing pain in her back during the second set of sit-ups, he immediately told her to stop the exercise, and after a break proceeded with the session by having Krantz use the exercise machines to work out her legs. Vazquez also states that Krantz's first and only complaint about pain was during the second set of sit-ups.

Defendants' also rely on the expert affidavit of Annett Lang (Lang), who states that she has twenty-five years of experience in the physical fitness industry. Lang, who

reviewed the pleadings, Krantz's deposition, Vazquez's affidavit and the Foundations course materials, opines that "[t]he Foundations course provided by NYSC . . . meets the standards of the personal training industry. Based upon his training and experience, Mr. Vasquez [sic] adequately instructed, supervised, protected and safeguarded the Plaintiff during the personal training session on April 1, 2002." (Lang affidavit ¶ 8). Lang further opines that Vazquez responded appropriately and in accordance with industry standards in proceeding with the training session by moving on to other exercises.

In opposition to the motion, Krantz submits the expert affidavit of Kory Angelin (Angelin), who opines that Vazquez's particular conduct failed to conform to industry standards for various reasons, including his failure to end the exercises after Krantz complained of the pain she was experiencing.

In reply, the defendants argue that Krantz's affidavit should be disregarded by the court as it contains statements which contradict Krantz's sworn deposition testimony, and that the expert affidavit of Angelin should not be considered as it is conclusory and was offered after the filing of the Note of Issue.

Discussion

On a motion for summary judgment it is incumbent upon the moving party to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. . ." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has established this prima facie showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467, 470 (2nd Dept. 1991), citing Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

Waiver

In general, when a contract creates a release which removes liability from one party that would have otherwise existed at common law, the release "is enforceable '[w]here the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence." Blog v. Battery Park City Authority, 234 A.D.2d 99, 100 (1st Dept 1996) (quoting Lago v. Krollage, 78 NY2d 95, 99-100 (1991). However, General Obligations Law § 5-326 prohibits the enforcement of such agreements by owners and operators of pools, gymnasiums, places of amusement or recreation, and similar establishments. N.Y. General Obligations Law § 5-326 (McKinney 1976). The statutory exemption renders releases from liability made by these enumerated entities void as against public policy unless the entity can show that its facility is used for "purely instructional purposes," as opposed to recreational purposes. Bacchiocchi v. Ranch Parachute Club, Ltd., 273 AD2d 173, 174-175 (1st Dept 2000).

In the instant case, NYSC is a gymnasium used mainly for recreational purposes and, therefore, General Obligations Law § 5-326 applies. Accordingly, any language in the membership agreement which could be construed as a release absolving NYSC from liability is void as against public policy. N.Y. General Obligations Law § 5-326 (McKinney 1976).

In any event, the relevant language of the membership agreement fails to create a release since it contains no language clearly and explicitly absolving the defendants from

liability. Boll v. Sharp & Dohme, 281 AD 568, 570 (1st Dept 1953), aff'd 307 NY 646 (1954) ("Contracts exempting from liability for negligence are not favored by the law; they are strictly construed against the party relying on them, and *clear and explicit language* in the contract is required to absolve a person from such liability.") (emphasis added). Thus, section 3.0 advises members to seek instruction before using equipment, section 3.2 disclaims any medical results obtained through the use of the club and indicates that the club does not provide medical advice, and section 3.3 provides that members are aware that "[a]ny strenuous athletic or physical activity involves certain risks" and that the members "represent that they are aware of the possibility that accidents or injuries of any kind may be sustained by reasons of or in connection with use of the facilities" and that they have "no medical or physical conditions" which prevent their use of the facilities.

In contrast to the NYSC membership agreement, the cases cited by the defendants, which found a valid wavier releasing the defendant from liability all dealt with release agreements with language explicitly absolving them from liability. See e.g. Blog v. Battery Park City Authority, 234 AD2d at 101 (in which the release was titled "*release and waiver of liability, assumption of the risk and indemnity agreement (read carefully before signing*") (emphasis added). As the language in the NYSC membership agreement contains no such explicit language the document fails to create a waiver releasing the defendants from liability.

Assumption of the Risk

The defense of implied assumption of the risk holds that "[r]elieving an owner or operator of a sporting venue from liability is justified when the consenting participant is

aware of the risks; and voluntarily assumes the risks." Morgan v. State, 90 NY2d 471, 484 (1997) (citations omitted); Turcotte v. Fell, 68 NY2d 432, 439 (1986) ("As a general rule, participants properly may be held to have consented by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of participation"). This defense is based on the proposition that "by engaging in a sport or activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from the participation." Morgan, 90 NY2d at 484.

Here, summary judgment is not warranted based on defendants' position that Krantz assumed the risk of injury as Krantz's testimony raises issues of fact as to whether conduct of defendants' employee during the training session enhanced the risk of foreseeable injury. See Dowdy v. New York Health and Racquet Club, Inc., 223 AD2d 382 (1st Dept 1996) (summary judgment properly denied to health club where issues of fact existed as to whether the plaintiff assumed the risk of injury resulting from a slippery gym floor of a Karate class); Alexander v. Kendall Cent. School District, 221 AD2d 898 (4th Dept 1995) (expert testimony raised triable issue of fact regarding whether the placement of a scoring table near a wrestling mat created risks beyond those inherent in the sport of wrestling).

In Mathis v. New York Health Club, Inc., 261 AD2d 345, 345 (1st Dept 1999), a case similar to the instant one, the First Department held that despite the plaintiff's experience as a weight lifter, that the injuries plaintiff allegedly sustained during a personal training session were not known, apparent, or reasonably foreseeable as they resulted from the plaintiff being pushed beyond his abilities by a personal trainer.

Specifically, the court held that "factual issues are raised as to whether plaintiff's injury, which allegedly occurred in the course of the repetitions urged upon her by the defendant trainer, was the consequence of risks which, although inherent in weight training, were unreasonably augmented by culpable misjudgment as to plaintiff's capacity to bear so much weight. Id. (citations omitted).

Moreover, Feeney v. Manhattan Sports Club, Inc., 227 AD2d 293 (1st Dept 1996), on which defendants rely, does not require a different result. In Feeney, the court held that plaintiff could not justifiably rely on a statement by a personal trainer, who was aware that plaintiff had undergone shoulder surgery, that plaintiff "would have no problem" using free weights where plaintiff signed an agreement acknowledging that the neither the defendant health club nor its employees could diagnose a medical condition. Notably, unlike the instant case, there is no evidence that the defendant health club or its personnel augmented the risk to the plaintiff who voluntarily participated in the class during which he was injured.

Accordingly, the defense of assumption of the risk does not provide a basis for granting summary judgment in favor of the defendant. Turcotte, 68 NY2d 432, 437-438 (1986).

In reaching this conclusion, the court notes that contrary to defendants' position, statements in Krantz's affidavit may be considered by the court as they amplify rather than contradict Krantz's deposition testimony. See Bosshart v. Pyrce, 276 AD2d 314 (1st Dept 2000) (denying summary judgment when allegations by plaintiff in opposition to the motion though more detailed did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601 (2nd Dept 1995) (court did not err in considering

affidavit which did not contradict plaintiff's deposition testimony); compare Zylinski v. Carito Contracting, 268 AD2d 427 (2nd Dept 2000). Furthermore, as Krantz's version of the facts relating to the training session is sufficient to create triable issues of fact as to whether she assumed the risk of injury, the court need not reach whether it may consider the affidavit of Krantz's expert. Orsi v. County of Dutchess, 28 AD3d 728 (2nd Dept 2006).

Duty

It has been held that the duty owed by owners and operators of recreational or sporting facilities is less than the duty ordinarily applicable to landowners and is reduced to protecting against unassumed, concealed or unreasonably increased risks. Morgan v. State, 90 NY2d 471, 485 (1997). "In assessing whether an owner or operator of an athletic facility has violated a duty of care to participants who are injured on premises while engaged in voluntary sports activities, the applicable standard should include whether the conditions caused by the defendant's negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport." Id. at 472-473; but see Corrigan v. Musclemakers Inc., 258 A.D.2d 861, 862-863 (3rd Dept 1999) (holding that the lesser duty owed by owners and operators of athletic facilities did not apply to a defendant health club where the plaintiff was a member of the club, and was injured during a personal training session).

As explained above in accordance with the court's discussion of the assumption of the risk doctrine, there are triable issues of fact as to whether the conduct of defendant's employee increased the risk ordinarily associated with the exercises. Mathis v. New York Health Club, 261 AD2d 345.

Accordingly, summary judgment is not warranted as there exists no enforceable waiver absolving the defendants of liability, and triable issues of fact exist as to whether and to what extent Krantz had assumed the risks of injury, and whether defendants breached their duty of care owed to Krantz.

Conclusion

In view of the above, it is

ORDERED that the defendants' motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference will be held in Part 11, room 351, 60 Centre St., New York, NY on April 12, 2007 at 2:30 pm.

DATED April 12, 2007

J.S.C.