Pineda v Town Sports Intl., Inc.
2009 NY Slip Op 32582(U)
November 2, 2009
Supreme Court, New York County
Docket Number: 113493/2005
Judge: Michael D. Stallman
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SCANNED ON 11/5/2009

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

PART 7

Index Number : 113493/2005

PINEDA, ENRIQUE

VS.

TOWN SPORTS INTERNATIONAL

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 5/6/09

MOTION SEQ. NO.

MOTION CAL. NO. 72

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted as per the annexed Decision and Order filed herewith.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN

Dated: 11/2/09

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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ENRIQUE PINEDA,

Plaintiff,

Index No. 113493/05

-against-

TOWN SPORTS INTERNATIONAL, INC., NEW YORK SPORTS CLUB, NEW YORK SPORTS CLUB, INC. ABC CORP., a fictitious name representing a person or entity which owned, operated and/or does business as New York Sports Club and "CHRIS" DOE, last name being unknown, a servant agent or employee of the Defendants or NEW YORK SPORTS CLUB,

Defendants.

Decision and Order

FILED
NOV 05 2009
NEW YORK
COUNTY CLERK'S OFFICE

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HON. MICHAEL D. STALLMAN, J.:

In this negligence action, defendant Town Sports International, Inc. a/k/a New York Sports Club (Town Sports) moves for an order, pursuant to CPLR 3212, dismissing the complaint for failure to state a cause of action.

BACKGROUND

The following facts are not in dispute. On September 26, 2002, plaintiff Enrique Pineda joined a Town Sports fitness club located at 1657 Broadway (at 52nd Street), in the City, County, and State of New York (Premises). At the time plaintiff joined, he was 21 years old, overweight and out of shape. On September 30, 2002, plaintiff took advantage of a free session with a personal trainer to begin his fitness regimen. The session was conducted by Chris Simmons, a fitness instructor who was certified by the National Academy of Sports Medicine (NASM) in 1999. Prior to the session, plaintiff was asked whether he had any prior medical condition that would prevent him from working out, and whether he had any heart problems, to which he answered, "No." A staff member took his

blood pressure, which was normal, and he subsequently began his session. After a ten-minute warm-up on the treadmill and stationary bike, plaintiff moved onto the exercise machines. There, he began a set of upper and lower body exercises using weights varying from 20 to 80 pounds. The 50- minute session ended with 15-20 minutes of "cool down" exercises that included abdominal crunches, sit-ups, and maneuvers on a rowing machine. After the workout, plaintiff felt sluggish and tired. While at the gym, he did not ask for medical attention, because he did not think he needed it. After the session, plaintiff allegedly became ill. The day following his workout, plaintiff complained of flu-like symptoms, blood in his urine, and pain in his lower back. Two days later, plaintiff sought medical advice concerning his ailments. Plaintiff's physician, Dr. D'Souza, could not determine the nature of his injuries. D'Souza made arrangements for plaintiff to see a specialist at Lenox Hill Hospital (Lenox Hill). Following that exam, plaintiff was admitted to Lenox Hill where he was diagnosed as suffering from "rhabdomyolysis" and "sepis." Plaintiff spent a total of nine days at Lenox Hill. Plaintiff thereafter commenced this action alleging a single cause of action for negligence.

CONTENTIONS

Town Sports argues that it is entitled to summary judgment because: (1) plaintiff has failed to demonstrate any cause of action against the defendants, (2) plaintiff signed a waiver agreement releasing Town Sports from liability, (3) Town Sports is not liable under the assumption of the risk doctrine, and (4) no act or omission on Town Sports' behalf was the proximate cause of plaintiff's injuries.

Plaintiff contends that movant Town Sports is not entitled to summary judgment because: (1) the doctrine of assumption of the risk is inapplicable because plaintiff had no appreciation of the

dangers inherent in being overtrained, (2) pursuant to General Obligations Law § 5-326, the waiver contained in the membership agreement is unenforceable, and (3) defendants failed to exercise the standard duty of care in training plaintiff.

DISCUSSION

Under CPLR 3212 (b), a party can show entitlement to summary judgment, if, upon all the proof submitted, the cause of action shall be established sufficiently to warrant the court as a matter of law to direct judgment in favor of any party. To defeat summary judgment, the party opposing the motion must show that there is a material question of fact that requires a trial *(Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, Town Sports has demonstrated its entitlement to summary judgment, and plaintiff has failed to show that a material question of fact remains.

In support of its motion to dismiss, Town Sports has submitted evidence of a "release" signed by plaintiff whereby he acknowledged the possibility that "accidents or injuries of any kind may be sustained by reason of or in connection with use of the facilities" (Exhibit O to Affirmation of Kimberly Fandrey, dated January 14, 2009) (Fandrey Aff.).

Section 3.3 of the New York Sports Club Membership Agreement (Membership Agreement) provides:

> " 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 who are elderly, pregnant, unaccustomed to physical exertion, or who have physical limitations, a history of high blood pressure, heart problems, or other chronic illness. Before beginning any fitness program, each member is responsible for obtaining authorization, if appropriate, from his or her doctor. Members who are over thirty-five years of age, or have any Coronary Risk Factors, should have a full cardiovascular stress test administered by a doctor. Members shall not use the club (s) facilities in such a way as to endanger the health or safety of themselves or others"

(*id.*). Plaintiff further represented that he had no medical or physical condition that would prevent him from using the facility nor had he been instructed by any physician not to engage in weight training exercise (*id.*).

In opposition, plaintiff argues that the release he signed is void under General Obligations Law § 5-326. General Obligations Law § 5-326 provides:

> "Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable."

Here, the broad sweeping language of the release did not include language relieving defendant of any liability arising from its own negligence (*see Trummer v Niewisch*, 17 AD3d 349 [2d Dept, *lv denied* 5 NY3d 712 [2005]). Nevertheless, the release is enforceable to the extent of

[* 6]

insulating Town Sports from liability for injuries resulting from accidents or injuries of any kind which may be sustained by reason of or in connection with a member's use of the facilities (*id.* at 350).

Plaintiff also argues that the font size of the release was so minuscule, that the language was indecipherable. Moreover, plaintiff alleges that he has no recollection of seeing the second page of the membership agreement containing the release. As a general matter, "a party will not be excused from reading a document that he or she has signed, including a release from liability" (*Blog v Battery Park City Authority*, 234 AD2d 99,101 [1st Dept 1996]). The Membership Agreement was two pages long. The fact that plaintiff failed to read any of the language immediately preceding the place for his signature will not relieve him from being bound by the terms of the release (*id.*). Furthermore, the record demonstrates that plaintiff relied upon the language of the Membership Agreement to be true and accurate, and there is no evidence in plaintiff's testimony or in the record that suggests fraud or duress on the part of Town Sports.

Assumption of the Risk

The doctrine of primary assumption of the risk provides that a voluntary participant in a sporting or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport [or recreational activity] generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484, *rearg denied* 90 NY2d 936 [1997]; *Joseph v New York Racing Assn.*, 28 AD3d 105, 108 [2d Dept 2006]; *Koubek v Denis*, 21 AD3d 453 [2d Dept 2005]). The Court of Appeals and the Appellate Division have held that individuals are not restricted to playing organized sports for this doctrine to apply. It also applies to various types of unorganized sports as well as many forms of recreational activity (*see Marcano v City of New*

York, 99 NY2d 548, 549 [2002] ["plaintiff assumed the risk of injury when he swung on, and subsequently fell off, an exercise apparatus constructed over a concrete floor"]; *see Koubek v Denis*, 21 AD3d 453, *supra*); [plaintiff assumed the risk of injury when she climbed on a three-foot high trampoline located in a defendant's back-yard]); *see Yisrael v City of New York*, 38 AD3d 647, 648 [2d Dept 2007] [plaintiff assumed risk when jumping rope on concrete pavement).

A plaintiff who voluntarily participates in a recreational activity is deemed to consent to the apparent or reasonably foreseeable consequences of that activity. Moreover, it is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which the injury occurred, so long as he or she is aware of the potential for injury from the mechanism from which the injury results (*Joseph v New York Racing Assn.*, 28 AD3d 105, *supra)*. Therefore, "if the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty" (*id.*) (*internal quotation marks and citation omitted*).

It is uncontroverted that plaintiff was engaged in a recreational activity when he allegedly sustained an injury. Although in his affidavit plaintiff states that at the time of his injury he did not understand or comprehend the risks inherent in weight training because he had just begun his membership at Town Sports, in his examination before trial, plaintiff states that he had no problem using the machines, and although he felt a little tired and sore midway through his routine, he felt fine for the most part (page 67 of Exhibit D to Fandrey Aff.). The record further demonstrates that after a ten minute warm-up, plaintiff completed shoulder, chest, and arm exercises, before moving to machines that worked the lower body (*id.* at pages 57, 67).

In fact, throughout his testimony plaintiff maintains that he had no objection to the workout routine. He gladly followed the instructor's advice because he desired to have a similar physique

muscles, and that, as a consequence of his trainer's disregard, plaintiff sustained massive muscle damage resulting in a condition known as exertional rhabdomyolsis[1].

To prevail upon a negligence claim, plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation and damages (*Luina v Katharine Gibbs School N.Y., Inc.*, 37 AD3d 555, 556 [2d Dept 2007]). The existence of a legal duty presents a question of law for the court (*id.*).

Town Sports has demonstrated its entitlement to judgment as a matter of law by showing that plaintiff's injuries were not due to any negligence on their part, but rather were caused from an inherent, usual and ordinary risk associated with weight training. In opposition, plaintiff failed to raise a triable issue of fact as to defendant's negligence.

In opposition to this motion, plaintiff submitted the affirmation of Frederick C. Hatfield, Ph.D, the President and Co-Founder of the International Sports Sciences Association (ISSA). ISSA is an accredited organization for educating and certifying personal fitness trainers. Hatfield contends that exertional rhabdomyolsis is a probable and foreseeable injury in situations such as the one involving plaintiff (Exhibit 2 to Martuscello Aff.). Hatfield's comments are conclusory and unsubstantiated and the record is devoid of any corroborating documentation, testimony, or exhibits to support his contentions. Consequently, the lack of evidentiary proof in admissible form, coupled with the absence of any testimony from a medical professional to support Hatfield's claims, are

[1] Exertional rhabdomyolsis is a condition that occurs when a person, who has not exercised in a long time, has his or her muscles overworked causing the muscle to break down leaching protein and other muscle content into the blood. As a result, the kidneys are unable to handle the onslaught of waste and begin to shut down. The symptoms are extreme muscle pain, severe dehydration, dark urine, and if not immediately addressed, the condition will result in kidney failure (Affirmation of Mary M. Martuscello, dated March 13, 2009) (Martuscello Aff.).

insufficient to establish the existence of material issues of fact requiring trial (*Zuckerman v City of New York*, 49 NY2d 557, *supra*).

CONCLUSION AND ORDER

Accordingly, it is

ORDERED that Town Sports International Inc.'s motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 2, 2009
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
NOV 05 2009
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