

Zuckerman v City of New York
2011 NY Slip Op 30410(U)
February 18, 2011
Supreme Court, New York County
Docket Number: 105044/2010
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 105044/2010
ZUCKERMAN, JONATHAN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS
CAL # 148

INDEX NO. _____
MOTION DATE 1/25/11
MOTION SEQ. NO. _____
MOTION CAL. NO. 148

this motion to/for _____

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

PAPERS NUMBERED
1
2,3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

FEB 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/18/11

BJ
BARBARA JAFFE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION FEB 18 2011 NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----x
JONATHAN ZUCKERMAN,

Plaintiff,

-against-

Index No. 105044/10

Motion Date: 1/25/10

Motion Seq. Nos.: 001,

Calendar Nos.: 148,

DECISION & ORDER

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,
NEW YORK ROAD RUNNERS, INC. and ROAD
ROAD RUNNERS CLUB OF AMERICA,

Defendants.
-----x

BARBARA JAFFE, JSC:

For plaintiff:

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FILED
FEB 23 2011
NEW YORK
COUNTY CLERK'S OFFICE
For defendant City:
Anthony Bila, ACC
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Corporation Counsel
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By notice of motion dated August 20, 2010, defendants New York Road Runners, Inc. and Road Runners Club of America (collectively, NYRR) move pursuant to CPLR 3212 for an order summarily dismissing the complaint, and defendant Road Runners Club of America, Inc. (RRCA) moves pursuant to CPLR 3211(c) for an order dismissing the complaint. Plaintiff opposes as to NYRR, and does not oppose as to RRCA. Defendants City and New York City Department of Recreation (collectively, City) move separately pursuant to CPLR 3025(c) for an order granting leave to amend their answer *nunc pro tunc* to add an affirmative defense, and pursuant to CPLR 3211(a)(5) and (a)(7) for an order dismissing the complaint. Plaintiff opposes City's motion.

I. FACTS

NYRR conducts more than 100 events a year, including the Manhattan Half Marathon (Half Marathon). (Affirmation of Kenneth L. Winell, Esq., dated Aug. 20, 2010 [Winell Aff.], Exh. D). Participants in the Half Marathon register through NYRR's website which contains the following provision:

I know that participating in NYRR events is a potentially hazardous activity. I agree not to enter and participate unless I am medically able and properly trained. I agree to abide by any decision of an event official relative to my ability to safely complete the event. *I am voluntarily entering and assume all risks associated with participating in the event, including, but not limited to, falls, contact with other participants, spectators or others, the effect of the weather, including heat and/or humidity, traffic and the conditions of the course, all such risks being known and appreciated by me.* I grant to the Medical Director of this event and his designee access to my medical records and physicians, as well as other information, relating to medical care that may be administered to me as a result of my participation in this event. Having read this Waiver and knowing these facts, and in consideration of your acceptance of this application, I, for myself and anyone entitled to act of my behalf, *waive and release New York Road Runners Club, Inc., Road Runners Club of America, USA Track & Field, the City of New York and its agencies and departments, the Metropolitan Athletics Congress, and all sponsors, and their representatives and successors, from present and future claims and liabilities of any kind, known or unknown, arising out of my participation in this event or related activities, even though such claim or liability may arise out of negligence or fault on the part of the foregoing persons or entities.* I grant permission to the foregoing persons and entities to use or authorize others to use any photographs, motions pictures, recordings, or any other record of my participation in this event or related activities for any legitimate purpose without remuneration.

(*Id.*, Exhs. C, F [emphases added]). The registrant must then either select "I accept and agree to the above waiver," or "I do not accept and do not agree to the above waiver." (*Id.*) If the registrant selects the latter, he cannot register. (*Id.*, Exh. C).

Plaintiff, a member of NYRR, is an experienced runner, having participated in over 100 NYRR events. (Affirmation of Frank Taubner, Esq., dated Oct. 11, 2010 [Taubner Aff.]). He registered for the 2009 Half Marathon online approximately one week earlier, and recalls seeing

a waiver as part of the registration procedure. (*Id.*).

At approximately 8:00 a.m. on January 25, 2009, plaintiff arrived at the starting area of the Half Marathon in Central Park. (*Id.*). Snow banks flanked the course's pathways. (*Id.*). An NYRR official orally instructed the participants that if they had to stop for any reason, they were to exit the course and proceed to the shoulder of the roadway so as not to block other participants. (*Id.*). While running, plaintiff's shoe became untied and seeing no designated exit areas, he stepped off the path as instructed and proceeded to what he believed to be a patch of dirt. (*Id.*). There, he slipped on ice that he had not seen, and fell backward, seriously injuring himself. (*Id.*).

II. NYRR'S MOTION

A. Contentions

NYRR contends that it is entitled to summary dismissal as plaintiff executed a valid and enforceable waiver of liability, and because it did not organize, supervise or control the half marathon. (Memorandum of Law in Support of Defendants' Motion to Dismiss, dated Aug. 2010 [NYRR Mem.]). In support, it annexes the affidavits of three of its employees, (*id.*, Exhs. C, D, E), a copy of the waiver (*id.*, Exh. F), and proof of plaintiff's registration (*id.*, Exh. F).

Plaintiff argues that in light of defendants' gross negligence and his compliance with the instructions given at the commencement of the half marathon that he exit the course if he needed to stop, the waiver is unenforceable. He also denies having assumed the risk of slipping on ice when exiting the course. (Taubner Aff.).

In reply, NYRR asserts that plaintiff's injury is encompassed by the waiver and that plaintiff has failed to establish that NYRR's conduct rises to the level of gross negligence. (Reply

Affirmation of Deborah Peters Jordan , Esq., dated Nov. 18, 2010).

B. Analysis

Contractual agreements to waive liability for a party's negligence, although frowned upon, are generally enforceable where not expressly prohibited by law. (*Gross v Sweet*, 49 NY2d 102, 105 [1979]). Language relieving one from liability must be unmistakable and easily understood. (*Id.* at 107). Agreements to indemnify for gross negligence or willful behavior, however, are void. (*Id.* at 106). "Gross negligence, when invoked to pierce an agreed-upon limitation of liability . . . must smack of intentional wrongdoing . . . that evinces a reckless indifference to the rights of others." (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554 [1992]; *Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 77 AD3d 431, 433 [1st Dept 2010]).

As plaintiff does not deny that he agreed to the waiver or that it is generally enforceable and not void as a matter of law or public policy, I need only address whether there exist factual issues as to whether NYRR was grossly negligent and whether the accident was outside the scope of the waiver. That the waiver references the "conditions of the course" does not remove plaintiff's accident from its scope as the waiver extends to "all risks associated with participating in the event, including, but not limited to, falls, contact with other participants, spectators or others, the effect of the weather, including heat and/or humidity, traffic and the conditions of the course." The breadth of the provision permits the inference that plaintiff was aware that by executing the waiver, he assumed the risks of running through Central Park in the winter, where the presence of ice is reasonably anticipated, which risks are reasonably deemed part of the activity, and not just of the course. (*See Bufano v Nat. Inline Roller Hockey Assn.*, 272 AD2d 359

[2d Dept 2000] [plaintiff assumed risk of injury during fight while playing inline roller hockey]). Nothing in the provision precludes its application to accidents incurred by a participant who momentarily steps off the course.

And, although plaintiff acted in compliance with defendants' instruction to leave the race course if he needed to stop, such an instruction constitutes a sensible means of protecting participants from colliding with one another, and neither invites nor would naturally lead to an accident sufficient to constitute reckless indifference. Consequently, an inference of gross negligence is not reasonably drawn therefrom. (*See Lemoine v Cornell Univ.*, 2 AD3d 1017 [3d Dept 2003], *lv denied* 2 NY3d 701 [2005] [plaintiff fell from wall after rock-climbing instructor told her where to place her hands and feet; waiver of liability enforced; not gross negligence]). And, assuming that NYRR had a duty to keep the park free of slippery substances, the failure to do so constitutes ordinary negligence at best.

Given this result, I need not address RRCA's alternative argument that it did not organize, supervise, or control the half marathon.

III. CITY'S MOTION

A. Contentions

City argues that it should be granted leave to amend its answer to add an affirmative defense that the action is barred by plaintiff's execution of a written release. It observes that leave is freely granted, that plaintiff will not suffer no prejudice, and that, although this motion was served after joinder of issue, it is procedurally proper as City moves pursuant to CPLR 3211(a)(7) as well as (a)(5). (Affirmation of Anthony Bila, ACC, dated Sept. 29, 2010).

Plaintiff asserts that City is not entitled to dismissal given the factual issues as to City's

gross negligence and whether plaintiff's accident is encompassed by the waiver, and that the motion to amend should be denied because the affirmative defense is meritless and prejudicial. (Taubner Aff.).

In reply, City maintains that as it moves only pursuant to CPLR 3211, the existence of factual issues is immaterial. It contends that the amendment is meritorious and will not prejudice plaintiff, and that plaintiff's accident falls squarely within the scope of the waiver and that there is no evidence of gross negligence. (Reply Affirmation of Anthony Bila, ACC, dated Nov. 18, 2010).

B. Analysis

Although objections pursuant to CPLR 3211(a)(5) are waived if not invoked in the movant's answer (CPLR 3211[e]), a motion to amend an answer may be granted in order that the affirmative defense be addressed on the merits. (Siegel, NY Prac § 274, at 435 [3d ed]; *Marks v Macchiarola*, 221 AD2d 217 [1st Dept 1995]). Thus, and absent any discernible prejudice given plaintiff's having addressed the substance of the motion above (II.A.), leave is granted. (*Cf Young v GSL Enter., Inc.*, 170 AD2d 401 [1st Dept 1991] [Supreme Court properly addressed merits of proposed affirmative defense in motion to amend]; *Scheff v St. John's Episcopal Hosp.*, 115 AD2d 532, 534 [2d Dept 1985] [same]).

Although plaintiff executed the waiver on NYRR's website, City was expressly included therein. (*See Brookner v New York Roadrunners Club, Inc.*, 51 AD3d 841 [2d Dept 2008], *lv denied* 11 NY3d 704 [upholding waiver against NYRR and City]; *cf Tedesco v Triborough Bridge and Tunnel Auth.*, 250 AD2d 758 [2d Dept 1998] [bicycle tour waiver included party not specifically named in release]). Moreover, the waiver of liability is a release within the meaning

of CPLR 3211(a)(5). (See *Brookner*, 51 AD3d 841).

Having already determined that the waiver is enforceable as against plaintiff, and as NYRR's conduct was not grossly negligent, the same result is reached as to City.

IV. CONCLUSION

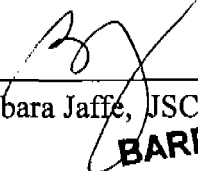
Accordingly, it is hereby

ORDERED, that the motion for summary judgment by New York Road Runners, Inc. and Road Runners Club of America is granted, and the complaint dismissed against them with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that the motion by City of New York and New York City Department of Parks and Recreation for leave to serve an amended answer is granted, and the annexed answer is deemed timely served, *nunc pro tunc*; and it is further

ORDERED, that the motion for dismissal as against City of New York and New York City Department of Parks and Recreation is granted, and the complaint dismissed against them with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs.

This constitutes the decision and order of the court.


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: February 18, 2011
New York, New York

FEB 13 2011

FILED

FEB 23 2011

NEW YORK
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