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SHORT FORM ORDER

INDEX No. 11-20800
CAL. No. 13-01778OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 3-11-14 (001)
MOTION DATE 5-6-14 (002)
ADJ. DATE 6-24-14
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

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JANE MYERS and DANIEL MYERS,

Plaintiffs,

- against -

JOHN DOE a/k/a ISLANDIA FARMS,

Defendant.

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VESSA & WILENSKY, PC
Attorney for Plaintiffs
626 Reckson Plaza
Uniondale, New York 11556

FARBER BROCKS & ZANE, LLP
Attorney for Defendant
51 Charles Street, 2nd Floor
Mineola, New York 11501

Upon the following papers numbered 1 to 24 read on these motions for summary judgment and dismissal pursuant to 3211(b): Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 20; Answering Affidavits and supporting papers 21 - 22; Replying Affidavits and supporting papers 23 - 24; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Islandia Farms for summary judgment dismissing the complaint against it is granted; and it is

ORDERED that the cross motion by plaintiffs for dismissal of defendant's affirmative defenses pursuant to CPLR 3211(b) is denied, as moot.

Plaintiff Jane Myers commenced to recover damages for personal injuries she allegedly sustained on May 9, 2011, when she was thrown from a horse during a riding lesson held at Islandia Farms, an equestrian facility located at 1239 Old Nichol's Road, Islandia, New York. The accident allegedly occurred when plaintiff, at the behest of her trainer, prompted the horse to increase its speed to a canter. Shortly after the horse began to canter, it allegedly bucked, kicked its heel out, and threw plaintiff to the ground by thrusting its head downward. By her amended complaint, plaintiff alleges, inter alia, that defendant was aware of the horse's vicious propensities, that its instructor was negligent in failing to provide her proper instruction to safeguard against the accident, and that she sustained pecuniary and economic losses as a result of her injuries. The complaint also asserts a derivative claim on behalf of

plaintiff's husband, Daniel Myers, for loss of services and affections. Defendant joined issue on July 27, 2011. In its answer to the amended complaint, defendant denies plaintiff's claims and asserts affirmative defenses based on, among other things, assumption of the risk, joint and several liability, failure to mitigate damages, and enforcement of a waiver and release form executed by plaintiff in connection with the riding lesson.

Defendant now moves for summary judgment dismissing the complaint on the grounds the action is barred by the general release plaintiff signed in connection with the riding lessons, that she assumed the risk of injury by engaging in the sport of horseback riding, and that it cannot be held liable for the alleged negligence of the trainer, since she was an independent contractor at the time of the accident. In support of the motion, defendant submits, inter alia, copies of the pleadings, transcripts of the parties' deposition testimony, and an expert affidavit by Rita Timpanaro, which asserts that plaintiff's own negligence in failing to keep her heels down as instructed by the trainer precipitated the accident. Plaintiff opposes the motion, arguing triable issues exists as to whether defendant had prior knowledge of the horse's vicious propensities, and, if so, whether its continued use of the horse for riding lessons unreasonably heightened the risk of injury. Plaintiff also cross-moves for dismissal of the remainder of defendant's affirmative defenses. Specifically, plaintiff asserts that General Obligations Law §5-326 prohibits any defense based on the execution of a general release where, as here, the facility is used for mixed recreational and instructional purposes. Plaintiff further contends that there is no basis for defendant's affirmative defenses based on joint and several liability and failure to mitigate damages, as no other defendants were named in the complaint and she sought medical attention immediately after the accident.

At her examination before trial, plaintiff testified that she had ridden the same horse, known as "Fred," on two other occasions prior to her accident. Plaintiff testified that she had no difficulties preparing or grooming Fred before the lesson began, and that she had ridden him for approximately 45 minutes without any difficulties before the accident occurred. Plaintiff testified that she had cantered on other occasions, and that, like those previous occasions, she squeezed the horse's girth, tightened the reins, and squared her shoulders in preparation of the maneuver. According to plaintiff, the accident occurred seconds after the horse began to canter when it bucked, put its head down and pulled her head over heels, over its left shoulder. Plaintiff testified that she did not know what caused Fred to buck, and that she could not tell whether her body was straight up or if she was leaning forward when he pulled her over his shoulder. She further testified that after the accident, the trainer told her that Fred had been "losing his mind all week," and that someone else had fallen off him earlier that day or week.

At her examination before trial, defendant's principal, Jane Schmidt, testified that in addition to horse riding lessons, her facility offered, among other things, pony rides, face painting, picnics, and birthday celebrations. Schmidt testified that plaintiff specifically pre-paid for a number of riding lessons at the facility, and that plaintiff personally chose Jacqueline McMahon as her trainer. Schmidt testified that she had no knowledge of any prior incident where Fred was spooked, or where he "bucked" and threw someone to the ground, and that she considered Fred a "beginner" or "intermediate rider" training horse. She further testified that she did not require the horse be taken out of rotation after the accident because the trainer had informed her that the accident was not Fred's fault.

At her examination before trial, Jacqueline McMahon testified that she was working as a part-time trainer with Islandia Farms at the time of the accident. She testified that she previously worked at another equestrian facility, and had approximately eight years experience working with horses. McMahon testified that she began working with plaintiff in the late summer of 2009, and that she considered plaintiff to be an intermediate rider at the time of the accident, since she was competent at walking, trotting and cantering horses. McMahon testified that Fred was a relatively even-tempered horse, and she considered him to be an appropriate lesson horse for intermediate riders such as plaintiff. McMahon recalled another incident during May 2011 when plaintiff mistakenly pulled her heels up and fell off another horse known as "Remy." McMahon testified that while it was normal for even the "best" horse to get spooked, she did not recall having any conversations where she advised the owners of the facility that their horses, including Fred, had any behavioral problems. According to McMahon, the accident occurred as plaintiff was doing one final canter at the end of the lesson, when she mistakenly brought her heels up and fell over the left side of the horse's neck after losing her balance. She further testified that plaintiff made the same mistake of bring her heels up while riding when she fell off "Remy" earlier that year. McMahon testified that she had never seen Fred engage in any bucking movements prior to the fall, and that she did not make any comments to plaintiff about whether the horse had been displaying erratic behavior earlier that week prior to the accident.

Defendant's submissions also include a copy of a general release signed by plaintiff in connection with her riding lessons. The release states, in pertinent part, as follows:

> I assume all the risk and danger incidental to horseback riding, whether occurring prior to, during or subsequent to actual horseback riding, including specifically (but not exclusively) the danger of being injured from falling from a horse or being kicked by a horse and agree that Islandia Farms and any other owners are not liable for any injuries or damages resulting from these or any other causes

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

General Obligations Law § 5-326 generally prohibits an owner or operator of a recreational facility from enforcing a release given to an individual who has paid it a fee or other compensation for use of the facility (*see* ***Boateng v Motorcycle Safety School, Inc.***, 51 AD3d 702, 858 NYS2d 312 [2d Dept 2008]; ***Petrie v Bridgehampton Rd. Races Corp.***, 248 AD2d 605, 670 NYS2d 504 [1998]). The

statute provides as follows:

> 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.

"The legislative intent of the statute is to prevent amusement parks and recreational facilities from enforcing exculpatory clauses printed on admission tickets or membership applications because the public is either unaware of them or not cognizant of their effect" (***Lemoine v Cornell Univ.***, 2 AD3d 1017, 1018, 769 NYS2d 313 [3d Dept 2003]; *see* ***Lago v Krollage***, 78 NY2d 95, 571 NYS2d 689 [1991]; ***Thiele v Oakland Val., Inc.***, 72 AD3d 803, 898 NYS2d 481 [2d Dept2010]; ***Boateng v Motorcycle Safety School, Inc.***, *supra*; ***Fazzinga v Westchester Track Club***, 48 AD3d 410, 851 NYS2d 278 [2d Dept 2008]; ***Millan v Brown***, 295 AD2d 409, 411, 743 NYS2d 539 [2002] *compare* ***Meier v Ma-Do Bars***, 106 AD2d 143, 145, 484 NYS2d 719 [1985]). However, facilities that are places of instruction and training rather than "amusement or recreation" have been found to be outside the scope of the statute (*see* ***Lago v Krollage***, *supra*; ***Lemoine v Cornell Univ.***, *supra*). In determining the statute's application in mixed-use facilities, courts have focused on whether the facility provides instruction only as an "ancillary" function (*see* ***Scrivener v Sky's the Limit***, 68 F. Supp. 2d 277 [SDNY1999]; ***Chieco v Paramarketing, Inc.***, 228 AD2d 462, 643 NYS2d 668 [2d Dept 1996]; ***Baschuk v Diver's Way Scuba, Inc.***, 209 AD2d 369, 370, 618 NYS2d 428 [2d Dept 1994]), or whether a plaintiff was at the facility for instruction rather than recreational purposes (*see* ***Boateng v Motorcycle Safety School, Inc.***, *supra*; ***Fazzinga v Westchester Track Club***, *supra*; ***Lemoine v Cornell Univ.***, *supra*).

Moreover, a plaintiff who voluntarily participates in a sporting or recreational event generally is held to have consented to those commonly-appreciated risks that are inherent in, and arise out of, participation in the sport (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Paone v County of Suffolk***, 251 AD2d 563, 674 NYS2d 761 [2d Dept 1998]), including those injury-causing events which are known, apparent, or reasonably foreseeable (*see* ***Rosenbaum v Bayis Ne'Emon Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]; ***Colucci v Nansen Park, Inc.***, 226 AD2d 336, 640 NYS2d 578 [2d Dept 1996]). It is not necessary for application of the assumption of the risk doctrine that the injured plaintiff have foreseen the exact manner in which his or her injury occurred; rather, what is required is an awareness of the injury-causing potential of the mechanism from which the injury results (***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]). Further, a

plaintiff's awareness of risk is to be assessed against the background of the skill and experience of the particular plaintiff (*see* ***Maddox v City of New York***, *supra*; ***Gahan v Mineola Union Free School Dist.***, 241 AD2d 439, 660 NYS2d 144 [2d Dept 1997]).

Here, defendant established its prima facie entitlement to summary judgment by demonstrating that plaintiff's claims against it were barred by the release she signed before participating in the riding lessons (*see* ***Lago v Krollage***, *supra*; ***Thiele v Oakland Val., Inc.***, *supra*; ***Lemoine v Cornell Univ.***, *supra*; ***Chieco v Paramarketing, Inc.***, *supra*). The language of the release unambiguously expresses the intention of the parties to relieve defendant of liability for injuries that occurred during horseback riding at the facility, including "the danger of being injured from falling from a horse." The agreement also unequivocally recites that plaintiff "assume[s] all the risk and danger incidental to horseback riding." Defendant further established that plaintiff, an intermediate rider at the time of the accident, assumed the risk of injury by voluntarily participating in the riding lesson (*see* ***Stanislav v Papp***, 78 AD3d 556, 911 NYS2d 60 [1st Dept 2010] [holding that as a person with experience riding horses, plaintiff was aware that the risk of falling from a horse was inherent in the sport]; ***Dalton v Adirondack Saddle Tours, Inc.***, 40 AD3d 1169, 836 NYS2d 303 [3d Dept 2007][holding that being thrown or falling was an inherent risk in sporting events involving horses]; ***Eslin v County of Suffolk***, 18 AD3d 698, 795 NYS2d 349 [2d Dept 2005][holding that the risk of being thrown from a horse or a horse acting in an unintended manner are dangers inherent in the sport of horseback riding]; *compare* ***Maher v Wood Hollow Equestrian Ctr., LLC***, 85 AD3d 876, 925 NYS2d 838 [2d Dept 2011]).

In opposition, plaintiff failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Contrary to plaintiff's assertion regarding the unenforceability of the general release, the Court finds that General Obligations Law § 5-326 is inapplicable under the circumstances of this case, as it is undisputed that plaintiff was at defendant's premises for the purpose of taking an instructional riding lesson at the time of her accident. Although the facility offered other recreational services, the adduced evidence indicates that instructional riding lessons was its primary activity. Moreover, plaintiff specifically pre-paid for riding lessons, and, unlike a mere recreational user of the facility, she was presented with and signed a separate release in connection with the lessons (*see* ***Lago v Krollage***, *supra*; ***Scrivener v Sky's the Limit***, *supra*; ***Thiele v Oakland Val., Inc.***, *supra*; ***Lemoine v Cornell Univ.***, *supra*; ***Chieco v Paramarketing, Inc.***, *supra*; *compare* ***Filson v Cold River Trail Rides***, 242 AD2d 775, 661 NYS2d 841 [3d Dept 1997]; ***Brancati v Bar-U-Farm, Inc.***, 183 AD2d 1027, 583 NYS2d 660 [3d Dept 1992]).

Plaintiff also failed to raise a triable issue as to whether defendant concealed or unreasonably increased her risk of injury by failing to inform her of Fred's alleged vicious propensities, as the alleged statement by her trainer that Fred had been losing his mind and recently injured another student constitutes hearsay, which, by itself, is insufficient to defeat defendant's prima facie showing (*see* ***Sprotte v Fahey***, 95 AD3d 1103, 944 NYS2d 612 [2d Dept 2012]; ***Mallen v Farmingdale Lanes, LLC***, 89 AD3d 996, 933 NYS2d 338 [2d Dept 2011]; ***Stock v Otis El. Co.***, 52 AD3d 816, 861 NYS2d 722 [2d Dept 2008]). It is noted that normal or typical equine behavior is insufficient to establish a vicious

propensity (*see* ***Collier v Zambito***, 1 NY3d 444,775 NYS2d 205 [2004]; ***Carey v Schwab***, 108 AD3d 976, 969 NYS2d 619 [3d Dept 2013]; ***Bloomer v Shauger***, 94 AD3d 1273, 942 NYS2d 277 [3d Dept 2012]), and no other evidence has been adduced to show that defendant knew or should have known that Fred exhibited ferocious proclivities, or that defendant concealed its knowledge of such behavior from plaintiff (*cf* ***Haggerty v Zelnick***, 68 AD3d 721, 888 NYS2d 903 [2d Dept 2009]; ***Deak v Bach Farms, LLC***, 34 AD3d 1212, 825 NYS2d 852 [4th Dept 2006]). Furthermore, the affidavit by plaintiff's purported expert, which was speculative and conclusory, is insufficient to defeat summary judgment (*see* ***Fotiatis v Cambridge Hall Tenants Corp.***, 70 AD3d 631, 632, 895 NYS2d 456 [2d Dept 2010]; ***Pappas v Cherry Cr., Inc.***, 66 AD3d 658, 659, 888 NYS2d 511 [2d Dept 2009]; ***Rivas-Chirino v Wildlife Conservation Socy.***, 64 AD3d 556, 558, 883 NYS2d 552 [2d Dept 2009]). Accordingly, defendant's motion for summary judgment dismissing the complaint against it is granted.

In light of the foregoing, the cross motion by plaintiff for an order, pursuant to CPLR 3211(b), dismissing defendant's affirmative defenses is denied, as moot.

Dated: SEP 15 2014

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**