SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

URSULA KARVEN-VERES,

Plaintiff,

-against-

SILVER SPRINGS FARM, LLC and WINLEY FARM, LLC,

Defendants.

WINLEY FARM, LLC

Third-Party Plaintiff,

-against-

VAN WORMER INTERNATIONAL LLC,

Third-Party Defendant.

DECISION AND ORDER

Index No. 50317/17

The following papers were read on defendants' motions for summary judgment and plaintiff's motion for partial summary judgment:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - H
MEMORANDUM OF LAW IN SUPPORT
REPLY MEMORANDUM OF LAW
REPLY AFFIRMATION

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - Z; AA

MEMORANDUM OF LAW IN OPPOSITION

REPLY AFFIRMATION

MOTION FOR PARTIAL SUMMARY JUDGMENT
AFFIRMATION IN SUPPORT
EXHIBITS A - T
MEMORANDUM OF LAW IN SUPPORT

AFFIDAVIT IN OPPOSITION
EXHIBIT A
AFFIRMATION IN OPPOSITION
EXHIBITS A - G
AFFIRMATION IN OPPOSITION
EXHIBITS A - E
MEMORANDUM OF LAW IN OPPOSITION
AFFIRMATION IN OPPOSITION
EXHIBITS A - F

REPLY MEMORANDUM OF LAW

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - S

AFFIRMATION IN OPPOSITION
EXHIBIT A
MEMORANDUM OF LAW IN OPPOSITION
EXHIBITS U - W
AFFIRMATION IN OPPOSITION

REPLY AFFIRMATION

Plaintiff commenced this action seeking damages for injuries allegedly sustained when she fell off a horse while preparing for the filming of a German movie produced by defendant Van Wormer International, LLC ("Van Wormer"). Defendant Silver Springs Farm, LLC ("Silver Springs") owned the horse and boarded it at Winley Farm, a property owned by defendant Winley Farm, LLC ("Winley Farm"). Plaintiff has asserted causes of action for negligence and gross-negligence against Winley Farm and Silver Springs. Winley Farm cross-claimed against Silver Springs for indemnification, contribution and commenced a third-party action against Van Wormer. Defendants and the third-party defendant move for summary judgment on the plaintiff's direct claims. Plaintiff moves for partial summary judgment to dismiss affirmative defenses.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of triable issues of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof

submitted by the parties in favor of the opponent to the motion." Yelder v. Walters, 64 AD3d 762, 767 (2nd Dep't 2009).

Plaintiff, a German actress, testified at her deposition that the director of the movie told her that she was going to appear on horseback starting and stopping a horse. In anticipation of the filming and as part of scouting suitable horses and locations, representatives from Van Wormer went with plaintiff to Winley Farm on August 11, 2015. Plaintiff's representatives had previously advised the farm manager at Winley Farm that plaintiff had horseback riding experience. Prior to their arrival, two horses Silver Springs boarded at the farm were prepared for the test ride. Plaintiff and her entourage arrived approximately an hour late for the scheduled test ride. During that period one of the horses became restless and a representative and part-owner of Silver Springs determined that plaintiff would be better served riding "Dior," whom he described as relaxed, and compliant with no obedience issues. Upon arrival, Plaintiff immediately entered the riding ring and began petting the horses. She advised the Silver Springs representative that she was a "very proficient rider." Plaintiff then mounted Dior using a mounting block and on her own initiative began to walk the horse clockwise in the ring. She made appropriate verbal commands and squeezed Dior with her legs causing him to trot. Plaintiff subsequently became more aggressive through her squeezing and clucking and brought the horse to a canter before appropriately stopping him by pulling back on the reins. Plaintiff then indicated that she wanted to keep cantering in the opposite direction. She brought Dior from a walk directly to a canter but subsequently lost her balance and fell off the horse.

The doctrine of primary assumption of risk provides that "by engaging in a sport or recreational activity, a participate consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." Morgan v. State of New York, 90 NY2d 471, 484 (1997). Application of the doctrine of assumption of risk does not require that an injured plaintiff foresee the exact manner in which the injury occurred "so long as he or she is aware of the potential for injury of the mechanism from which the injury results." Joseph v. New York Racing Ass'n, Inc., 28 AD3d 105, 108 (2nd Dept 2006). Awareness of the risk must be assessed against the background, skill and experience of a particular plaintiff, and participants in an activity are not deemed to have assumed the risks of reckless conduct or concealed or unreasonably increased risks. Id. However, if the risks of the activity are fully comprehended or perfectly obvious, a plaintiff has consented to them and the defendant has performed its duty by making the conditions as they appear to be. Id. at 108. The risk of falling from a horse is a risk inherent in the sport of horseback riding. See Kirkland v. Hall, 38 AD3d 497, 498 (2nd Dept 2007), Eslin v. Cty. of Suffolk, 18 AD3d 698 (2nd Dept 2005).

The record as a whole establishes that plaintiff had ample horseback riding experience to make her aware of the inherent danger of being thrown from a horse or a horse acting in an unintended manner. Plaintiff testified at her deposition that she was given instructions and first rode a horse while preparing for a movie in the early 1990s. In 2014 she rode horses on two separate occasions as part of a group ride trail while living in California. Her husband at the time owned two horses which were stabled at her house in Burbank, California. Her ex-husband rode the horses

approximately three times a week, and plaintiff rode the horses on approximately three occasions. After the couple moved to Malibu, California, they lived within walking distance of a riding school for children. Plaintiff's children took riding lessons at the school, and on approximately five occasions she rode horses there on group trail rides. Plaintiff took more substantial horseback riding lessons in preparation for a 2014 film she made in Spain. Her deposition testimony about multiple lessons she took prior to filming reveals that she was taught various aspects of good horsemanship. Video clips from the film show that she knew how to ride a horse. In one particular scene, she is riding a horse as it runs down a beach and manages to stay on the horse after it stumbled. In addition to this evidence of her prior riding experience, Winley Farm and Silver Springs employees testified that plaintiff essentially initiated the riding upon arriving at Winley Farm on the day of her fall. Their unrefuted testimony was that Plaintiff eagerly entered the riding ring, voluntarily interacted with the horses and appeared comfortable mounting and riding Dior. The foregoing demonstrates as a matter of law that Plaintiff was a sufficiently experienced horseback rider to have foreseen the possibility of falling off a horse. Plaintiff chose to bring the horse to a canter despite her deposition testimony that the scene that she was going to film only required her to start and stop on a horse. Defendants and third-party defendant have made an evidentiary showing that Plaintiff assumed the risk of injury from voluntarily riding the horse, thereby establishing their *prima facie* entitlement to summary judgment on her negligence claims.

In opposition, Plaintiff fails to raise a material issue of fact. She has failed to produce any competent evidence in support of her claim that the defendants were reckless or unreasonably increased her risk of falling based on the choice of horse provided. The only documentation offered in support of this theory is an unsworn report of an expert claiming that Dior was not suitable for the ride because he was not a stage horse. The unsworn report is not in admissible form and thus may not be considered in opposition to the summary judgment motion. See Bendik v. Dydowski, 227 AD2d 228 (1st Dept 1996); Hagan v. General Motor Corp., 194 AD2d 766 (2nd Dept 1993). Moreover, Plaintiff's deposition testimony reveals that her prior riding experience was not limited to riding stage horses nor that a stage horse was requested or warranted under the circumstances as Plaintiff was not riding on a movie set at the time of her fall.

Plaintiff also fails to raise a material issue of fact by claims of negligent hiring, and/or supervision or that defendants did not provide adequate medical treatment after she fell. She did not assert these negligence theories in her complaint or bill of particulars and thus may not rely on them now to defeat defendants' motions. Nor has plaintiff demonstrated that any of the defendants voluntarily assumed a duty of care in attending to her after her fall. The factual record does not support such theory, and plaintiff fails to offer any competent evidence that the rendering of any medical attention was negligent, caused her to suffer additional injuries or placed her in a more vulnerable position than she would have been in if no action had been taken.

Winley Farm has further demonstrated an entitlement to summary judgment based upon its production of a signed waiver Plaintiff executed prior to riding Dior. The Winley farm manager testified that upon Plaintiff and her entourage arriving at the farm he gave someone from the production crew the waiver for Plaintiff to sign. The farm manager saw the woman speaking to

Plaintiff and then return with a signed waiver. At her deposition the plaintiff did not dispute that it was her signature on the waiver. In the waiver Plaintiff acknowledged the inherent dangers of horseback riding and waived and relinquished all rights and claims related to riding on Winley Farm for personal injury sustained. The waiver operates as an express assumption of risk further barring Plaintiff from maintaining a negligence action against Winley Farm. See Arbegast v. Board of Educ., 65 NY2d 161 (1985).

The court rejects Plaintiff's claim that the waiver is barred by General Obligations Law §5-326. That statute bars the enforcement of any waiver used by the owner or operator of a place of amusement or recreation, or a similar establishment, where the owner receives a fee or other compensation for the use of such facilities. GOL §5-326. That statute was enacted as a consumer protection measure based upon an assessment that members of the general public patronizing proprietary recreational and amusement facilities are commonly either entirely unaware of the existence of exculpatory clauses in admission tickets or membership applications or do not appreciate the legal consequences thereof. See Fazzinga v. Westchester Track Club, 48 AD3d 410, 411-12 (2nd Dept 2008). The farm and riding establishment here was not a "place of amusement or recreation" within the meaning of GOL §5-326. See Millan v. Brown, 95 AD2d 409, 411 (2nd Dept 2002). Winley Farm was not open to public use, and merely housed retired horses in addition to renting out stalls to independent horse owners. Based on the foregoing, it is

ORDERED that the motions of the defendants Silver Spring Farm, LLC, Winley Farm, LLC and Van Wormer International, LLC for summary judgment dismissing Plaintiff's claims in their entirety are granted. It is further

ORDERED that Plaintiff's motion for partial summary judgment to dismiss affirmative defenses is denied.

The foregoing constitutes the decision and order of the Court.

Dated: March 7, 2019
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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