

Dinkel v Cobalt Fitness, LLC
2020 NY Slip Op 34723(U)
October 9, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 609281/17
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

ANDREW DINKEL IV and CONSTANCE DINKEL,

**Index No.
609281/17**

Plaintiffs,

Motion Seq:

003 MD

004 MG

Decision/Order

-against-

COBALT FITNESS, LLC d/b/a CROSSFIT COBALT,

Defendant.

x

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	41-61; 64-78
Answering Papers.....	80-85; 88-90
Reply.....	92-93; 94
Briefs: Plaintiff’s/Petitioner’s.....	
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Defendant fitness facility (Cobalt) seeks summary judgment dismissal of the complaint (Motion Sequence 003), and plaintiffs seek dismissal of Cobalt’s twenty-third (23rd) affirmative defense based upon plaintiff Andrew Dinkel IV’s execution of a waiver and release form. The parties oppose the respective motions that are consolidated for determination herein.

It is undisputed that plaintiff Andrew Dinkel IV (the plaintiff)¹ was injured on February 23, 2017, when he was struck by a truck tire being flipped during an exercise class conducted at defendant’s facility. His back was to the tire that was flipped by two other participants in the class, and the tire, weighing approximately three hundred pounds (300 lbs.) or more, landed on the back and side of plaintiff’s left leg. Plaintiff ultimately required surgery to repair his left foot/ankle and he remained unable to work on light duty until September 2017. Plaintiff returned to full duty as a firefighter in February 2018. Plaintiff alleges, *inter alia*, that Cobalt was negligent in failing to properly organize the tire flip activity in a safe manner, in failing to properly organize the members performing the activity, in failing to warn users of the tires about the dangers associated with flipping tires in close proximity to

¹ Plaintiff’s wife, Constance Dinkel sues derivatively.

one another, and in failing to have more instructors present to properly supervise and guide the members in proper performance of the tire flip activity.

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). “It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Vega v. Restani*, 18 NY3d 499, 505 [2012]). Issue-finding rather than issue determination is the court’s function upon a summary judgment motion (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Furthermore, the Court’s analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*) “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible for sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of its motion, Cobalt submits, *inter alia*, the pleadings and the deposition transcripts of the plaintiff, Cobalt’s owner, and four non-party witnesses who participated in the class when the accident occurred. Cobalt contends that it is entitled to summary judgment dismissal of the complaint because plaintiff assumed the risk of participating in the tire flip exercise; the alleged dangerous condition was open and obvious, and plaintiff signed a waiver releasing Cobalt from liability. In its answer, Cobalt asserts primary assumption of the risk as its second affirmative defense. Cobalt’s 23rd affirmative defense asserts that plaintiff’s claims are barred by his signing of the membership agreement and online waiver form.

Applying these summary judgment principles, this Court determines that the defendant has not met its burden to entitle it to summary judgment dismissal of the complaint on any of the grounds asserted. Here, with respect to assumption of the risk doctrine and the open and obvious condition, the evidence presented shows questions of material fact essential to the resolution of this action that cannot be resolved upon this motion. Furthermore, the waiver form is inapplicable to the circumstances of this case as a matter of law.

Assumption of the Risk Doctrine Analysis

CPLR § 1411, adopted in 1975, provides in pertinent part that, “[i]n any action to recover damages for personal injury. . . the culpable conduct attributable to the claimant. . . including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages

otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant. . . bears to the culpable conduct which caused the damages.”

Despite enactment of CPLR § 1411, courts “have held that a limited vestige of the assumption of the risk doctrine—referred to as ‘primary’ assumption of the risk—survived the enactment of CPLR 1411 as a defense to tort recovery in cases involving certain types of athletic or recreational activities” (*Custodi v. Town of Amherst*, 20 NY3d 83, 87 [2012]). “Since the adoption of CPLR 1411, we have generally restricted the concept of assumption of the risk to particular athletic and recreative activities in recognition that such pursuits have ‘enormous social value’ even while they may ‘involve significantly heightened risks’” (*Id.* at 88, citing *Trupia v. Lake George Central School District*, 14 NY3d 392, 395 [2010]). “Hence, the continued application of the doctrine ‘facilitate[s] free and vigorous participation in athletic activities’ (*Benitez*, 73 NY2d at 657)², and fosters these socially beneficial activities by shielding coparticipants, activity sponsors or venue owners from ‘potentially crushing liability’ (*Bukowski*, 19 NY3d at 358)³” (*Custodi*, *supra.* at 88). Consistent with this justification each of our cases applying the doctrine involved a sporting event or recreative activity that was sponsored or otherwise supported by the defendant, or occurred in a designated athletic or recreational venue” (*Id.* at 88).

With regard to primary assumption of the risk, “[r]isks in this category are incidental to a relationship of free association between the defendant and the plaintiff in the sense that either party is perfectly free to engage in the activity or not as he wishes. Defendant’s duty under such circumstances is a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty” (*Turcotte v. Fell*, 68 NY2d 432, 438-439 [1986]). “[B]y engaging in a sport or recreational 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 such participation” (*Morgan v. State*, 90 NY2d 471, 484 [1997]). “Relatedly, risks which are commonly encountered or ‘inherent’ in a sport, such as being struck by a ball or bat in baseball, are ‘risks [for] which various participants are legally deemed to have accepted personal responsibility’” (*Bukowski v. Clarkson University*, 19, NY3d 353, 356 [2012], quoting *Morgan*, *supra* at 484). On the other hand, an “important counterweight to an undue interposition of the assumption of risk doctrine is that participants will not be deemed to have assumed the risks of reckless or intentional conduct [citation omitted] or concealed or unreasonably increased risks” (*Morgan*, *supra* at 485; see also *Benitez*, *supra* at 658). “[T]he 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’” (*Morgan*, *supra* at 485, citing *Owen v. R.J.S. Safety Equipment, Inc.*, 79 NY2d 967, 970 [1992]).

A key criteria for the application of the primary assumption of risk doctrine is the plaintiff’s awareness of the risk of harm, and that awareness is to be assessed against his skill, background and experience with the activity (*Maddox v. City of New York*, 66 NY2d 270, 278 [1985]; see also *Morgan*, *supra* at 486).

² *Benitez v. New York City Board of Education*, 73 NY2d 650 (1989).

³ *Bukowski v. Clarkson University*, 19 NY3d 353 (2012).

Here, the evidence submitted by defendant Cobalt shows that plaintiff became a gym member in mid-January 2017, approximately six weeks before the subject accident occurred, and that he had never participated in a tire flip exercise prior to the date of incident. Plaintiff had taken four or five classes prior to February 23, 2017 and two “on ramp” sessions to teach him various movements necessary to perform cross fit style exercises. None of the prior classes or the “on ramp” sessions included the tire flip, and plaintiff had never engaged in cross fit activities prior to joining the defendant’s facility. While the plaintiff testified that he was a member of the New York City Fire Department (FDNY), and a special operations firefighter within the FDNY, plaintiff did not testify that he had flipped truck tires as part of his FDNY training or in the performance of his official duties.

The submitted deposition testimony establishes that the tire flip exercise engaged in on the date of the subject incident was part and parcel of an exercise class in which the participating members were required to perform various exercises inside the gym for a period of sixty (60) seconds and then proceed to Cobalt’s parking lot to flip one of the three or four truck tires laid out in the lot. After the tire flip, the participants were to return to the gym and resume the exercises for another 60 seconds. This series of exercises inside the gym and tire flip in the parking lot was to proceed through four rounds. The participating members entered and exited the facility through a large bay door located in the rear of the Cobalt facility, like a garage door. The deposition testimony also establishes that Cobalt’s owner, Elizabeth Seder, was the only instructor supervising the class of somewhere between nine and fifteen people participating in the subject class.

According to the testimony, Ms. Seder and perhaps one other more experienced “cross fitter” demonstrated the tire flip to the other participants in terms of how to grab the tire lying flat on the blacktop, lift it to a standing position, and then push it, causing it to fall over onto its other side by its own momentum. The plaintiff testified that he flipped the tire twice without incident prior to his being struck by a tire in the process of being flipped by two other class participants.

The testimony of the witnesses indicate that the three or four tires were being flipped by the participants, sometimes simultaneously but depending upon when a member would emerge from inside the gym, and apparently in different directions in the parking lot. Further evident is that there were more class participants than available tires; at most, there were four available tires thereby requiring members to wait their turn to flip a tire of their choosing. The individual tires were of varying but significant weights, and class participants were free to choose to flip whichever tire they chose. Plaintiff testified that he chose to flip the lightest tire since he had never engaged in this particular activity prior to the date of incident.

Also established by the witnesses’ testimony is that the tires would land in different spots on the blacktop, that the tires sometimes got closer together during the exercise, and that a specific tire would not necessarily be in the same spot when a participant re-emerged from inside the gym.

Immediately prior to the occurrence of the subject incident, the plaintiff acknowledged that he was aware that other class participants were flipping tires when he emerged from the gym; however, when he emerged from the gym for what was likely the third time, he was concentrating on the particular class member who was flipping the tire that plaintiff wanted to flip. Plaintiff described that he had to wait his turn, that he was looking at the gentleman who was flipping that tire, and the next thing

he remembers, he was hit by a different tire being flipped by two female class members working in tandem.

Plaintiff acknowledged that he did not look left or right before he stepped into the parking lot from the gym and that he did not notice the women flipping the tire or any other people in the general vicinity of where he was walking as he exited the gym. The plaintiff also acknowledged that he sent a responsive text message to Ms. Seder on March 4, 2017. She had texted plaintiff that she felt “so bad,” and plaintiff responded, “Nah, nothing to feel bad about. I wasn’t paying attention. Was trying to concentrate too much on the workout...” Concerning the text, plaintiff testified that he was “zoned in on getting that next tire flipped,” that he was “focused in on the tire that was in front of [him] and . . . was waiting to flip that tire after the gentleman in front of me was done flipping it.” Plaintiff further explained that he told her that there was nothing to feel bad about because “I appreciate that she was my coach and I was trying to learn how to do Cross Fit.”

Despite the foregoing, the plaintiff was asked if he had “an issue with the setup” of the tires in the parking lot, and plaintiff stated that he “would have tried to create positions in which the tires were only going in one direction, and then everybody would have been in line waiting to flip next, when they came outside finishing their workout. So there was not tires being flipped in random directions or they would not lose their original position from where you flipped them originally.” He also testified that “More supervision could have been a lot better.”

The submitted deposition testimony of Ms. Seder and the non-party witnesses, plus that of the plaintiff, establish without dispute that Ms. Seder was the only instructor supervising the class, and that she was situated either in the garage/bay door area observing the participants both inside and outside the gym, or that she went back and forth between the inside and outside of the gym. It is further established that there were no markings or lanes on the blacktop designating where the tires should be positioned, or in what direction they should be flipped, that Ms. Seder did not periodically readjust the tires during the course of the workout or direct that the participants do so when the tires got closer together, and that Ms. Seder did not monitor or direct the participants emerging from inside the gym as to when it was his or her turn to flip a tire.

According to the testimony of the non-party witnesses, Ms. Seder did not instruct the participants concerning in which direction the tires should be flipped; rather, it was up to the participants to determine which was a better direction in which to flip the tires, depending on the proximity to others engaged in the activity.

Ms. Heuschneider and Ms. Lee, the two women who flipped the tire that struck the plaintiff testified inconsistently as to whether any specific safety instructions were given to the group about flipping the tire, including ensuring that the surrounding area should be clear before flipping and that they should be aware of others during the tire flip. Ms. Heuschneider did not recall any such instructions being given, nor did she recall if anything was said about keeping the tires separated from each other. Ms. Trivedi, another non-party witness, testified that she did not remember if they were specifically told to make sure the area was clear before flipping a tire. Ms. Lee, on the other hand, testified that Ms. Seder gave safety instructions, including that the participants should be aware of what is going around them during the tire flip.

Ms. Lee described that she and Ms. Heuschneider had already tipped their tire when plaintiff stood in front of it “at the last second;” therefore, they could not stop the momentum of the falling tire. Although Ms. Lee shouted at plaintiff to look out, his back was to the women and he did not realize that she was speaking to him. Ms. Heuschneider testified that she did not see the plaintiff at the moment that she and Ms. Lee pushed the tire forward so that its momentum would cause it to descend; Ms. Heuschneider testified that plaintiff was not directly in front of them at that point. According to Ms. Heuschneider and Ms. Seder, the plaintiff ran in front of the already-falling tire.

Ms. Seder could not supply the dimensions of the tires used on the date of incident, nor could she specify the distance between the tires as they were laid out on the blacktop. Ms. Seder offered only that the tires were “a safe distance” apart, but she acknowledged that once a tire is flipped, it is moved to a different place. At the time of the incident, Ms. Seder explained that the women (Lee and Heuschneider) were flipping their tire toward the street while the man who was flipping the tire that plaintiff was going to flip was proceeding toward the bay door to the gym, thereby indicating that these two tires were being flipped in perpendicular directions at the same time.

“[F]or purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine qua non” (*Morgan, supra* at 484). The submitted testimony concerning the undisputed lack plaintiff’s experience in the tire flip activity, lack of markings on the blacktop, lack of instruction as to the direction in which the tires should be flipped and the apparent lack of a coherent plan as to where and how each participant was to wait his or her turn while the available tires were all being flipped as part of this timed workout raises material questions of fact as to whether defendant’s conduct unreasonably increased the risks involved in this tire-flipping activity and whether the defendant performed its duty by making the conditions as safe as they appear to be. Given the discrepancy as to whether the instruction/warning about being aware of one’s surroundings was given, there are also questions of fact as to whether the risk of being struck by a falling truck tire is commonly inherent in the nature of that activity, and whether plaintiff knowingly accepted that risk (*see Lee v. Brooklyn Boulders, LLC*, 156 AD3d 689 [2d Dept 2017]).

Moreover, whether a condition is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (*Stoppeli v Yacenda*, 78 AD3d 815, 816 [2d Dept 2010]). As noted, the plaintiff testified that he was “zoned in” on the tire flip and concentrating on the timed workout, thereby raising a question of fact as to whether he was distracted from the obvious danger of placing himself in the path of a falling truck tire.

Based upon the foregoing analysis, this Court determines that defendant Cobalt has failed to establish its *prima facie* entitlement to summary judgment as a matter of law on these grounds. Accordingly, it is unnecessary to determine whether the plaintiffs’ papers submitted in opposition are sufficient to raise a triable issue of fact in these respects (*see Levin v Khan*, 73 AD3d 991 [2d Dept 2010]; *Kjono v Fenning*, 69 AD3d 581[2d Dept 2010]).

The Waiver is Inapplicable, and the Affirmative Defense is Stricken

The waiver contained in the membership agreement does not release defendant Cobalt from liability; therefore, defendant has not sustained its *prima facie* burden as to this ground for dismissal of the complaint, and plaintiff's cross-motion to strike Cobalt's 23rd affirmative defense is granted.

General Obligations Law (GOL) § 5-326 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 language in the membership agreement and online waiver agreement seek to relieve Cobalt from its own negligence in that it reads in pertinent part that the signatory/member agrees to "voluntarily waive, release, discharge, and hold harmless Elizabeth Seder, Cobalt Fitness, LLC CrossFit Cobalt, CrossFit, Inc. . . ." from "any liability, claims, demands, actions or rights of action, or damages of any kind related to, arising from, or in any way connected with my participation in CFC fitness programs/classes, including those allegedly attributed to the negligent acts or omission of the above mentioned parties. In signing this document, I fully recognize and understand that if I am hurt, die, or my property is damaged, I am giving up my right to make a claim or file a lawsuit against CFC, even if they negligently or by any other act or omission cause the injury or damage" There is similar language in the online waiver form as well.

The only way that GOL § 5-326 would not apply to this matter is if Cobalt's business was entirely instructional in nature. The submitted record establishes that Cobalt operates as a gymnasium offering various types of memberships, including an unlimited membership that plaintiff subscribed to at the time of the subject incident. The unlimited membership included a certain number of what are referred to as "open gym" sessions during which members could use the gym and its equipment as they desired. Although trainers were available for consultation if requested by a member, the open gym sessions provided members with use of the facilities in exchange for their monthly fee. Moreover, the classes provided by Cobalt were known as Workout of the Day (WOD). Members were able to take these classes as they wished, whenever the WODs were offered throughout the course of a day. Members were also free not to take the classes; in short, attendance at Cobalt was purely at the discretion and will of the member and not required to attain any sort of certification or to acquire a particular skill but to exercise vigorously (*cf. Boateng v. Motorcycle Safety School, Inc.*, 51 AD3d 702 [2d Dept 2008] [release not void where tuition for course of instruction and not use fee for use of recreational facility was paid by plaintiff]; *Baschuk v. Diver'sWay Scuba*, 209 AD2d 369 [2d Dept 1994][tuition fee paid by plaintiff for a course of scuba instruction not analogous to use fee for recreational facilities contemplated by statute]). In addition to the open gym sessions and WODs,

Cobalt offered children's birthday parties, physical therapy services, nutritional services, and food services, each at an extra cost.

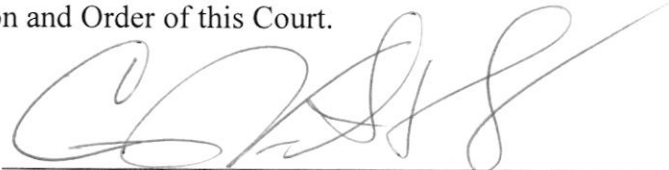
The submitted evidence also establishes that the WODs/classes did not run for a specified period of time, after which the participants are assessed or are conferred a license, certificate or degree. No member of Cobalt is tested, passes or fails any WOD/class, nor is attendance at any of the WODs/classes taken. Also, plaintiff did not have to pay an additional cost to attend the WOD during which he was hurt; it was included in the price of his unlimited membership.

Another relevant factor in determining whether a facility is recreational or instructional in nature is the statement of purpose asserted in the certificate of incorporation of the facility (*see Fusco v. Now & Zen, Inc.*, 294 AD2d 466 [2d Dept 2002]). In this case, Cobalt's stated purpose in its required publication notice is "any lawful purpose or activity." No mention of its purpose is made in its articles of organization or certificate of publication. Moreover, the question is not whether the plaintiff's activity was instructional or recreational in nature, but the nature of the facility (*see Lee, supra* at 690; *Debell v. Wellbridge Club Management*, 40 AD3d 248 [1st Dept 2007]; *Miranda v. Hampton Auto Raceway, Inc.*, 130 AD2d 558 [2d Dept 1987]). Thus, whether or not the plaintiff was receiving instruction at the time of his injury is not dispositive of this issue. For all the reasons enumerated herein, the Cobalt facility is, in this Court's determination as a matter of law, recreational in nature thereby rendering the waiver and release inapplicable pursuant to GOL § 5-326, thereby also warranting the granting of the relief requested in plaintiff's motion, which is to strike defendant's 23rd affirmative defense pursuant to CPLR § 3211 (b) as being without merit (*see Vita v. New York Waste Services, LLC*, 34 AD3d 559 [2d Dept 2006]) (Motion Sequence 004).

Motion Sequence 003 is denied, and Motion Sequence 004 is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 9, 2020
Riverhead, NY



CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]