

Sims v Sky Zone Trampoline Park
2020 NY Slip Op 35224(U)
June 18, 2020
Supreme Court, Nassau County
Docket Number: Index No. 612642/19
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
 PRESENT: HON. DENISE L. SHER
 Acting Supreme Court Justice

 VANESSA SIMS,

Plaintiff,

-against-

SKY ZONE TRAMPOLINE PARK,

Defendant.

TRIAL/IAS PART 33
 NASSAU COUNTY

Index No.: 612642/19
 Motion Seq. No.: 01
 Motion Date: 01/30/2020
 XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Partial Opposition and Memorandum of Law	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Complaint; or, in the alternative, moves, pursuant to CPLR § 7503, for an order compelling arbitration and staying the action; or, in the event the Court denies dismissal or the request to compel arbitration, moves, pursuant to CPLR § 2004, for an order extending its time to answer the Complaint. Plaintiff submits partial opposition to the motion.

Plaintiff commenced the instant action with the filing of a Summons and Complaint on or about September 13, 2019. *See* Defendant's Affirmation in Support Exhibit A.

In support of the motion, counsel for defendant asserts, in pertinent part, that, "[t]his claim arises out of injuries allegedly sustained by plaintiff at the premises located at 111 Rodeo Drive, Deer Park, New York (hereinafter referred to as 'Sky Zone'). Plaintiff alleges that on

September 19, 2018, plaintiff was lawfully on the premises at 111 Rodeo Drive, Deer Park, New York when she was caused to become injured due to the alleged negligence of defendants (*sic*). The accompanying affidavit of Andrew Neumann, the operations manager of the Deer Park Sky Zone location, affirms that as a precondition to participation at Sky Zone, each participant must sign a Participation Agreement, Release and Assumption of the Risk (The Agreement) — Sky Zone Deer Park (hereinafter referred to as ‘Participation Agreement’). Mr. Neumann’s affidavit further affirms that the Participation Agreement is a document kept in the ordinary course of Sky Zone’s business.... On September 2, 2018, plaintiff voluntarily signed a Participant Agreement as a precondition to entry to, and use of, Sky Zone’s trampoline facility.... Mr. Neumann’s affidavit affirms that the annexed Participation Agreement is a true and accurate copy of the Participation Agreement in effect on the date of the accident. It is respectfully requested that this Court consider the annexed Participation Agreement as a true and accurate copy of the Participation Agreement completed by plaintiff. The Participation Agreement was executed by the plaintiff. By signing said Participation Agreement, plaintiff acknowledged that she understood that there were risks to participating in the trampoline park activities and, therefore, under the terms of the Participation Agreement, participation in the activity by plaintiff was on a purely voluntary basis. The Participation Agreement further includes an arbitration cause The Participation Agreement provides that the signatory acknowledges and understands that there are risks to participating in the trampoline park activities, and, therefore, under the terms of the Participation Agreement, participation in the activity by the signatory is on a purely voluntary basis.... Additionally, the Participation Agreement requires that the signatory acknowledge that he/she has read the terms of the agreement, understands them, and voluntarily agrees to be bound by its terms listed within the

agreement. The Participation Agreement further provides that by signing said agreement, he/she acknowledges that the waiver prevents and prohibits any recovery of money from any Sky Zone related entity.... Plaintiff's court action is a 'dispute' that has arisen between plaintiff and defendant, and plaintiff's claim triggers the arbitration clause within the Participation Agreement.... To date, plaintiffs (*sic*) have not agreed to arbitrate the present matter, thus necessitating the instant motion." *See* Defendant's Affirmation in Support Exhibits A-D.

Counsel for defendant argues, in pertinent part, that, "Mr. Neumann affirmed that all patrons of Sky Zone must complete a Participation Agreement either online or at the 'Waiver Station' upon entering the facility and prior to partaking in any Sky Zone activities.... As such, based upon the affidavit of Mr. Neumann, it is clear that plaintiff executed the Participation Agreement and by signing the Participation Agreement, plaintiff's right to maintain a lawsuit against Sky Zone and its affiliates was waived. Moreover, in providing that 'any dispute' gives rise to arbitration, the arbitration provision unambiguously demonstrates the parties' mutual intent and voluntary agreement to arbitrate the plaintiff's claims. Based upon the documentary evidence, it is respectfully requested that this Court dismiss plaintiff's complaint with prejudice as plaintiff's right to maintain a lawsuit against defendant was voluntarily waived."

In partial opposition to the motion, counsel for plaintiff submits, in pertinent part, that, "[t]he plaintiff opposes defendant's motion as it pertains to the request to dismiss the action with prejudice. The plaintiff will consent to resolving the claim for personal injury by agreeing to have this matter heard and determined by an Arbitrator in accordance with the 'Participation Agreement' relied upon by the defendant."

Counsel for plaintiff further contends, in pertinent part, that, "[i]t is unclear as to whether the defendant seeks dismissal pursuant to the 'Assumption of Risk' clause of the 'Participation

Agreement' as it is only referenced within counsels (*sic*) Affirmation in Support and within the Statement of Facts portion of the defendants (*sic*) Memorandum of Law. No legal support for such dismissal has not (*sic*) been set forth within the defendants (*sic*) Memorandum. Notwithstanding the foregoing, any such argument must be given short shrift. It has been long standing law in the (*sic*) New York that any waiver of liability, excepting a few specific exceptions which do not apply here, shall be void as against public policy. In fact, such prohibition is codified in the General Obligations Law § 5-326,... There is no dispute that on the day in question the defendant herein did operate a recreational facility that falls within the auspices of General Obligations Law § 5-326. Likewise, there can be no disputing the fact that the plaintiff was a paying customer of defendant as that fact is acknowledged in the Affidavit of Andrew Neumann, operations manager of Sky Zone,... Therefore, in accordance with General Obligations Law § 5-326, as well as the holding of the Court of Appeals in *Owen v. R.S.J. Safety Equipment supra (sic)*, this Court must find the executed waiver to be void as against public policy."

In reply to plaintiff's opposition, counsel for defendant asserts, in pertinent part, that, "[i]t is undisputed that plaintiff executed a Participant Agreement, Release and Assumption of Risk (The Agreement) – Sky Zone Deer Park (hereinafter referred to as 'Participation Agreement') as a precondition to entry to, and use of, Sky Zone's trampoline facility. Plaintiff was not a minor when the agreement was executed. The terms of the Participant Agreement unequivocally and unambiguously require that the participant (plaintiff) commence an action, if at all, within one (1) year solely by submitting the dispute to Arbitration. Further, by executing the Participant Agreement, the plaintiff duly waived her right to commence a lawsuit by any other means. Plaintiff's complaint must be dismissed in its entirety since, by executing the Participant

Agreement, the adult plaintiff waived her right to maintain a lawsuit for any and all claims arising from the Agreement. As such, plaintiff's sole avenue of recourse was to submit the dispute to Arbitration within one (1) year of the accident. Plaintiff failed to submit this matter to arbitration within one year of the alleged incident. Plaintiff's purported 'consent' to submit this matter to Arbitration is nothing more than an attempt to avoid having the case dismissed in its entirety due to plaintiff's failure to timely commence an arbitration proceeding and to otherwise circumvent the CPLR. To date, plaintiff has not submitted this matter to arbitration, and she is clearly time-barred from doing so. Plaintiff's reliance on General Obligations Law § 5-326 is misplaced.... The Participation Agreement is valid and enforceable and not within the purview of § 5-326. The Participation Agreement does not exempt defendants (*sic*) from liability for negligence. Rather, the Participation Agreement places procedural conditions precedent with regard to the venue, jurisdiction, and adjudication of the matter itself, and requires that an arbitrator decide issues of liability.... A plain reading of the Participation Agreement only permits the plaintiff to commence an action by submitting the dispute to Arbitration within one year of the alleged accident. As discussed in greater detail in the moving paper and memoranda of law in support, New York Courts have enforced Sky Zone's arbitration provision within the Participation Agreement in similar matters. [citations omitted]. Clearly, the arbitration provision in the Participation Agreement is valid and enforceable and, further, the Participation Agreement satisfies the threshold requirements and constitutes 'documentary evidence' sufficient to warrant dismissal pursuant to CPLR 3211(a)(1). Plaintiff failed to submit this dispute to arbitration within one year of the alleged accident, as required, and therefore the within action should be dismissed in its entirety, rather than compelled to arbitration. The Court may also dismiss plaintiff's complaint under CPLR 3211(a)(7). Plaintiff should not be rewarded for his (*sic*)

failure to commence a timely arbitration claim. Dismissal is clearly warranted in light of the unambiguous agreement which the adult plaintiff signed.” See Defendant’s Affirmation in Support Exhibit D.

The Court notes that counsel for plaintiff e-filed a letter, dated June 5, 2020, “in lieu of a more formal Sur-Reply to defendants (*sic*) Reply Affirmation which was electronically filed on Thursday, June 4, 2020.” Counsel for defendant e-filed a letter dated June 9, 2020 in response to counsel for plaintiff’s sur-reply letter.

CPLR § 3211(a)(1) states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence;...” To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) citing *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) quoting *Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). “[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity.” *Fotanetta v. John Doe 1*, *supra*, citing SIEGEL, PRACTICE COMMENTARIES, MCKINNEY’S CONS LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. “[T]hat is, it must be ‘essentially unassailable.’” *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) quoting *Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits,

deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). See *Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. See *Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiffs' factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. See *Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), "the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBLA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed

on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). “In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez, supra* at 88.

It is evident that the documentary evidence provided by defendant, to wit the Participant Agreement, Release and Assumption of Risk (The Agreement) – Sky Zone Deer Park entered into between the parties, contains a binding arbitration clause. *See Defendant's Affirmation in Support Exhibit D page 4 of 8*. Therefore, it would be beyond the scope of said agreement for this Court to intervene in the dispute between the parties based upon the relief plaintiff is seeking in her Complaint. The Court further notes that said arbitration clause indicated that plaintiff's sole avenue for recourse for a legal action was to submit the underlying dispute to arbitration within one (1) year of the accident. *See id.* Plaintiff failed to meet this requirement.

Accordingly, based upon the above, the branch of defendant's motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Complaint, is hereby **GRANTED**.

The branches of defendant's motion, pursuant to CPLR § 7503, for an order compelling arbitration and staying the action; or, in the event the Court denies dismissal or the request to compel arbitration, pursuant to CPLR § 2004, for an order extending its time to answer the Complaint, are hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
June 18, 2020

ENTERED

Jun 23 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE