

Glassman v O'Connor
2021 NY Slip Op 32149(U)
October 28, 2021
Supreme Court, New York County
Docket Number: Index No. 160963/2017
Judge: Lewis J. Lubell
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**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF NEW YORK**

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

-----X
CHERIE GLASSMAN and TODD GLASSMAN,

Plaintiff(s),

-against-

MARIE O'CONNOR, NORDIC CRYOTHERAPY, LLC
EQUINOX ARMONK, INC., MAJESTIC CRYO, INC.,
CYRO SOLUTIONS, LLC, and CRYO CENTERS OF
AMERICA,

Defendant(s).

-----X
MARIE O'CONNOR and NORDIC CRYOTHERAPY, LLC,

Third-Party Plaintiff(s),

-against-

MAJESTIC CRYO, INC., CRYO SOLUTIONS, LLC and
CRYO CENTERS OF AMERICA,

Third-Party Defendant(s).

-----X
Defendants/Third-Party Plaintiffs Marie O'Connor (Ms. O'Connor) and Nordic Cryotherapy, LLC (Nordic) move (Motion #4) for summary judgment as to plaintiffs' claims, counterclaims, and cross-claims.

Third-Party Defendant Majestic Cryo, Inc. (Majestic) cross-moves for summary judgment as to the claims by and against Third-Party Plaintiffs.

The following papers filed on NYSCEF were read on the motion:

	Doc. Nos.
Notice of Motion, Affirmation, Exhibits (22), and Memo of Law	72-96
Notice of Cross-Motion, Aff'n, Affidavit, Exhibits (20), Memo of Law	111-134
Affirmation in Opposition, Exhibits (9), and Memo of Law	137-147
Affirmation in Opposition	149
Affirmations (2) in Opposition and Reply and Exhibits (2)	151-154
Affidavit	155

By way of background, on June 20, 2017, plaintiff Cherie Glassman (plaintiff) underwent cryotherapy treatment (treatment) in a cryosauna in a mobile trailer parked in her gym's parking lot. The "cryosauna" is a device that surrounds the body with cold air for therapeutic purposes. The mobile trailer was operated by Nordic; Ms. O'Connor is the owner and president of Nordic. The cryosauna was manufactured by Majestic. After the treatment, plaintiff began to experience some discomfort. This action ensued, seeking damages for personal injuries allegedly sustained as a result of the treatment. Subsequently, Ms. O'Connor and Nordic commenced a third-party action against, among others, Majestic. Now, Ms. O'Connor and Nordic move for summary judgment and Majestic cross-moves for summary judgment.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant makes a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the movant makes such a showing, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]). The Court addresses the motions in order.

In support of their motion, Ms. O'Connor and Nordic make several arguments. First, the movants contend that the treatment was administered in the normal way and thus they did not breach any duty to plaintiff. Second, the movants contend that plaintiff voluntarily underwent the treatment and was aware of the open and obvious risks. Third, Ms. O'Connor is the president and owner of Nordic, was not involved in the treatment, and is thus not a proper defendant. Fourth, the movants proffer an expert affidavit of Victor Popp, P.E., who opines that the cryosauna was improperly designed and was defective, which caused plaintiff's injuries. As such, the movants contend that they are entitled to indemnification from Majestic or defendants Cryo Solutions, LLC (Cryo Solutions) and Cryo Centers of America (Cryo Centers).

In opposition, plaintiffs note, among other things, that plaintiff testified that she complained of discomfort within one minute of the commencement of the treatment and was told not to worry. Plaintiffs proffer an expert affidavit from Shawn Hendi, who opines that the failure to stop the cryosauna was unquestionably a departure from reasonable safety standards and good and accepted practice. As to Ms. O'Connor, plaintiffs allege that her affirmative individual acts of negligence are the basis of the claim against her. Plaintiffs note, among other things, that Ms. O'Connor complained that the cryosauna had been malfunctioning since she obtained it and yet she permitted plaintiff to be treated therein.

In opposition, Majestic proffers, among other things, the deposition and/or affidavit testimony of plaintiff, non-party Ariana Mazzurco (who administered the treatment to plaintiff), James Montgomery (the president and director of operations of Majestic), Oleksandr Matorin (consultant with Majestic and designer of the subject cryosauna), and Tyler Slater (co-owner of Cryo Centers). Based hereon, Majestic notes that plaintiff testified that when she entered the cryosauna she was instructed to raise her arms, but was given no further instructions. Majestic also notes that plaintiff testified that she began experiencing pain about a minute into the treatment, informed the operator, and was told not to worry, that it was OK. Majestic notes that Ms. Mazzurco, who administered the treatment to plaintiff, testified that she was never advised that the clients should rotate during the treatment and thus did not instruct plaintiff to rotate. Majestic notes that Mr. Montgomery, the president and director of operations of Majestic, testified that Majestic has detailed requirements for the operation of the cryosauna. Specifically, Majestic notes that Mr. Montgomery testified that the client is to rotate constantly during the treatment and the operator must terminate the treatment immediately if the client fails to rotate or complains of discomfort. Majestic also notes that Mr. Montgomery testified that one should be certified to operate a cryosauna and to operate one without certification would be a violation of Majestic's required use of its system and would void the warranty. Majestic notes that Mr. Slater, co-owner of Cryo Centers, testified that Cryo Centers had purchased the subject cryosauna from Majestic and sold it to Nordic. Majestic notes that Mr. Matorin avers that he inspected the subject cryosauna prior to the date of plaintiff's treatment and found that it had been modified in a way that materially and detrimentally impacted its performance. In addition, Mr. Matorin avers that none of the employees of Nordic were ever properly trained and certified as cryosauna operators. Accordingly, Majestic contends, among other things, that, given the material modifications to the cryosauna made by Ms. O'Connor and Nordic, liability may not be imposed against Majestic.

In opposition, Cryo Solutions and Cryo Centers contend that Ms. O'Connor and Nordic are not entitled to indemnification because there is evidence that they modified the cryosauna. In addition, Cryo Solutions and Cryo Centers note that the trailer was in an accident prior to plaintiff's accident and they failed to determine whether the cryosauna was damaged as a result. Further, Cryo Solutions and Cryo Centers note that there is evidence that Ms. O'Connor and Nordic failed to follow the proper procedure in administering the treatment to plaintiff.

Material issues of fact abound, including whether Ms. O'Connor and Nordic followed proper procedure during the treatment and whether they materially modified the cryosauna. The doctrine of assumption of the risk is closely circumscribed "to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues" (*Custodi v Town of Amherst*, 20 NY3d 83, 89 [2012]). Here, undergoing cryotherapy is not an activity for which Ms. O'Connor and

Nordic should be insulated from a breach of duty claim. Next, the Court considers Majestic's cross-motion.

In support of its cross-motion,¹ Majestic proffers, among other things, the expert affidavit of Oleksandr Matorin, who opines that alterations to the cryosauna made by Ms. O'Connor and Nordic preclude liability for Majestic. In opposition, Ms. O'Connor and Nordic proffer the expert affidavit of Victor Popp, who opines that the basic construction of the cryosauna was insufficient to prevent a concentration of below-freezing cold nitrogen gas from coming into contact with the body of a user.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits" (*Brunetti v Musallam*, 11 AD3d 280, 280 [1st Dept 2004]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009] ["Resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury"]). This is especially true where, as here, the Court is bound to view the evidence in the light most favorable to the non-moving party (*see Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]).

To the extent not specifically addressed herein, the Court finds the remaining arguments of the movants to be without merit. Accordingly, it is hereby

ORDERED that the motion (Motion #4) of Ms. O'Connor and Nordic is DENIED; and it is further

ORDERED that the cross-motion of Majestic is DENIED.

Dated: New York, New York
October 28, 2021



HON. LEWIS J. LUBELL, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

¹ Majestic contends, among other things, that the opinions in Mr. Popp's expert affidavit are inadmissible under *Frye v United States* (293 F 1013 [DC Cir 1923]) and seeks a ruling to that effect. Although these arguments are appropriately put forward to undermine the sufficiency of the motion for summary judgment of Ms. O'Connor and Nordic to the extent based on Mr. Popp's opinions, these arguments do not play any role in supporting Majestic's cross-motion for summary judgment (*see Castillo-Sayre v Citarella Operating LLC*, 195 AD3d 513 [1st Dept 2021] ["Defendant's burden as movant was not satisfied by its merely pointing to perceived gaps in plaintiffs' proof."]). To the extent that Majestic seeks a ruling on the admissibility of Mr. Popp's opinions, a discrete motion should be made thereon.